# USCS Fed Rules Civ Proc R 37

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***United States Code Service - Federal*** Rules **Annotated** > ***FEDERAL*** RULES **OF CIVIL PROCEDURE** > ***TITLE V. DISCLOSURES AND DISCOVERY***

## Notice

*Part 1 of 2*. You are viewing a very large document that has been divided into parts.

## Rule 37. Failure to Make Disclosures or to Cooperate in Discovery; Sanctions

**(a)** Motion for an Order Compelling Disclosure or Discovery.

**(1)** ***In General.*** On notice to other parties and all affected persons, a party may move for an order compelling disclosure or discovery. The motion must include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make disclosure or discovery in an effort to obtain it without court action.

**(2)** ***Appropriate Court.*** A motion for an order to a party must be made in the court where the action is pending. A motion for an order to a nonparty must be made in the court where the discovery is or will be taken.

**(3)** ***Specific Motions.***

**(A)** To Compel Disclosure. If a party fails to make a disclosure required by Rule 26(a), any other party may move to compel disclosure and for appropriate sanctions.

**(B)** To Compel a Discovery Response. A party seeking discovery may move for an order compelling an answer, designation, production, or inspection. This motion may be made if:

**(i)** a deponent fails to answer a question asked under Rule 30 or 31;

**(ii)** a corporation or other entity fails to make a designation under Rule 30(b)(6) or 31(a)(4);

**(iii)** a party fails to answer an interrogatory submitted under Rule 33; or

**(iv)** a party fails to produce documents or fails to respond that inspection will be permitted--or fails to permit inspection--as requested under Rule 34.

**(C)** Related to a Deposition. When taking an oral deposition, the party asking a question may complete or adjourn the examination before moving for an order.

**(4)** ***Evasive or Incomplete Disclosure, Answer, or Response.*** For purposes of this subdivision (a), an evasive or incomplete disclosure, answer, or response must be treated as a failure to disclose, answer, or respond.

**(5)** ***Payment of Expenses; Protective Orders.***

**(A)** If the Motion Is Granted (or Disclosure or Discovery Is Provided After Filing). If the motion is granted--or if the disclosure or requested discovery is provided after the motion was filed--the court must, after giving an opportunity to be heard, require the party or deponent whose conduct necessitated the motion, the party or attorney advising that conduct, or both to pay the movant's reasonable expenses incurred in making the motion, including attorney's fees. But the court must not order this payment if:

**(i)** the movant filed the motion before attempting in good faith to obtain the disclosure or discovery without court action;

**(ii)** the opposing party's nondisclosure, response, or objection was substantially justified; or

**(iii)** other circumstances make an award of expenses unjust.

**(B)** If the Motion Is Denied. If the motion is denied, the court may issue any protective order authorized under Rule 26(c) and must, after giving an opportunity to be heard, require the movant, the attorney filing the motion, or both to pay the party or deponent who opposed the motion its reasonable expenses incurred in opposing the motion, including attorney's fees. But the court must not order this payment if the motion was substantially justified or other circumstances make an award of expenses unjust.

**(C)** If the Motion Is Granted in Part and Denied in Part. If the motion is granted in part and denied in part, the court may issue any protective order authorized under Rule 26(c) and may, after giving an opportunity to be heard, apportion the reasonable expenses for the motion.

**(b)** Failure to Comply with a Court Order.

**(1)** ***Sanctions Sought in the District Where the Deposition Is Taken.*** If the court where the discovery is taken orders a deponent to be sworn or to answer a question and the deponent fails to obey, the failure may be treated as contempt of court. If a deposition-related motion is transferred to the court where the action is pending, and that court orders a deponent to be sworn or to answer a question and the deponent fails to obey, the failure may be treated as contempt of either the court where the discovery is taken or the court where the action is pending.

**(2)** ***Sanctions Sought in the District Where the Action Is Pending.***

**(A)** For Not Obeying a Discovery Order. If a party or a party's officer, director, or managing agent--or a witness designated under Rule 30(b)(6) or 31(a)(4)--fails to obey an order to provide or permit discovery, including an order under Rule 26(f), 35, or 37(a), the court where the action is pending may issue further just orders. They may include the following:

**(i)** directing that the matters embraced in the order or other designated facts be taken as established for purposes of the action, as the prevailing party claims;

**(ii)** prohibiting the disobedient party from supporting or opposing designated claims or defenses, or from introducing designated matters in evidence;

**(iii)** striking pleadings in whole or in part;

**(iv)** staying further proceedings until the order is obeyed;

**(v)** dismissing the action or proceeding in whole or in part;

**(vi)** rendering a default judgment against the disobedient party; or

**(vii)** treating as contempt of court the failure to obey any order except an order to submit to a physical or mental examination.

**(B)** For Not Producing a Person for Examination. If a party fails to comply with an order under Rule 35(a) requiring it to produce another person for examination, the court may issue any of the orders listed in Rule 37(b)(2)(A)(i)-(vi), unless the disobedient party shows that it cannot produce the other person.

**(C)** Payment of Expenses. Instead of or in addition to the orders above, the court must order the disobedient party, the attorney advising that party, or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the failure was substantially justified or other circumstances make an award of expenses unjust.

**(c)** Failure to Disclose, to Supplement an Earlier Response, or to Admit.

**(1)** ***Failure to Disclose or Supplement.*** If a party fails to provide information or identify a witness as required by Rule 26(a) or (e), the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless. In addition to or instead of this sanction, the court, on motion and after giving an opportunity to be heard:

**(A)** may order payment of the reasonable expenses, including attorney's fees, caused by the failure;

**(B)** may inform the jury of the party's failure; and

**(C)** may impose other appropriate sanctions, including any of the orders listed in Rule 37(b)(2)(A)(i)-(vi).

**(2)** ***Failure to Admit.*** If a party fails to admit what is requested under Rule 36 and if the requesting party later proves a document to be genuine or the matter true, the requesting party may move that the party who failed to admit pay the reasonable expenses, including attorney's fees, incurred in making that proof. The court must so order unless:

**(A)** the request was held objectionable under Rule 36(a);

**(B)** the admission sought was of no substantial importance;

**(C)** the party failing to admit had a reasonable ground to believe that it might prevail on the matter; or

**(D)** there was other good reason for the failure to admit.

**(d)** Party's Failure to Attend Its Own Deposition, Serve Answers to Interrogatories, or Respond to a Request for Inspection.

**(1)** ***In General.***

**(A)** Motion; Grounds for Sanctions. The court where the action is pending may, on motion, order sanctions if:

**(i)** a party or a party's officer, director, or managing agent--or a person designated under Rule 30(b)(6) or 31(a)(4)--fails, after being served with proper notice, to appear for that person's deposition; or

**(ii)** a party, after being properly served with interrogatories under Rule 33 or a request for inspection under Rule 34, fails to serve its answers, objections, or written response.

**(B)** Certification. A motion for sanctions for failing to answer or respond must include a certification that the movant has in good faith conferred or attempted to confer with the party failing to act in an effort to obtain the answer or response without court action.

**(2)** ***Unacceptable Excuse for Failing to Act.*** A failure described in Rule 37(d)(1)(A) is not excused on the ground that the discovery sought was objectionable, unless the party failing to act has a pending motion for a protective order under Rule 26(c).

**(3)** ***Types of Sanctions.*** Sanctions may include any of the orders listed in Rule 37(b)(2)(A)(i)-(vi). Instead of or in addition to these sanctions, the court must require the party failing to act, the attorney advising that party, or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the failure was substantially justified or other circumstances make an award of expenses unjust.

**(e)** Failure to Preserve Electronically Stored Information. If electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery, the court:

**(1)** upon finding prejudice to another party from loss of the information, may order measures no greater than necessary to cure the prejudice; or

**(2)** only upon finding that the party acted with the intent to deprive another party of the information's use in the litigation may:

**(A)** presume that the lost information was unfavorable to the party;

**(B)** instruct the jury that it may or must presume the information was unfavorable to the party; or

**(C)** dismiss the action or enter a default judgment.

**(f)** Failure to Participate in Framing a Discovery Plan. If a party or its attorney fails to participate in good faith in developing and submitting a proposed discovery plan as required by Rule 26(f), the court may, after giving an opportunity to be heard, require that party or attorney to pay to any other party the reasonable expenses, including attorney's fees, caused by the failure.

## History

(Amended Dec. 29, 1948, eff. Oct. 20, 1949; March 30, 1970, eff. July 1, 1970; April 29, 1980, eff. Aug. 1, 1980; Oct. 21, 1980,P.L. 96-481, § 205(a), 94 Stat. 2330, eff. Oct. 1, 1981; March 2, 1987, eff. Aug. 1, 1987; April 22, 1993, eff. Dec. 1, 1993; April 17, 2000, eff. Dec. 1, 2000; April 12, 2006, eff. Dec. 1, 2006; April 30, 2007, eff. Dec. 1, 2007.)

(As amended April 16, 2013, eff. Dec. 1, 2013; April 29, 2015, eff. Dec. 1, 2015.)

### Annotations

## Notes

### Amendments:

#### 1980

. Act Oct. 21, 1980 (effective 10/1/81, as provided by § 208 of such Act), deleted subsec. (f) which read: Expenses Against United States. Except to the extent permitted by statute, expenses and fees may not be awarded against the United States under this rule.".

### Other provisions:

**Notes of Advisory Committee on** Rules. The provisions of this rule authorizing orders establishing facts or excluding evidence or striking pleadings, or authorizing judgments of dismissal or default, for refusal to answer questions or permit inspection or otherwise make discovery, are in accord with Hammond Packing Co. v Arkansas, 212 US 322, 29 S Ct 370, 53 L Ed 530, 15 Ann Cas 645 (1909), which distinguishes between the justifiable use of such measures as a means of compelling the production of evidence, and their unjustifiable use, as in Hovey v Elliott, 167 US 409, 17 S Ct 841, 42 L Ed 215 (1897), for the mere purpose of punishing for contempt.

**Notes of Advisory Committee on 1949 amendments.** The amendment effective October 1949, substituted the reference to "Title 28, USC, § 1783" in subdivision (e) for the reference to "the act of July 3, 1926, ch 762, § 1 (*44 Stat 835*), *USC, Title 28, § 711*."

**Notes of Advisory Committee on 1970 amendments.** Rule 37 provides generally for sanctions against parties or persons unjustifiably resisting discovery. Experience has brought to light a number of defects in the language of the rule as well as instances in which it is not serving the purposes for which it was designed. See Rosenberg, Sanctions to Effectuate Pretrial Discovery, 58 Col L Rev 480 (1958). In addition, changes being made in other discovery rules require conforming amendments to Rule 37.

Rule 37 sometimes refers to a "failure" to afford discovery and at other times to a "refusal" to do so. Taking note of this dual terminology, courts have imported into "refusal" a requirement of "wilfullness." See Roth v Paramount Pictures Corp., 8 FRD 31 (WD Pa 1948); Campbell v Johnson, 101 F Supp 705, 707 (SD NY 1951). In Societe Internationale v Rogers, 357 US 197 (1958), the Supreme Court concluded that the rather random use of these two terms in Rule 37 showed no design to use them with consistently distinctive meanings, that "refused" in Rule 37(b)(2) meant simply a failure to comply, and that wilfullness was relevant only to the selection

of sanctions, if any, to be imposed. Nevertheless, after the decision in Societe, the court in Hinson v Michigan Mutual Liability Co., 275 F2d 537 (5th Cir 1960) once again ruled that "refusal" required wilfullness. Substitution of "failure" for "refusal" throughout Rule 37 should eliminate this confusion and bring the rule into harmony with the Societe Internationale decision. See Rosenberg, supra, 58 Col L Rev 480, 489-490 (1958).

*Note to Subdivision (a).* Rule 37(a) provides relief to a party seeking discovery against one who, with or without stated objections, fails to afford the discovery sought. It has always fully served this function in relation to depositions, but the amendments being made to Rules 33 and 34 give Rule 37(a) added scope and importance. Under existing Rule 33, a party objecting to interrogatories must make a motion for court hearing on his objections. The changes now made in Rules 33 and 37(a) make it clear that the interrogating party must move to compel answers, and the motion is provided for in Rule 37(a). Existing Rule 34, since it requires a court order prior to production of documents or things or permission to enter on land, has no relation to Rule 37(a). Amendments of Rules 34 and 37(a) create a procedure similar to that provided for Rule 33.

*Note to Subdivision (a)(1).* This is a new provision making clear to which court a party may apply for an order compelling discovery. Existing Rule 37(a) refers only to the court in which the deposition is being taken; nevertheless, it has been held that the court where the action is pending has "inherent power" to compel a party deponent to answer. Lincoln Laboratories, Inc. v Savage Laboratories, Inc., 27 FRD 476 (D Del 1961). In relation to Rule 33 interrogatories and Rule 34 requests for inspection, the court where the action is pending is the appropriate enforcing tribunal. The new provision eliminates the need to resort to inherent power by spelling out the respective roles of the court where the action is pending and the court where the deposition is taken. In some instances, two courts are available to a party seeking to compel answers from a party deponent. The party seeking discovery may choose the court to which he will apply, but the court has power to remit the party to the other court as a more appropriate forum.

*Note to Subdivision (a)(2).* This subdivision contains the substance of existing provisions of Rule 37(a) authorizing motions to compel answers to questions put at depositions and to interrogatories. New provisions authorize motions for orders compelling designation under Rules 30(b)(6) and 31(a) and compelling inspection in accordance with a request made under Rule 34. If the court denies a motion, in whole or part, it may accompany the denial with issuance of a protective order. Compare the converse provision in Rule 26(c).

*Note to Subdivision (a)(3).* This new provision makes clear that an evasive or incomplete answer is to be considered, for purposes of subdivision (a), a failure to answer. The courts have consistently held that they have the power to compel adequate answers. E.g., Cone Mills Corp. v Joseph Bancroft & Sons Co., 33 FRD 318 (D Del 1963). This power is recognized and incorporated into the rule.

*Note to Subdivision (a)(4).* This subdivision amends the provisions for award of expenses, including reasonable attorney's fees, to the prevailing party or person when a motion is made for an order compelling discovery. At present, an award of expenses is made only if the losing party or person is found to have acted without substantial justification. The change requires that expenses be awarded unless the conduct of the losing party or person is found to have been substantially justified. The test of "substantial justification" remains, but the change in language is intended to encourage judges to be more alert to abuses occurring in the discovery process.

On many occasions, to be sure, the dispute over discovery between the parties is genuine, though ultimately resolved one way or the other by the court. In such cases, the losing party is substantially justified in carrying the matter to court. But the rules should deter the abuse implicit in carrying or forcing a discovery dispute to court when no genuine dispute exists. And the potential or actual imposition of expenses is virtually the sole formal sanction in the rules to deter a party from pressing to a court hearing frivolous requests for or objections to discovery.

The present provision of Rule 37(a) that the court shall require payment if it finds that the defeated party acted without "substantial justification" may appear adequate, but in fact it has been little used. Only a handful of reported cases include an award of expenses, and the Columbia Survey found that in only one instance out of about 50 motions decided under Rule 37(a) did the court award expenses. It appears that the courts do not utilize the most important available sanction to deter abusive resort to the judiciary.

The proposed change provides in effect that expenses should ordinarily be awarded unless a court finds that the losing party acted justifiably in carrying his point to court. At the same time, a necessary flexibility is maintained, since the court retains the power to find that other circumstances make an award of expenses unjust--as where the prevailing party also acted unjustifiably. The amendment does not significantly narrow the discretion of the court, but rather presses the court to address itself to abusive practices. The present provision that expenses may be imposed upon either the party or his attorney or both is unchanged. But it is not contemplated that expenses will be imposed upon the attorney merely because the party is indigent.

*Note to Subdivision (b).* This subdivision deals with sanctions for failure to comply with a court order. The present captions for subsections (1) and (2) entitled "Contempt" and "Other Consequences," respectively, are confusing. One of the consequences listed in (2) is the arrest of the party, representing the exercise of the contempt power. The contents of the subsections show that the first authorizes the sanction of contempt (and no other) by the court in which the deposition is taken, whereas the second subsection authorizes a variety of sanctions, including contempt, which may be imposed by the court in which the action is pending. The captions of the subsections are changed to reflect their contents.

The scope of Rule 37(b)(2) is broadened by extending it to include any order "to provide or permit discovery," including orders issued under Rules 37(a) and 35. Various rules authorize orders for discovery--e.g., Rule 35(b)(1), Rule 20(c) as revised, Rule 37(d). See Rosenberg, supra, 58 Col L Rev 480, 484-486. Rule 37(b)(2) should provide comprehensively for enforcement of all these orders. Cf. Societe Internationale v Rogers, 357 US 197, 207 (1958). On the other hand, the reference to Rule 34 is deleted to conform to the changed procedure in that rule.

A new subsection (E) provides that sanctions which have been available against a party for failure to comply with an order under Rule 35(a) to submit to examination will now be available against him for his failure to comply with a Rule 35(a) order to produce a third person for examination, unless he shows that he is unable to produce the person. In this context, "unable" means in effect "unable in good faith." See Societe Internationale v Rogers, 357 US 197 (1958).

Subdivision (b)(2) is amplified to provide for payment of reasonable expenses caused by the failure to obey the order. Although Rules 37(b)(2) and 37(d) have been silent as to award of expenses, courts have nevertheless ordered them on occasion. E.g., United Sheeplined Clothing Co. v Arctic Fur Cap Corp., 165 F Supp 193 (SD NY 1958); Austin Theatre, Inc. v

Warner Bros. Pictures, Inc., 22 FRD 302 (SD NY 1958). The provision places the burden on the disobedient party to avoid expenses by showing that his failure is justified or that special circumstances make an award of expenses unjust. Allocating the burden in this way conforms to the changed provisions as to expenses in Rule 37(a), and is particularly appropriate when a court order is disobeyed.

An added reference to directors of a party is similar to a change made in subdivision (d) and is explained in the note to that subdivision. The added reference to persons designated by a party under Rule 30(b)(6) or 31(a) to testify on behalf of the party carries out the new procedure in those rules for taking a deposition of a corporation or other organization.

*Note to Subdivision (c).* Rule 37(c) provides a sanction for the enforcement of Rule 36 dealing with requests for admission. Rule 36 provides the mechanism whereby a party may obtain from another party in appropriate instances either (1) an admission, or (2) a sworn and specific denial, or (3) a sworn statement "setting forth in detail the reasons why he cannot truthfully admit or deny." If the party obtains the second or third of these responses, in proper from, Rule 36 does not provide for a pretrial hearing on whether the response is warranted by the evidence thus far accumulated. Instead, Rule 37(c) is intended to provide posttrial relief in the form of a requirement that the party improperly refusing the admission pay the expenses of the other side in making the necessary proof at trial.

Rule 37(c), as now written, addresses itself in terms only to the sworn denial and is silent with respect to the statement of reasons for an inability to admit or deny. There is no apparent basis for this distinction, since the sanction provided in Rule 37(c) should deter all unjustified failures to admit. This omission in the rule has caused confused and diverse treatment in the courts. One court has held that if a party gives inadequate reasons, he should be treated before trial as having denied the request, so that Rule 37(c) may apply. Bertha Bldg. Corp. v National Theatres Corp. 15 FRD 339 (EDNY 1954). Another has held that the party should be treated as having admitted the request. Heng Hsin Co. v Stern, Morgenthau & Co., 20 Fed. Rules Serv. 36a.52, Case 1 (SDNY Dec. 10, 1954). Still another has ordered a new response, without indicating what the outcome should be if the new response were inadequate. United States Plywood Corp. v Hudson Lumber Co., 127 F Supp 489, 497-498 (SDNY 1954). See generally Finman, The Request for Admissions in Federal Civil Procedure, 71 Yale L.J. 371, 426-430 (1962). The amendment eliminates this defect in Rule 37(c) by bringing within its scope all failures to admit.

Additional provisions in Rule 37(c) protect a party from having to pay expenses if the request for admission was held objectionable under Rule 36(a) or if the party failing to admit had reasonable ground to believe that he might prevail on the matter. The latter provision emphasizes that the true test under Rule 37(c) is not whether a party prevailed at trial but whether he acted reasonably in believing that he might prevail.

*Note to Subdivision (d).* The scope of subdivision (d) is broadened to include responses to requests for inspection under Rule 34, thereby conforming to the new procedures of Rule 34.

Two related changes are made in subdivision (d): the permissible sanctions are broadened to include such orders "as are just"; and the requirement that the failure to appear or respond be "wilful" is eliminated. Although Rule 37(d) in terms provides for only three sanctions, all rather severe, the courts have interpreted it as permitting softer sanctions than those which it sets forth. E.g., Gill v Stolow, 240 F2d 669 (2d Cir 1957); Saltzman v Birrell, 156 F Supp 538 (SDNY 1957); 2A Barron & Holtzoff, Federal Practice and Procedure 554-557 (Wright ed. 1961). The rule is changed to provide the greater flexibility as sanctions which the cases show is needed.

The resulting flexibility as to sanctions eliminates any need to retain the requirement that the failure to appear or respond be "wilful." The concept of "wilful failure" is at best subtle and difficult, and the cases do not supply a bright line. Many courts have imposed sanctions without referring to wilfulness. E.g., Milewski v Schneider Transportation Co. 238 F2d 397 (6th Cir 1956); Dictograph Products, Inc. v Kentworth Corp. 7 FRD 543 (WD Ky 1947). In addition, in view of the possibility of light sanctions, even a negligent failure should come within Rule 37(d). If default is caused by counsel's ignorance of Federal practice, cf. *Dunn. v Pa RR., 96 F Supp 597 (N.D. Ohio 1951),* or by his preoccupation with another aspect of the case, cf. Maurer-Neuer, Inc. v United Packinghouse Workers, 26 FRD 139 (D Kans 1960), dismissal of the action and default judgment are not justified, but the imposition of expenses and fees may well be. "Wilfulness" continues to play a role, along with various other factors, in the choice of sanctions. Thus, the scheme conforms to Rule 37(b) as construed by the Supreme Court in Societe Internationale v Rogers, 357 US 197, 208 (1958).

A provision is added to make clear that a party may not properly remain completely silent even when he regards a notice to take his deposition or a set of interrogatories or requests to inspect as improper and objectionable. If he desires not to appear or not to respond, he must apply for a protective order. The cases are divided on whether a protective order must be sought. Compare Collins v Wayland, 139 F2d 677 (9th Cir. 1944), cert. den. *322 US 744;* Bourgeois v El Paso Natural Gas Co. 20 FRD 358 (SDNY 1957); Loosley v Stone, 15 FRD 373 (SD Ill 1954), with Scarlatos v Kulukundis, 21 FRD 185 (SDNY 1957); Ross v True Temper Corp. 11 FRD 307 (ND Ohio 1951). Compare also Rosenberg supra, 58 Col. L. Rev. 480, 496 (1958) with 2A Barron & Holtzoff, Federal Practice and Procedure 530-531 (Wright ed. 1961). The party from whom discovery is sought is afforded, through Rule 26(c), a fair and effective procedure whereby he can challenge the request made. At the same time, the total noncompliance with which Rule 37(d) is concerned may impose severe inconvenience or hardship on the discovering party and substantially delay the discovery process. Cf. 2B Barron & Holtzoff, Federal Practice and Procedure 306-307 (Wright ed. 1961) (response to a subpoena).

The failure of an officer or managing agent of a party to make discovery as required by present Rule 37(d) is treated as the failure of the party. The rule as revised provides similar treatment for a director of a party. There is slight warrant for the present distinction between officers and managing agents on the one hand and directors on the other. Although the legal power over a director to compel his making discovery may not be as great as over officers or managing agents, Campbell v General Motors Corp., 13 FRD 331 (SD NY 1952), the practical differences are negligible. That a director's interests are normally aligned with those of his corporation is shown by the provisions of old Rule 26(d)(2), transferred to 32(a)(2) (deposition of director of party may be used at trial by an adverse party for any purpose) and of Rule 43(b) (director of party may be treated at trial as a hostile witness on direct examination by any adverse party). Moreover, in those rare instances when a corporation is unable through good faith efforts to compel a director to make discovery, it is unlikely that the court will impose sanctions. Cf. Societe Internationale v Rogers, 357 US 197 (1958).

*Note to Subdivision (e).* The change in the caption conforms to the language of 28 USC § 1783, as amended in 1964.

*Note to Subdivision (f).* Until recently, costs of a civil action could be awarded against the United States only when expressly provided by Act of Congress, and such provision was rarely made. See HR Rep No. 1535, 89th Cong, 2d Sess, 2-3 (1966). To avoid any conflict with this

doctrine, Rule 37(f) has provided that expenses and attorney's fees may not be imposed upon the United States under Rule 37. See 2A Barron and Holtzoff, Federal Practice and Procedure 857 (Wright ed 1961).

A major change in the law was made in 1966, *80 Stat 308*, *28 USC § 2412* (1966), whereby a judgment for costs may ordinarily be awarded to the prevailing party in any civil action brought by or against the United States. Costs are not to include the fees and expenses of attorneys. In light of this legislative development, Rule 37(f) is amended to permit the award of expenses and fees against the United States under Rule 37, but only to the extent permitted by statute. The amendment brings Rule 37(f) into line with present and future statutory provisions.

**Notes of Advisory Committee on 1980 amendments.** *Note to Subdivision (b)(2).* New Rule 26(f) provides that if a discovery conference is held, at its close the court shall enter an order respecting the subsequent conduct of discovery. The amendment provides that the sanctions available for violation of other court orders respecting discovery are available for violation of the discovery conference order.

*Note to Subdivision (e).* Subdivision (e) is stricken. Title 28, U.S.C. § 1783 no longer refers to sanctions. The subdivision otherwise duplicates Rule 45(e)(2).

*Note to Subdivision (g).* New Rule 26(f) imposes a duty on parties to participate in good faith in the framing of a discovery plan by agreement upon the request of any party. This subdivision authorizes the court to award to parties who participate in good faith in an attempt to frame a discovery plan the expenses incurred in the attempt if any party or his attorney fails to participate in good faith and thereby causes additional expense.

Failure of United States to Participate in Good Faith in Discovery. Rule 37 authorizes the court to direct that parties or attorneys who fail to participate in good faith in the discovery process pay the expenses, including attorneys' fees, incurred by other parties, as a result of that failure. Since attorneys' fees cannot ordinarily be awarded against the United States (*28 U.S.C. § 2412*), there is often no practical remedy for the misconduct of its officers and attorneys. However, in the case of a government attorney who fails to participate in good faith in discovery, nothing prevents a court in an appropriate case from giving written notification of that fact to the Attorney General of the United States and other appropriate heads of offices or agencies thereof.

**Effective date of 1980 amendments.** Section 2 of the Order of April 29, 1980, -- US --, 64 L Ed 2d xli, -- S Ct --, which adopted the 1980 amendments to this Rule, provided "That the foregoing amendments to the Federal Rules of Civil Procedure shall take effect on August 1, 1980, and shall govern all civil proceedings thereafter commenced and, insofar as just and practicable, all proceedings then pending." Section 3 of such Order provided "That subsection (e) of Rule 37 of the Federal Rules of Civil Procedure is hereby abrogated, effective August 1, 1980.".

**Notes of Advisory Committee on 1987 amendments.** The amendments are technical. No substantive change is intended.

**Notes of Advisory Committee on 1993 amendments.** *Note to Subdivision (a).* This subdivision is revised to reflect the revision of Rule 26(a), requiring disclosure of matters without a discovery request.

Pursuant to new subdivision (a)(2)(A), a party dissatisfied with the disclosure made by an opposing party may under this rule move for an order to compel disclosure. In providing for such a motion, the revised rule parallels the provisions of the former rule dealing with failures to

answer particular interrogatories. Such a motion may be needed when the information to be disclosed might be helpful to the party seeking the disclosure but not to the party required to make the disclosure. If the party required to make the disclosure would need the material to support its own contentions, the more effective enforcement of the disclosure requirement will be to exclude the evidence not disclosed, as provided in subdivision (c)(1) of this revised rule.

Language is included in the new paragraph and added to the subparagraph (B) that requires litigants to seek to resolve discovery disputes by informal means before filing a motion with the court. This requirement is based on successful experience with similar local rules of court promulgated pursuant to Rule 83.

The last sentence of paragraph (2) is moved into paragraph (4).

Under revised paragraph (3), evasive or incomplete disclosures and responses to interrogatories and production requests are treated as failures to disclose or respond. Interrogatories and requests for production should not be read or interpreted in an artificially restrictive or hypertechnical manner to avoid disclosure of information fairly covered by the discovery request, and to do so is subject to appropriate sanctions under subdivision (a).

Revised paragraph (4) is divided into three subparagraphs for ease of reference, and in each the phrase "after opportunity for hearing" is changed to "after affording an opportunity to be heard" to make clear that the court can consider such questions on written submissions as well as on oral hearings.

Subparagraph (A) is revised to cover the situation where information that should have been produced without a motion to compel is produced after the motion is filed but before it is brought on for hearing. The rule also is revised to provide that a party should not be awarded its expenses for filing a motion that could have been avoided by conferring with opposing counsel.

Subparagraph (C) is revised to include the provision that formerly was contained in subdivision (a)(2) and to include the same requirement of an opportunity to be heard that is specified in subparagraphs (A) and (B).

*Note to Subdivision (c).* The revision provides a self-executing sanction for failure to make a disclosure required by Rule 26(a), without need for a motion under subdivision (a)(2)(A).

Paragraph (1) prevents a party from using as evidence any witnesses or information that, without substantial justification, has not been disclosed as required by Rules 26(a) and 26(e)(1). This automatic sanction provides a strong inducement for disclosure of material that the disclosing party would expect to use as evidence, whether at a trial, at a hearing, or on a motion, such as one under Rule 56. As disclosure of evidence offered solely for impeachment purposes is not required under those rules, this preclusion sanction likewise does not apply to that evidence.

Limiting the automatic sanction to violations "without substantial justification," coupled with the exception for violations that are "harmless," is needed to avoid unduly harsh penalties in a variety of situations: e.g., the inadvertent omission from a Rule 26(a)(1)(A) disclosure of the name of a potential witness known to all parties; the failure to list as a trial witness a person so listed by another party; or the lack of knowledge of a pro se litigant of the requirement to make disclosures. In the latter situation, however, exclusion would be proper if the requirement for disclosure had been called to the litigant's attention by either the court or another party.

Preclusion of evidence is not an effective incentive to compel disclosure of information that, being supportive of the position of the opposing party, might advantageously be concealed by the disclosing party. However, the rule provides the court with a wide range of other

sanctions--such as declaring specified facts to be established, preventing contradictory evidence, or, like spoliation of evidence, allowing the jury to be informed of the fact of nondisclosure--that, though not self-executing, can be imposed when found to be warranted after a hearing. The failure to identify a witness or document in a disclosure statement would be admissible under the Federal Rules of Evidence under the same principles that allow a party's interrogatory answers to be offered against it.

*Note to Subdivision (d).* This subdivision is revised to require that, where a party fails to file any response to interrogatories or a Rule 34 request, the discovering party should informally seek to obtain such responses before filing a motion for sanctions.

The last sentence of this subdivision is revised to clarify that it is the pendency of a motion for protective order that may be urged as an excuse for a violation of subdivision (d). If a party's motion has been denied, the party cannot argue that its subsequent failure to comply would be justified. In this connection, it should be noted that the filing of a motion under Rule 26(c) is not self-executing--the relief authorized under that rule depends on obtaining the court's order to that effect.

*Note to Subdivision (g).* This subdivision is modified to conform to the revision of Rule 26(f).

**Notes of Advisory Committee on 2000 amendments.** *Note to Subdivision (c)(1).* When this subdivision was added in 1993 to direct exclusion of materials not disclosed as required, the duty to supplement discovery responses pursuant to Rule 26(e)(2) was omitted. In the face of this omission, courts may rely on inherent power to sanction for failure to supplement as required by Rule 26(e)(2), see 8 Federal Practice & Procedure § 2050 at 607-09, but that is an uncertain and unregulated ground for imposing sanctions. There is no obvious occasion for a Rule 37(a) motion in connection with failure to supplement, and ordinarily only Rule 37(c)(1) exists as rule-based authority for sanctions if this supplementation obligation is violated.

The amendment explicitly adds failure to comply with Rule 26(e)(2) as a ground for sanctions under Rule 37(c)(1), including exclusion of withheld materials. The rule provides that this sanction power only applies when the failure to supplement was "without substantial justification." Even if the failure was not substantially justified, a party should be allowed to use the material that was not disclosed if the lack of earlier notice was harmless.

"Shall" is replaced by "is" under the program to conform amended rules to current style conventions when there is no ambiguity.

**Notes of Advisory Committee on 2006 amendments.** *Note to Subdivision (f).* Subdivision (f) is new. It focuses on a distinctive feature of computer operations, the routine alteration and deletion of information that attends ordinary use. Many steps essential to computer operation may alter or destroy information, for reasons that have nothing to do with how that information might relate to litigation. As a result, the ordinary operation of computer systems creates a risk that a party may lose potentially discoverable information without culpable conduct on its part. Under Rule 37(f), absent exceptional circumstances, sanctions cannot be imposed for loss of electronically stored information resulting from the routine, good-faith operation of an electronic information system.

Rule 37(f) applies only to information lost due to the "routine operation of an electronic information system"--the ways in which such systems are generally designed, programmed, and implemented to meet the party's technical and business needs. The "routine operation" of computer systems includes the alteration and overwriting of information, often without the operator's specific direction or awareness, a feature with no direct counterpart in hard-copy

documents. Such features are essential to the operation of electronic information systems.

Rule 37(f) applies to information lost due to the routine operation of an information system only if the operation was in good faith. Good faith in the routine operation of an information system may involve a party's intervention to modify or suspend certain features of that routine operation to prevent the loss of information, if that information is subject to a preservation obligation. A preservation obligation may arise from many sources, including common law, statutes, regulations, or a court order in the case. The good faith requirement of Rule 37(f) means that a party is not permitted to exploit the routine operation of an information system to thwart discovery obligations by allowing that operation to continue in order to destroy specific stored information that it is required to preserve. When a party is under a duty to preserve information because of pending or reasonably anticipated litigation, intervention in the routine operation of an information system is one aspect of what is often called a "litigation hold." Among the factors that bear on a party's good faith in the routine operation of an information system are the steps the party took to comply with a court order in the case or party agreement requiring preservation of specific electronically stored information.

Whether good faith would call for steps to prevent the loss of information on sources that the party believes are not reasonably accessible under Rule 26(b)(2) depends on the circumstances of each case. One factor is whether the party reasonably believes that the information on such sources is likely to be discoverable and not available from reasonably accessible sources.

The protection provided by Rule 37(f) applies only to sanctions "under these rules." It does not affect other sources of authority to impose sanctions or rules of professional responsibility.

This rule restricts the imposition of "sanctions." It does not prevent a court from making the kinds of adjustments frequently used in managing discovery if a party is unable to provide relevant responsive information. For example, a court could order the responding party to produce an additional witness for deposition, respond to additional interrogatories, or make similar attempts to provide substitutes or alternatives for some or all of the lost information.

**Notes of Advisory Committee on 2007 amendments.** The language of Rule 37 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

**Notes of Advisory Committee on 2013 amendments.** *Note to Subdivision (b).* Rule 37(b) is amended to conform to amendments made to Rule 45, particularly the addition of Rule 45(f) providing for transfer of a subpoena-related motion to the court where the action is pending. A second sentence is added to Rule 37(b)(1) to deal with contempt of orders entered after such a transfer. The Rule 45(f) transfer provision is explained in the Committee Note to Rule 45.

**Notes of Advisory Committee on 2015 amendments.***Subdivision (a).* Rule 37(a)(3)(B)(iv) is amended to reflect the common practice of producing copies of documents or electronically stored information rather than simply permitting inspection. This change brings item (iv) into line with paragraph (B), which provides a motion for an order compelling "production, or inspection."

*Subdivision (e).* Present Rule 37(e), adopted in 2006, provides: "Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system." This limited rule has not adequately addressed the serious problems resulting from the continued exponential growth in the volume of such information. Federal circuits have established significantly different standards for imposing sanctions or

curative measures on parties who fail to preserve electronically stored information. These developments have caused litigants to expend excessive effort and money on preservation in order to avoid the risk of severe sanctions if a court finds they did not do enough.

New Rule 37(e) replaces the 2006 rule. It authorizes and specifies measures a court may employ if information that should have been preserved is lost, and specifies the findings necessary to justify these measures. It therefore forecloses reliance on inherent authority or state law to determine when certain measures should be used. The rule does not affect the validity of an independent tort claim for spoliation if state law applies in a case and authorizes the claim.

The new rule applies only to electronically stored information, also the focus of the 2006 rule. It applies only when such information is lost. Because electronically stored information often exists in multiple locations, loss from one source may often be harmless when substitute information can be found elsewhere.

The new rule applies only if the lost information should have been preserved in the anticipation or conduct of litigation and the party failed to take reasonable steps to preserve it. Many court decisions hold that potential litigants have a duty to preserve relevant information when litigation is reasonably foreseeable. Rule 37(e) is based on this common-law duty; it does not attempt to create a new duty to preserve. The rule does not apply when information is lost before a duty to preserve arises.

In applying the rule, a court may need to decide whether and when a duty to preserve arose. Courts should consider the extent to which a party was on notice that litigation was likely and that the information would be relevant. A variety of events may alert a party to the prospect of litigation. Often these events provide only limited information about that prospective litigation, however, so that the scope of information that should be preserved may remain uncertain. It is important not to be blinded to this reality by hindsight arising from familiarity with an action as it is actually filed.

Although the rule focuses on the common-law obligation to preserve in the anticipation or conduct of litigation, courts may sometimes consider whether there was an independent requirement that the lost information be preserved. Such requirements arise from many sources--statutes, administrative regulations, an order in another case, or a party's own information-retention protocols. The court should be sensitive, however, to the fact that such independent preservation requirements may be addressed to a wide variety of concerns unrelated to the current litigation. The fact that a party had an independent obligation to preserve information does not necessarily mean that it had such a duty with respect to the litigation, and the fact that the party failed to observe some other preservation obligation does not itself prove that its efforts to preserve were not reasonable with respect to a particular case.

The duty to preserve may in some instances be triggered or clarified by a court order in the case. Preservation orders may become more common, in part because Rules 16(b)(3)(B)(iii) and 26(f)(3)(C) are amended to encourage discovery plans and orders that address preservation. Once litigation has commenced, if the parties cannot reach agreement about preservation issues, promptly seeking judicial guidance about the extent of reasonable preservation may be important.

The rule applies only if the information was lost because the party failed to take reasonable steps to preserve the information. Due to the ever-increasing volume of electronically stored information and the multitude of devices that generate such information, perfection in preserving

all relevant electronically stored information is often impossible. As under the current rule, the routine, good-faith operation of an electronic information system would be a relevant factor for the court to consider in evaluating whether a party failed to take reasonable steps to preserve lost information, although the prospect of litigation may call for reasonable steps to preserve information by intervening in that routine operation. This rule recognizes that "reasonable steps" to preserve suffice; it does not call for perfection. The court should be sensitive to the party's sophistication with regard to litigation in evaluating preservation efforts; some litigants, particularly individual litigants, may be less familiar with preservation obligations than others who have considerable experience in litigation.

Because the rule calls only for reasonable steps to preserve, it is inapplicable when the loss of information occurs despite the party's reasonable steps to preserve. For example, the information may not be in the party's control. Or information the party has preserved may be destroyed by events outside the party's control--the computer room may be flooded, a "cloud" service may fail, a malign software attack may disrupt a storage system, and so on. Courts may, however, need to assess the extent to which a party knew of and protected against such risks.

Another factor in evaluating the reasonableness of preservation efforts is proportionality. The court should be sensitive to party resources; aggressive preservation efforts can be extremely costly, and parties (including governmental parties) may have limited staff and resources to devote to those efforts. A party may act reasonably by choosing a less costly form of information preservation, if it is substantially as effective as more costly forms. It is important that counsel become familiar with their clients' information systems and digital data--including social media--to address these issues. A party urging that preservation requests are disproportionate may need to provide specifics about these matters in order to enable meaningful discussion of the appropriate preservation regime.

When a party fails to take reasonable steps to preserve electronically stored information that should have been preserved in the anticipation or conduct of litigation, and the information is lost as a result, Rule 37(e) directs that the initial focus should be on whether the lost information can be restored or replaced through additional discovery. Nothing in the rule limits the court's powers under Rules 16 and 26 to authorize additional discovery. Orders under Rule 26(b)(2)(B) regarding discovery from sources that would ordinarily be considered inaccessible or under Rule 26(c)(1)(B) on allocation of expenses may be pertinent to solving such problems. If the information is restored or replaced, no further measures should be taken. At the same time, it is important to emphasize that efforts to restore or replace lost information through discovery should be proportional to the apparent importance of the lost information to claims or defenses in the litigation. For example, substantial measures should not be employed to restore or replace information that is marginally relevant or duplicative.

*Subdivision (e)(1).* This subdivision applies only if information should have been preserved in the anticipation or conduct of litigation, a party failed to take reasonable steps to preserve the information, information was lost as a result, and the information could not be restored or replaced by additional discovery. In addition, a court may resort to (e)(1) measures only "upon finding prejudice to another party from loss of the information." An evaluation of prejudice from the loss of information necessarily includes an evaluation of the information's importance in the litigation.

The rule does not place a burden of proving or disproving prejudice on one party or the other. Determining the content of lost information may be a difficult task in some cases, and placing

the burden of proving prejudice on the party that did not lose the information may be unfair. In other situations, however, the content of the lost information may be fairly evident, the information may appear to be unimportant, or the abundance of preserved information may appear sufficient to meet the needs of all parties. Requiring the party seeking curative measures to prove prejudice may be reasonable in such situations. The rule leaves judges with discretion to determine how best to assess prejudice in particular cases.

Once a finding of prejudice is made, the court is authorized to employ measures "no greater than necessary to cure the prejudice." The range of such measures is quite broad if they are necessary for this purpose. There is no all-purpose hierarchy of the severity of various measures; the severity of given measures must be calibrated in terms of their effect on the particular case. But authority to order measures no greater than necessary to cure prejudice does not require the court to adopt measures to cure every possible prejudicial effect. Much is entrusted to the court's discretion.

In an appropriate case, it may be that serious measures are necessary to cure prejudice found by the court, such as forbidding the party that failed to preserve information from putting on certain evidence, permitting the parties to present evidence and argument to the jury regarding the loss of information, or giving the jury instructions to assist in its evaluation of such evidence or argument, other than instructions to which subdivision (e)(2) applies. Care must be taken, however, to ensure that curative measures under subdivision (e)(1) do not have the effect of measures that are permitted under subdivision (e)(2) only on a finding of intent to deprive another party of the lost information's use in the litigation. An example of an inappropriate (e)(1) measure might be an order striking pleadings related to, or precluding a party from offering any evidence in support of, the central or only claim or defense in the case. On the other hand, it may be appropriate to exclude a specific item of evidence to offset prejudice caused by failure to preserve other evidence that might contradict the excluded item of evidence.

*Subdivision (e)(2).* This subdivision authorizes courts to use specified and very severe measures to address or deter failures to preserve electronically stored information, but only on finding that the party that lost the information acted with the intent to deprive another party of the information's use in the litigation. It is designed to provide a uniform standard in federal court for use of these serious measures when addressing failure to preserve electronically stored information. It rejects cases such as Residential Funding Corp. v. DeGeorge Financial Corp., 306 F.3d 99 (2d Cir. 2002), that authorize the giving of adverse-inference instructions on a finding of negligence or gross negligence.

Adverse-inference instructions were developed on the premise that a party's intentional loss or destruction of evidence to prevent its use in litigation gives rise to a reasonable inference that the evidence was unfavorable to the party responsible for loss or destruction of the evidence. Negligent or even grossly negligent behavior does not logically support that inference. Information lost through negligence may have been favorable to either party, including the party that lost it, and inferring that it was unfavorable to that party may tip the balance at trial in ways the lost information never would have. The better rule for the negligent or grossly negligent loss of electronically stored information is to preserve a broad range of measures to cure prejudice caused by its loss, but to limit the most severe measures to instances of intentional loss or destruction.

Similar reasons apply to limiting the court's authority to presume or infer that the lost information was unfavorable to the party who lost it when ruling on a pretrial motion or presiding

at a bench trial. Subdivision (e)(2) limits the ability of courts to draw adverse inferences based on the loss of information in these circumstances, permitting them only when a court finds that the information was lost with the intent to prevent its use in litigation.

Subdivision (e)(2) applies to jury instructions that permit or require the jury to presume or infer that lost information was unfavorable to the party that lost it. Thus, it covers any instruction that directs or permits the jury to infer from the loss of information that it was in fact unfavorable to the party that lost it. The subdivision does not apply to jury instructions that do not involve such an inference. For example, subdivision (e)(2) would not prohibit a court from allowing the parties to present evidence to the jury concerning the loss and likely relevance of information and instructing the jury that it may consider that evidence, along with all the other evidence in the case, in making its decision. These measures, which would not involve instructing a jury it may draw an adverse inference from loss of information, would be available under subdivision (e)(1) if no greater than necessary to cure prejudice. In addition, subdivision (e)(2) does not limit the discretion of courts to give traditional missing evidence instructions based on a party's failure to present evidence it has in its possession at the time of trial.

Subdivision (e)(2) requires a finding that the party acted with the intent to deprive another party of the information's use in the litigation. This finding may be made by the court when ruling on a pretrial motion, when presiding at a bench trial, or when deciding whether to give an adverse inference instruction at trial. If a court were to conclude that the intent finding should be made by a jury, the court's instruction should make clear that the jury may infer from the loss of the information that it was unfavorable to the party that lost it only if the jury first finds that the party acted with the intent to deprive another party of the information's use in the litigation. If the jury does not make this finding, it may not infer from the loss that the information was unfavorable to the party that lost it.

Subdivision (e)(2) does not include a requirement that the court find prejudice to the party deprived of the information. This is because the finding of intent required by the subdivision can support not only an inference that the lost information was unfavorable to the party that intentionally destroyed it, but also an inference that the opposing party was prejudiced by the loss of information that would have favored its position. Subdivision (e)(2) does not require any further finding of prejudice.

Courts should exercise caution, however, in using the measures specified in (e)(2). Finding an intent to deprive another party of the lost information's use in the litigation does not require a court to adopt any of the measures listed in subdivision (e)(2). The remedy should fit the wrong, and the severe measures authorized by this subdivision should not be used when the information lost was relatively unimportant or lesser measures such as those specified in subdivision (e)(1) would be sufficient to redress the loss.

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## I. IN GENERAL

### A. General Considerations

#### 1. Generally

Control of discovery proceedings is important so just and speedy determination of lawsuit can be reached; Rule 37 provides trial courts with means and power to enforce compliance with rules of discovery by imposing sanctions for failure to comply with order compelling discovery. In re Professional Hockey Antitrust Litigation (1976, CA3 Pa) 531 F2d 1188, 1976-1 CCH Trade Cases P 60747, 21 FR Serv 2d 391, revd on other grounds (1976) 427 US 639, 96 S Ct 2778, 49 L Ed 2d 747, 1976-1 CCH Trade Cases P 60941, 21 FR Serv 2d 1027, reh den *(1976) 429 US 874, 97 S Ct 196, 97 S Ct 197, 50 L Ed 2d 158.*

Court's inherent authority is not displaced or limited by discovery sanctioning scheme of Federal Rules of Civil Procedure. Poole v Textron, Inc. (2000, DC Md) 192 FRD 494, 46 FR Serv 3d 572.

#### 2. Constitutional considerations, generally

No violation of due process or equal protection clauses of Constitution occurs when defendant has suppressed or failed to produce relevant evidence in his possession which he has been ordered to produce, thereby giving rise to presumption as to bad faith and untruth of his answer, justifying striking it from record and rendering judgment as though by default. Hammond Packing Co. v Arkansas (1909) 212 US 322, 53 L Ed 530, 29 S Ct 370.

Provisions of Rule 37 must be read in light of provisions of Fifth Amendment that no person shall be deprived of property without due process of law; there are constitutional limitations upon power of courts, even in aid of their own valid process, to dismiss action without affording party opportunity for hearing on merits of his cause. Societe Internationale Pour Participations Industrielles et Commerciales, S. A. v Rogers (1958) 357 US 197, 2 L Ed 2d 1255, 78 S Ct 1087.

Rule 37 must be read as limited by Fifth Amendment's proscription against deprivation of property without due process of law. Kakuwa v Sanchez (1974, CA9 Guam) 498 F2d 1223, 19 FR Serv 2d 365.

Although *Fed. R. Civ. P. 37(c)* was chiefly targeted at protecting party from being ambushed at trial with previously undisclosed evidence, by contrast, employer contended it could not locate and therefore could never use evidence at issue in employees' motion; thus, *Fed. R. Civ. P. 37(c)(1)* did not speak to employees' request for sanctions arising out of employer's inability to live up to its promise to furnish certain records, and it should have been obvious that there was, at most, only minimal risk that employer would have used evidence that it had unequivocally represented to be lost or nonexistent to defend itself in litigation, and if that risk were to materialize, employees would have been free to file proper *Fed. R. Civ. P. 37(c)* motion; therefore, magistrate judge was on firm ground when he determined *Fed. R. Civ. P. 37(c)* did not apply to employees' motion. Alvariza v Home Depot (2007, DC Colo) 241 FRD 663.

**3. Construction**

That Federal Rules of Civil Procedure are to be interpreted to provide broadest possible discovery is well-settled. Roto--Finish Co. v Ultramatic Equipment Co. (1973, ND Ill) 60 FRD 571, 181 USPQ 86, 17 FR Serv 2d 1396.

*FRCP 37* provides nonexclusive list of sanctions that may be imposed on party for failing to obey order to provide or permit discovery. Martinelli v Bridgeport Roman Catholic Diocesan Corp. (1998, DC Conn) 179 FRD 77, 41 FR Serv 3d 817.

**4. Purpose**

Purpose of discovery rules is to produce evidence for speedy determination of trial and not to punish erring parties. Robison v Transamerica Ins. Co. (1966, CA10 Utah) 368 F2d 37, 10 FR Serv 2d 1038.

Purpose of Rule 37 is to provide mechanism by which Rules 26 to 36 can be made effective. Fisher v Marubeni Cotton Corp. (1975, CA8 Mo) 526 F2d 1338, 21 FR Serv 2d 1148.

Purpose of Rule 37 is to protect court and opposing parties from dilatory or unwarranted motions and to promote expeditious hearing of cases. Eastern Maico Distributors, Inc. v Maico-Fahrzeugfabrik, G.m.b.H. (1981, CA3 Pa) 658 F2d 944, 32 FR Serv 2d 584.

General deterrence is permissible, and perhaps even mandatory, goal under Rule 37. Hashemi v Campaigner Publications, Inc. (1983, ND Ga) 572 F Supp 331, 39 FR Serv 2d 980, affd (1984, CA11 Ga) 737 F2d 1538, 10 Media L R 2256, 39 FR Serv 2d 983.

**5. Relationship to other** rules and laws

Prison Litigation Reform Act's rate cap to attorneys' fees applied to fees relating to discovery sanctions which were related to litigant's underlying § 1983 cause of action; discovery sanctions were ordered against county for refusing to turn over documents related to jail's staffing levels. Webb v Ada County (2002, CA9 Idaho) 285 F3d 829, 2002 CDOS 2941, 2002 Daily Journal DAR 3601, 52 FR Serv 3d 350, cert den *(2002) 537 US 948, 154 L Ed 2d 292, 123 S Ct 413* and (criticized in Hadix v Johnson (2002, WD Mich) 2002 US Dist LEXIS 23421) and (criticized in Chatmon v Winnebago County (2003, ND Ill) 2003 US Dist LEXIS 22070) and (criticized in Skinner v Uphoff (2004, DC Wyo) 324 F Supp 2d 1278).

Plaintiffs' *Fed. R. Civ. P. 56(f)* motion failed to show good cause for their professed inability to conduct desired discovery at earlier date; they did not demonstrate that they seasonably availed themselves of any of usual remedies under *Fed. R. Civ. P. 37* for failure of production during discovery period. Rivera-Torres v Rey-Hernandez (2007, CA1 Puerto Rico) 502 F3d 7.

Court's review of petitioner's challenge was limited to Transportation Security Administration's final protective orders; ongoing issues of enforcement and application of protective order, or admission or exclusion of evidence during petitioner's prospective employment discrimination trial, remained within discretion of district court. Robinson v Napolitano (2012, CA8) 689 F3d 888.

Defendant IRS had been under no obligation to invoke privileges for irrelevant documents under *Fed. R. Civ. P. 26(b)(1)* in plaintiff taxpayer's prior state *Fed. R. Civ. P. 60(b)* proceeding while it could still invoke privileges in Freedom of Information Act (FOIA) litigation where relevance did not bar production; waiver did not apply to agency's claim of exemption under *5 USCS § 552(b)(5)* in taxpayer's FOIA case in as much as, unlike in civil discovery under *Fed. R. Civ. P. 37*, there was no opportunity to obtain protective order in FOIA case. Stonehill v IRS (2009, App DC) 558 F3d 534, 103 AFTR 2d 1215.

Where defendant in civil action had possession of original copies of deposition transcript in his possession and plaintiff, who had not ordered copies, attempted to obtain original from defendant in order to make copies pursuant to Rule 37(a)(2) and Rule 34(a), District Court ruled that, because Rule 30(f)(2) provided method of obtaining copies, plaintiff could not utilize procedures available in other rules to accomplish same end. Kinan v Brockton Massachusetts (1986, DC Mass) 112 FRD 206.

Discovery is pretrial matter, and magistrate judges have general authority to order discovery sanctions; however, magistrate judge cannot issue sanctions which fall within eight dispositive motions excepted in *28 USCS § 636(b)(1)(A)*. Burns v Imagine Films Entertainment (1996, WD NY) 164 FRD 594.

Factors that district courts should consider before awarding *FRCP 11* sanction (i.e. reasonableness of opposing party's attorney's fees, minimum to deter, ability to pay, and factors related to severity of violation) may be applied in connection with sanctions awarded pursuant to *FRCP 37(d)*, since *FRCP 37*, much like *FRCP 11*, is designed to deter future misconduct

during discovery. Gordon v New England Tractor Trailer Training Sch. (1996, DC Md) 168 FRD 178, 36 FR Serv 3d 616.

Filing of FRCP 72 objections to magistrate judge's discovery order does not stay magistrate judge's discovery order compelling production, and does not constitute substantial justification for refusing to provide discovery as ordered. White v Burt Enters. (2000, DC Colo) 200 FRD 641.

According to District Court for District of Maryland, Southern Division, since Health Insurance and Portability Accountability Act of 1996, 42 USCS §§ 1320d et seq., does not include any reference to how court should treat such violation during discovery or at trial, type of remedy to be applied is within discretion of court under *Fed. R. Civ. P. 37*. Law v Zuckerman (2004, DC Md) 307 F Supp 2d 705.

Where defendant companies' responses to show cause order, in connection with arguments they had made in opposing plaintiff individuals' motion to strike companies' specially retained expert witnesses due to failure to comply with *Fed. R. Civ. P. 26(a)(2)(B)*, 35, were that individuals were not prejudiced by any insufficient disclosure, and that *Fed. R. Civ. P. 37(c)(1)* permitted preclusion only when failure to disclose expert witness was prejudicial, and that Fed. R. Civ. P. 35 only required independent medical examiner to produce report of examination if it existed, arguments failed because rule that required showing of exceptional circumstances before permitting discovery of non-testifying experts, so as to preclude discovery from non-testifying experts if information was available from other sources, had nothing whatsoever to do with requiring disclosures of information about expert witnesses who would be called as witnesses, and simple truth was that because companies' experts were not disclosed, individuals had no choice but to move to strike them. Novak v Capital Mgmt. & Dev. Corp. (2007, DC Dist Col) 241 FRD 389.

Doctor's motion to dismiss or motion for summary judgment was denied in plaintiffs' medical negligence case because rigid disclosure and sanction provisions of Tex. Civ. Prac. & Rem. Code Ann. § 74.351 invaded province of *Fed. R. Civ. P. 26* and *37* and thus did not apply in federal court in cases involving federal question jurisdiction. Mason v United States (2007, WD Tex) 486 F Supp 2d 621.

That movant did not follow process required by D. Me. R. 26(b) for filing of discovery motion did not present procedural obstacle to motion for sanctions grounded on defendants' failure to attend their depositions. Rule 26(b) applied to motions requesting discovery, not to motion for sanctions pursuant to *Fed. R. Civ. P. 37(d)*. Michael v Liberty (2008, DC Me) 547 F Supp 2d 43, motions ruled upon, judgment entered (2008, DC Me) 2008 US Dist LEXIS 55231.

In wrongful death suit, where sanctions under *Fed. R. Civ. P. 37(c)* of payment of certain discovery costs and costs of sanctions motion as well as permitting plaintiff widow to inform jury that certain evidence was withheld in violation of discovery orders were imposed on defendants' counsel because he was aware of defendants' numerous discovery violations, including failures to disclose and intentional withholding of discovery information and false statements made during discovery, sanctions under *Fed. R. Civ. P. 11(c)* were not warranted because Rule 37 sanctions were sufficient. Tom v S.B., Inc. (2012, DC NM) 280 FRD 603.

Unpublished Opinions

Unpublished: In conspiracy and retaliation suit brought by property owners against appellees, city and former city officials, district court's refusal to grant relief under *Fed. R. Civ. P. 59(3)* from award of summary judgment in appellees' favor did not violate due process; owners argued that city failed to produce witnesses for depositions, but owners could have filed motion to compel depositions under *Fed. R. Civ. P. 37(a)*, and they failed to do so. Heath v City of Harvey (2007, CA7 Ill) 2007 US App LEXIS 8578.

Unpublished: Fed. R. Bankr. P. 7033 and 7037 make Fed R. Civ. P. 33 and *37* applicable in adversary proceedings in bankruptcy. Lavender v Manheim's Pa. Auction Servs. (In re Lavender) (2010, CA2) 2010 US App LEXIS 23021.

Unpublished: Pursuant to *Fed. R. Civ. P. 37(b)(2)*, trial court properly ruled that plaintiff could not use certain testimony in his case-in-chief because of his failure to make adequate disclosures under *Fed. R. Civ. P. 26(a)* and (e). Dillon v West Publ. Corp. (2011, CA9 Nev) 2011 US App LEXIS 952.

Unpublished: Because client's sanctions request was premised largely upon alleged discovery abuses, sanctionable under *Fed. R. Civ. P. 37*, or alleged misconduct that overlapped with merits of his claims against law firm, sanctions were not available under *Fed. R. Civ. P. 11*, and, there was no proof of false statements to court on discovery matters. Weaver v Mateer & Harbert, P.A. (2013, CA11 Fla) 2013 US App LEXIS 13898.

Unpublished: *Fed. R. Civ. P. 26(g)* applied to circumstances at issue; thus, there was no need for court to utilize *Fed. R. Civ. P. 37* or its inherent powers to issue sanctions. Having found that transferees' former counsel was not substantially justified in failing to provide discovery to Chapter 7 Trustee, Rule 26(g) required court to award sanctions to Trustee, including reasonable attorneys' fees caused by violation; specifically, reimbursement from former counsel for discovery violations and abuses in amount of $ 94,514, plus legal fees incurred in bringing sanctions motion in amount of $ 88,845, was required. McCarty v Global Fin. Solutions, LLC (In re Simonson) (2008, BC WD Wash) 2008 Bankr LEXIS 2936.

Unpublished: In action to avoid and recover preferential transfer under *11 USCS §§ 547* and 550, creditor's failure to comply with discovery deadlines established in court's first amended scheduling order could only be sanctioned under Fed. R. Civ. P. 16(f)(1)(C), not *Fed. R. Civ. P. 37(b)* or (d) as requested by trustee, but Fed. R. Civ. P. 16(f)(1)(C) referred court to *Fed. R. Civ. P. 37(b)(2)(A)(ii)*-(vii) for examples of type of sanctions it could impose; strong sanctions were warranted because of creditor's failure to comply with court's warnings and because trustee was prejudiced by failure to provide timely discovery and therefore, creditor was precluded from offering testimony or other evidence in support of any of its affirmative defenses. McHale v 1-15 Hartsdale Ave. Corp. (In re 1031 Tax Group, LLC) (2010, BC SD NY) 2010 Bankr LEXIS 2369.

**6. --FRCP 41**

Whether court has power to dismiss complaint because of noncompliance with production order depends exclusively upon Rule 37, which addresses itself with particularity to

consequences of failure to make discovery by listing variety of remedies which court may employ as well as by authorizing any order which is "just" so that there is no need to resort to Rule 41(b), which appears in that part of rules concerned with trials and which lacks specific references to discovery; furthermore Rule 41(b) is on its face appropriate only as defendant's remedy, while Rule 37 provides more expansive coverage by comprehending disobedience of production orders by any party. Societe Internationale Pour Participations Industrielles et Commerciales, S. A. v Rogers (1958) 357 US 197, 2 L Ed 2d 1255, 78 S Ct 1087.

Use of failure-to-prosecute component of Fed. R. Civ. P. 41(b), rather than *Fed. R. Civ. P. 37(a)*, was not plainly erroneous, based upon history of litigation and district court's inventory of myriad forms of corporation's dilatory behavior following recommencement of discovery; furthermore, assuming that there was error, error certainly did not result in miscarriage of justice that seriously affected fairness, integrity or public reputation of judicial proceedings. Ecclesiastes 9:10-11-12, Inc. v LMC Holding Co. (2007, CA10 Utah) 497 F3d 1135.

District court which improperly dismissed case with prejudice under Fed. R. Civ. P. 41(b) also would have abused its discretion had it dismissed plaintiff's suit with prejudice as discovery sanction under this rule because it did not first consider propriety of lesser sanctions. Bergstrom v Frascone (2014, CA8 Minn) 744 F3d 571, 87 FR Serv 3d 1248.

Factors for dismissal as sanction under FRCP 41(b) are helpful in considering dismissal under *FRCP 37*. Almonte v Coca-Cola Bottling Co. (1996, DC Conn) 169 FRD 246, 36 FR Serv 3d 1404.

FRCP 41 differs from *FRCP 37* in that former applies to court orders generally and/or failure to prosecute; latter applies only to failure to comply with discovery rules or discovery orders directed by court. Allen v Interstate Brands Corp. (1999, SD Ind) 186 FRD 512.

In suit by former employees of fast-food restaurant, alleging that their former employer violated federal and state wage and hour laws, where claims of two former employees were dismissed under *Fed. R. Civ. P. 37(b)* because they failed or refused to attend or complete their depositions, respond to employer's interrogatories, or to otherwise comply with court's discovery orders mandating their participation, and they failed to oppose employer's motion to dismiss their claims, resort to court's power to dismiss under Fed. R. Civ. P. 41(b) was unnecessary since *Fed. R. Civ. P. 37(b)* was applicable. Seever v Carrols Corp. (2007, WD NY) 528 F Supp 2d 159.

In in rem forfeiture case brought under 18 USCS § 981(a)(1)(A) and (C) in which claimant had failed to participate in discovery and failed to respond to correspondence from both government and court, dismissal under *Fed. R. Civ. P. 37* was preferable to dismissal under Fed. R. Civ. P. 41. United States v Proceeds of Drug Trafficking Transferred to Certain Foreign Bank Accounts (2008, DC Dist Col) 252 FRD 60.

Unpublished Opinions

Unpublished: In case in which apparent basis for district court's dismissal of pro se employee's discrimination case was Fed. R. Civ. P. 41(b) because she failed to appear at numerous

scheduled hearings, including her deposition, and other violations of court orders, district court did not address employer's *Fed. R. Civ. P. 37* motion for sanctions; Rule 37(d) would also have provided adequate basis for dismissing case as district court found that employee acted willfully based on her knowledge of scheduled dates and court's warnings about her dilatory behavior. Holt v Loyola Univ. of Chi. (2012, CA7 Ill) 2012 US App LEXIS 25770.

Unpublished: Where pro se employee appealed district court's Fed. R. Civ. P. 41(b) dismissal of her discrimination case, she unsuccessfully argued that district court should have required her employer to file *Fed. R. Civ. P. 37* motion rather than Rule 41(b) motion. District court had already acted by ordering her to attend her deposition, but she did not participate in her deposition. Stezzi v Citizens Bank of Pa (2013, CA3 Pa) 2013 US App LEXIS 20428.

**7. --FRCP 45**

Regardless of whether sanction is premised on finding of contempt or deemed justified under Rule 37 generally, Constitution requires provision of procedural protections before non-compensatory, punitive fine can be demanded from party or attorney. Satcorp Int'l Group v China Nat'l Silk Import & Export Corp. (1996, CA2 NY) 101 F3d 3, 36 FR Serv 3d 463.

Former Rule 37(a)(4) provides authority for award of attorneys' fees to prevailing parties in action to enforce administrative subpoena issued pursuant to Rule 45(d)(1). *United States v Allen (1982, WD Wis) 578 F Supp 468.*

Exclusion of evidence is severe sanction because it implicates due process concerns. In re Independent Serv. Orgs. Antitrust Litig. (1996, DC Kan) 168 FRD 651.

When prospective deponent is not party to litigation, proper procedure for obtaining jurisdiction necessary to compel attendance is issuance of subpoena pursuant to FRCP 45. Bueker v Atchison, T. & S. F. Ry. (1997, ND Ill) 175 FRD 291, 39 FR Serv 3d 1012.

Motion to quash and motion for protective order were granted because although judge had knowledge about statements made by code enforcement officer while attempting to obtain search warrant and statements were very relevant to civil rights action, judge was not only possible source of testimony regarding this officer's statements. Ciarlone v City of Reading (2009, ED Pa) 263 FRD 198.

**8. --Federal** Rules of Criminal Procedure

Procedural safeguards set out in Federal Rules of Criminal Procedure 42(b) need not be followed by court levying civil contempt fine. United States v Westinghouse Electric Corp. (1981, CA9 Cal) 648 F2d 642, 1981-1 CCH Trade Cases P 64112, 31 FR Serv 2d 952.

Sanction imposed by court for discovery abuse is not rendered criminal rather than civil, and thus subject to provisions of Rule 42(b) of Federal Rules of Criminal Procedure, notwithstanding contentions (1) that compensatory nature of sanction is undercut by order's language which reveals court's displeasure with party's conduct, and (2) that monetary sanctions imposed, including absolute award of $ 500, are not tailored to match harm suffered and therefore cannot

support their civil, compensatory label. Kraszewski v State Farm General Ins. Co. (1984, ND Cal) 130 FRD 111, 36 BNA FEP Cas 1367, 34 CCH EPD P 34503, 39 FR Serv 2d 427.

Pursuant to guidelines established under Fed. R. Civ. P. 34 and *37*, vague notions that there should have been more documents produced by government in criminal case were speculative and insufficient premises for judicial action, and it was proper to produce electronically stored information in other than native files unless not reasonably usable. United States v O'Keefe (2008, DC Dist Col) 537 F Supp 2d 14.

**9. --Tax Court** rules

Tax Court Rule 104(c) is quite similar to Rule 37 and would be construed in pari materia. Spear v Commissioner (Estate of Spear) (1994, CA3) 41 F3d 103, 94-2 USTC P 50605, 30 FR Serv 3d 1380, 74 AFTR 2d 7058, 94 TNT 237-22.

On appeal from Tax Court's dismissal of actions as sanction for failure to present evidence at discovery hearing, Court of Appeals properly looks to cases reviewing dismissals under Rule 37, Federal Rules of Civil Procedure, since that rule is exclusive remedy for noncompliance with discovery orders and is thus most analogous to Tax Court Rule 104. Aruba Bonaire Curacao Trust Co. v Commissioner (1985, App DC) 250 US App DC 38, 777 F2d 38, 85-2 USTC P 9815, 3 FR Serv 3d 615, 56 AFTR 2d 6465, cert den *(1986) 475 US 1086, 106 S Ct 1469, 89 L Ed 2d 725.*

**10. --Equal Access to Justice Act**

Legislative history underlying Equal Access to Justice Act demonstrates that Congress intended to authorize award of attorneys' fees and expenses against United States under Rule 37. United States v Kemper Money Market Fund, Inc. (1986, CA7 Ill) 781 F2d 1268, 86-1 USTC P 9188, 57 AFTR 2d 682.

Application of *Federal* Rules of Civil Procedure 37 to Equal Access to Justice Act (*28 USCS § 2412*) should be tempered with clear indications in Act's legislative history that mere absence of bad faith or of deliberate abuse of legal process does not absolve government from liability for fees and expenses. Nunes-Correia v Haig (1982, DC Dist Col) 543 F Supp 812.

**11. Applicability**

Federal Rules of Civil Procedure regarding discovery apply to injunctive action which is purely civil proceeding. SEC v MacElvain (1969, CA5) 417 F2d 1134, CCH Fed Secur L Rep P 92509, cert den *(1970) 397 US 972, 90 S Ct 1087, 25 L Ed 2d 265.*

Rule 37 is of limited application to non-parties and can only be used to order non-party to answer written and oral questions under Rules 30 and 31; it has no application to non-party's refusal to produce documents. Fisher v Marubeni Cotton Corp. (1975, CA8 Mo) 526 F2d 1338, 21 FR Serv 2d 1148.

In diversity contract action, although normal sanctions under Rule 37 may not be available for defendant's failure to cooperate in pretrial disclosure of relevant matters where motion for stay

in trial is granted pending completion of arbitration proceedings, arbitrators may be able to devise appropriate sanctions if defendant impedes or complicates arbitration process by lack of cooperation in discovery. Bigge Crane & Rigging Co. v Docutel Corp. (1973, ED NY) 371 F Supp 240, 17 FR Serv 2d 337 (criticized in Interchem Asia 2000 PTE Ltd. v Oceana Petrochemicals AG (2005, SD NY) 373 F Supp 2d 340).

Within context of civil litigation, discovery rules and sanctions of Rule 37 apply to agencies of government in same manner that they apply to any other litigant; government agency should have no added burden to voluntarily disclose information relevant to opponent's cause of action. Barrett v Hoffman (1981, SD NY) 521 F Supp 307, revd on other grounds, remanded (1982, CA2 NY) 689 F2d 324, cert den *(1983) 462 US 1131, 77 L Ed 2d 1366, 103 S Ct 3111* and (criticized in Hill v Martinez (2000, DC Colo) 87 F Supp 2d 1115).

Although *Fed. R. Civ. P. 37(b)* did not apply since there was no court order requiring purchasers to preserve or produce destroyed documents, even in absence of discovery order, court may impose sanctions on party for misconduct in discovery under its inherent power to manage its own affairs. In re WRT Energy Secs. Litig. (2007, SD NY) 246 FRD 185.

Insurance company was awarded $ 4,613 in attorney's fees and discovery-related expenses as sanction pursuant to *Fed. R. Civ. P. 37(b)(2)*: (1) defendant failed to provide any excuse or justification for its failure to comply with several court orders, including Fed. R. Civ. P. 16 scheduling order, discovery orders, and order requiring it to file summary judgment responsive brief; and (2) company's request for expenses and attorney's fees was reasonable in light of repeated attempts that it had made seeking to obtain discovery compliance from defendant prior to, and in addition to, seeking court's intervention in discovery process. Nat'l Fire & Marine Ins. Co. v Robin James Constr., Inc. (2007, DC Del) 478 F Supp 2d 660.

In case in which magistrate judge awarded $ 1,000.00 to armament company for expenses it incurred in filing motion to compel, optical company argued unsuccessfully that magistrate judge's sanction was not authorized under *Fed. R. Civ. P. 37(a)(5)(A)* because its opposition to armament company's motion to compel was substantially justified; Rule 37(a)(5)(A) was inapplicable because magistrate judge granted in part and denied in part armament company's motion to compel; therefore, *Fed. R. Civ. P. 37(a)(5)(C)* was applicable. Knights Armament Co. v Optical Sys. Tech., Inc. (2008, MD Fla) 254 FRD 470.

Because employers in FLSA action were permitted to attack court's jurisdiction at any point in proceedings, sanctions under 28 USCS § 1927 were inapplicable and sanctions for discovery violations under *Fed. R. Civ. P. 37* was also inappropriate under facts of case. Rodriguez v Diego's Rest., Inc. (2009, SD Fla) 619 F Supp 2d 1345.

In a breach of contract suit, where a service provider sought sanctions against a service recipient for willful destruction of relevant evidence, although *Fed. R. Civ. P. 37* was not applicable to the provider's motion because he did not identify any court order violated by the recipient in its alleged spoliation of evidence, Rule 37 was relevant in determining that the spoliation motion was timely, that the recipient's acts constituted spoliation, and that a general adverse instruction regarding the spoliation was an appropriate sanction. Goodman v Praxair Servs. (2009, DC Md) 632 F Supp 2d 494.

Employee's motion to strike documents from employer's supplemental summary judgment appendix was denied because order extending discovery deadline did not impose deadline upon employer to respond to employee's written discovery request, remedy employee sought for discovery dispute was inappropriate as employee failed to comply with requirements of N.D. & S.D. Iowa Civ. R. 37(a), and employer had not disobeyed discovery order, so sanctions were not proper under *Fed. R. Civ. P. 37(b)*. Mahony v Universal Pediatric Servs. (2010, SD Iowa) 753 F Supp 2d 839.

Although rule regarding imposition of sanctions for discovery violations was not applicable to Rule 2004 examinations, that rule was appropriate guide for determining whether to impose sanctions under Bankruptcy Code, court's inherent powers, and under U.S. Code provision applicable to sanctions against attorneys for unreasonable and vexatious multiplication of proceedings. In re Rosebar (2014, BC DC Dist Col) 505 BR 82.

### 12. Discretion of court, generally

Protections and sanctions found in discovery rules are not absolute and contemplate use of judicial discretion. Marshall v Ford Motor Co. (1971, CA10 Okla) 446 F2d 712.

Although district court has wide latitude in framing orders and in penalizing failures to comply, that discretion has constitutional limits. Watkis v Payless Shoesource (1997, MD Fla) 174 FRD 113, 38 FR Serv 3d 1274, 11 FLW Fed D 65.

### 13. Waiver of rights

Unsuccessful plaintiffs' failure to act before trial to require defendants to fully answer interrogatories or to request sanctions against defendants for such neglect amounts to waiver of discovery rights under Rule 37. Butler v Pettigrew (1969, CA7 Ill) 409 F2d 1205, 13 FR Serv 2d 1012.

Defendant in patent case did not waive any right under Rule 37 by failure to seek sanctions until after trial and before judgment when evasive and incomplete character of plaintiff's answers to interrogatories did not become apparent to defendant until it had conducted its own investigation. Airtex Corp. v Shelley Radiant Ceiling Co. (1976, CA7 Ill) 536 F2d 145, 190 USPQ 6, 25 FR Serv 2d 796.

Corporation's failure to timely raise discovery non-compliance under *Fed. R. Civ. P. 37* constituted waiver of such rights. Tolliver v Fed. Republic of Nig. (2003, WD Mich) 265 F Supp 2d 873, affd (2005, CA6 Mich) 128 Fed Appx 469.

In insurance coverage dispute, insurer did not waive right to assert "other insurance" clause pursuant to *Fed. R. Civ. P. 26(e)(1)* and *37(c)(1)* because insurer disclosed this defense in its answer, which was in writing; however, clause did not bar insureds from recovery. URS Corp. v Travelers Indem. Co. (2007, ED Mich) 501 F Supp 2d 968.

### 14. Jurisdiction

Where defendant fails to comply with order for production of documents and moves to vacate order and to dismiss action for lack of jurisdiction, claim having arisen in foreign country, court

cannot, pursuant to Rule 37(b)(2), enter order refusing to allow defendant to interpose defense of lack of jurisdiction or enter default judgment against defendant, since court is without jurisdiction and powerless to render valid judgment. Bell v United States (1962, DC Kan) 31 FRD 32, 6 FR Serv 2d 758.

In field of foreign relations, 2 types of jurisdiction have been defined: prescriptive jurisdiction, referring to capacity of state under international law to make rule, exemplified by enactment of Federal Rules of Civil Procedure, for example, Rule 37 and enforcement jurisdiction referring to capacity of state under international law to enforce rule of law. In re Uranium Antitrust Litigation (1979, ND Ill) 480 F Supp 1138, 1980-1 CCH Trade Cases P 63124, 29 FR Serv 2d 414.

When prospective deponent is not party to litigation, proper procedure for obtaining jurisdiction necessary to compel attendance is issuance of subpoena pursuant to FRCP 45. Bueker v Atchison, T. & S. F. Ry. (1997, ND Ill) 175 FRD 291, 39 FR Serv 3d 1012.

District court that entered final monetary judgment against judgment debtors retained jurisdiction to continue enforcement of judgment and could entertain judgment creditor's motion to compel under *Fed. R. Civ. P. 37* if it was re-captioned under with court's name. Beller & Keller v Kindor (2003, SD NY) 2003-2 USTC P 50565, 92 AFTR 2d 5100.

Plaintiffs were not entitled to motion to compel non-party to remove "confidential" designation from certain produced documents because, under Fed. R. Civ. P. 45, court that issued subpoena to non-party was not trial court and had no authority to compel such action in that subpoena did not make reference to designation and documents had been voluntarily produced; plaintiffs only recourse was to ask trial court that issued protective order to enforce that order pursuant to *Fed. R. Civ. P. 37(b)*. Rhodes v John Adams Assocs. (In re John Adams Assocs.) (2008, DC Dist Col) 255 FRD 7.

**15. --Effect of appeal**

Where timely notice of appeal has been filed from final verdict, district court lacks jurisdiction to entertain post-trial motion by plaintiff-securities' purchaser for expenses and attorney's fees incurred as result of seller's failure to admit under Rule 36. G & M, Inc. v Newbern (1973, CA9 Or) 488 F2d 742, CCH Fed Secur L Rep P 94181, 17 FR Serv 2d 1410.

Appeal from District Court's denial of motion to compel arbitration did not divest District Court of jurisdiction to make subsequent orders, including entry of default judgment, since District Court was simply moving case along consistent with its view of case as reflected in its order denying arbitration and issue of arbitrability was only substantive issue presented in appeal. Britton v Co-op Banking Group (1990, CA9 Cal) 916 F2d 1405, CCH Fed Secur L Rep P 95613 (criticized in Baron v Best Buy Co. (1999, SD Fla) 79 F Supp 2d 1350) and (criticized in Blinco v Green Tree Servicing, LLC (2004, CA11 Fla) 366 F3d 1249, 17 FLW Fed C 463) and (criticized in McCauley v Halliburton Energy Servs. (2005, CA10 Okla) 413 F3d 1158, 23 BNA IER Cas 93, 151 CCH LC P 60021) and (criticized in Enderlin v XM Satellite Radio Holdings, Inc. (2006, ED Ark) 2006 US Dist LEXIS 78083) and (criticized in Reidy v Cyberonics, Inc. (2007, SD Ohio) 2007 US Dist LEXIS 9568) and (criticized in Express Scripts, Inc. v Aegon Direct Mktg. Servs.

(2007, ED Mo) 2007 US Dist LEXIS 24787) and (criticized in Ehleiter v Grapetree Shores, Inc. (2007, CA3) 482 F3d 207).

Where district court concluded that injured party's lawyer deliberately concealed documents known to favor adversary, court did not abuse its discretion in dismissing case as sanction under *Fed. R. Civ. P. 37* and awarding fees to opposing party. Wade v Soo Line R.R. Corp. (2007, CA7 Ill) 500 F3d 559.

There was no procedural abuse of discretion in district court's dismissal of plaintiff's action pursuant to former *Fed. R. Civ. P. 37(b)(2)(C)* because, although judgment of dismissal was mistakenly entered before time for responding to show cause order had expired, plaintiffs did advance their excuses for delay and arguments against dismissal in motion to vacate that judgment, which district court had under advisement for several months before denying it; thus, sanctioned party had notice of potential dismissal and opportunity to oppose it. Malloy v WM Specialty Mortg. LLC (2008, CA1 Mass) 512 F3d 23.

Unpublished Opinions

Unpublished: District court did not abuse its discretion when it dismissed employee's discrimination suit as sanction, pursuant to *Fed. R. Civ. P. 37(b)*, because employee willfully defied court's numerous orders pertaining to discovery and took affirmative steps to destroy or alter discovery materials, prejudicing employer. Torres v Amerada Hess Corp. (2007, CA3 NJ) 2007 US App LEXIS 17109.

**16. Miscellaneous**

Defendants forfeited any objection to plaintiff's motion for sanctions by failing to respond; their motion for reconsideration of sanction order could not revive claims that were forfeited by failing to timely oppose original motion. Crispin-Taveras v Municipality of Carolina (2011, CA1 Puerto Rico) 647 F3d 1, 79 FR Serv 3d 919.

Although both Federal Rules of Civil Procedure and district court's local rules require party filing motion to compel discovery to attach certification that good-faith effort has been made to resolve discovery dispute without judicial intervention, defendants did not file any motions to compel, and there was no requirement that party had to attach certification of good-faith attempts at dispute resolution to informative motion. Mulero-Abreu v P.R. Police Dep't (2012, CA1 Puerto Rico) 675 F3d 88, CCH Unemployment Ins Rep P 44456.

District court's decision that defendant federal employer had no sovereign immunity from sanctions under *Fed. R. Civ. P. 37*, though temporarily unfavorable to employer, was not permanently unreviewable; sanction awarded to plaintiff former employee, who was covered by Congressional Accountability Act of 1995, 2 USCS §§ 1301-1438, was not reviewable as collateral order under *28 USCS §§ 1291*, 1292(a)(1), (b). Banks v Office of Senate Sergeant-At-Arms & Doorkeeper of United States Senate (2006, App DC) 471 F3d 1341, 99 BNA FEP Cas 801.

Where clients voluntarily choose attorney as their representative in action, they may not later avoid consequences of his acts or omissions. Geigel v Sea Land Service, Inc. (1968, DC Puerto Rico) 44 FRD 1, 12 FR Serv 2d 910.

Redaction of videotapes in litigation is critical matter, and party's action of redacting tapes without disclosing fact of redactions must be thoroughly condemned as violation of discovery rules. Food Lion v Capital Cities/ABC (1996, MD NC) 165 FRD 454, motions ruled upon (1996, MD NC) 24 Media L R 2431, affd (1996, MD NC) 951 F Supp 1211, 25 Media L R 1182.

Party's failure to respond to other party's requests for documents does not excuse that other party from complying with first party's discovery requests; there is no authority which, absent court order, permits conditioning compliance with properly served discovery requests. Land Ocean Logistics, Inc. v Aqua Gulf Corp. (1998, WD NY) 181 FRD 229.

While it is possible to read Fed. R. Civ. P. 33(b)(4) to incorporate *Fed. R. Civ. P. 26(b)(5)*--argument supporting that view is that privilege claim cannot be specifically stated without describing documents that are subject of claim in accordance with Rule 26(b)(5)--more harmonious reading of rules as whole leaves enforcement of Rule 26(b)(5) to nuanced sanctioning regime governed by *Fed. R. Civ. P. 37* rather than nearly automatic waiver process required by Rule 33(b)(4). Pub. Serv. Co. v Portland Natural Gas (2003, DC NH) 2003 DNH 193, 218 FRD 361, 56 FR Serv 3d 1221.

Affidavit from plaintiff's attorney filed in conjunction with summary judgment motion was excluded from evidence pursuant to *Fed. R. Civ. P. 37(c)* because plaintiff failed to disclose attorney as witness in its discovery responses and attorney did not have sufficient personal knowledge of statements in affidavit. Neuma, Inc. v Wells Fargo & Co. (2006, ND Ill) 39 EBC 1355.

Where expert reports were provided well in advance of trial date, giving individuals and associations ample time to prepare for cross examination of witnesses or to engage expert to counter city's witnesses and city supplemented expert reports, providing signatures and information about qualifications left off previous reports, failure to provide this information earlier caused no prejudice to individuals and associations; it was not necessary to preclude testimony under *Fed. R. Civ. P. 37(c)*. Lozano v City of Hazleton (2007, MD Pa) 241 FRD 252, request gr (2007, MD Pa) 2007 US Dist LEXIS 17118.

In employment discrimination case in which former employee moved to compel responses to discovery requests by his former employer, employee satisfied his *Fed. R. Civ. P. 37*, D. Kan. R. 37.2 duty to confer; employee's counsel made numerous efforts over five-day period to confer with opposing counsel but, citing press of other business and medical issues, employer's counsel repeatedly declined; moreover, four separate attorneys from employer's counsel's firm had entered appearances in case, and district court found it difficult to believe that none of them could have made time to meet and confer with employee's counsel before scheduling order deadline for filing motion to compel. Manning v GM (2007, DC Kan) 247 FRD 646.

In action in which Securities and Exchange Commission, filed suit against defendants alleging violations of § 10(b) of Securities Exchange Act of 1934, *15 USCS § 78j(b)*, and S.E.C. Rule 10b-5, 17 C.F.R. § 240.10b-5, SEC's motion to strike was granted where failure to list individual as witness and disclose documents he relied on in compiling charts hampered SEC's ability to fully analyze customer trading records and question individual (as well as defendant) during

discovery to determine if records accurately supported defendant's contentions about his trading patterns. SEC v Roszak (2007, ND Ill) 495 F Supp 2d 875.

Under *Fed. R. Civ. P. 26(a)(1)*, *37(c)(1)*, court would not consider statements made in affidavit by former acting assistant supervisor for defendant government employer in connection with plaintiff employee's opposition to employer's motion for summary judgment because employee failed to identify supervisor as relevant witness during discovery and was not identified in mandatory disclosures, and further, as it appeared that it was either due to employee's attorney's lack of diligence in identifying supervisor as witness or employee's failure to timely make supervisor's identity known to his attorney, *Fed. R. Civ. P. 56(f)*, which permitted party to move for additional discovery, was not properly invoked to relieve counsel's lack of diligence. Thomas v Paulson (2007, DC Dist Col) 507 F Supp 2d 59.

Fed. R. Bankr. P. 7037 and *9014(c)* invoke requirements of *Fed. R. Civ. P. 37* in adversary proceedings and contested matters and provide for cost-shifting in context of discovery disputes. In re Ambotiene (2004, BC ED NY) 316 BR 25.

Unpublished Opinions

Unpublished: Summary judgment for electric cooperative was proper in negligence action because injured individual failed to establish that cooperative had duty to de-energize line that supplied electric energy to unoccupied residence; district court did not abuse its discretion under *Fed. R. Civ. P. 37(c)(1)* in excluding supplemental opinion of injured individual's expert, which was offered under *Fed. R. Civ. P. 26* to support claim of duty, because injured individual was dilatory in discovery process and additional expert opinion was submitted five months beyond time permitted for such disclosure. Matilla v S. Ky. Rural Elec. Coop. Corp. (2007, CA6 Ky) 2007 FED App 439N.

Unpublished: District court did not abuse its discretion in allowing testimony about overpayments made to plaintiff corporation by defendant corporation that was based on calculations not disclosed during pretrial discovery in violation of *Fed. R. Civ. P. 26*; defendant's violation of Rule 26 was rendered harmless because plaintiff had many months to review contested information before trial and was granted leeway by district court in cross-examining about contested testimony; accordingly, district court was not required to exclude testimony under *Fed. R. Civ. P. 37(c)(1)* because there is exception to Rule 37(c)(1) when discovery violation is harmless. Alliance Communs. Techs., Inc. v AT&T Corp. (2007, CA9 Cal) 2007 US App LEXIS 15645.

Unpublished: District court did not abuse its discretion when it denied appellant's *Fed. R. Civ. P. 37* sanction motion, seeking to bar appellees from using information to support their defense against his employment discrimination claims, given its findings that appellees complied with their discovery obligations and sufficiently disclosed their defense theories in their answer to appellant's complaint. Koger v Robert Half Int'l (2007, CA3 Pa) 2007 US App LEXIS 22200.

### B. Sanctions, Generally

### 17. Generally

In area of Rule 37, most severe in spectrum of sanctions provided must be available to District Court in appropriate cases, not merely to penalize those whose conduct may be deemed to

warrant such sanction, but to deter those who might be tempted to engage in such conduct in absence of such deterrent. National Hockey League v Metropolitan Hockey Club (1976) 427 US 639, 96 S Ct 2778, 49 L Ed 2d 747, 1976-1 CCH Trade Cases P 60941, 21 FR Serv 2d 1027, reh den *(1976) 429 US 874, 97 S Ct 196, 97 S Ct 197, 50 L Ed 2d 158.*

Sanctions found in Rule 37 are only relief available for failure to make discovery. Countryside Casualty Co. v Orr (1975, CA8 Ark) 523 F2d 870.

Sanctions must be weighed in light of full record in case. Cine Forty-Second Street Theatre Corp. v Allied Artists Pictures Corp. (1979, CA2 NY) 602 F2d 1062, 1979-2 CCH Trade Cases P 62778, 27 FR Serv 2d 828, 49 ALR Fed 820.

Nothing in *Fed. R. Civ. P. 37* precludes district court from imposing both evidentiary and monetary sanctions. Centennial Archaeology, Inc. v Aecom, Inc. (2012, CA10 Wyo) 688 F3d 673.

It was recognized from time of adoption of discovery rules that without adequate sanctions, procedure for discovery would be ineffectual. Burroughs Corp. v Philadelphia AFL-CIO Hospital Asso. (1978, ED Pa) 26 FR Serv 2d 839.

Sanctions, costs, attorneys' fees, and other penalties court may equitably impose should not be awarded where there is any risk that such award would chill assertion of discovery rights. *United States v American Tel. & Tel. Co. (1979, DC Dist Col) 86 FRD 603.*

Factors that district courts should consider before awarding *FRCP 11* sanction (i.e. reasonableness of opposing party's attorney's fees, minimum to deter, ability to pay, and factors related to severity of violation) may be applied in connection with sanctions awarded pursuant to *FRCP 37(d)*, since *FRCP 37*, much like *FRCP 11*, is designed to deter future misconduct during discovery. Gordon v New England Tractor Trailer Training Sch. (1996, DC Md) 168 FRD 178, 36 FR Serv 3d 616.

*Fed. R. Civ. P. 37* sanctions are available only if opposition does not file written response. Epcon Gas Sys. v Bauer Compressors, Inc. (2003, ED Mich) 243 F Supp 2d 729, affd (2004, CA FC) 90 Fed Appx 540.

Judicial warning is key factor to be considered in district court's analysis of appropriate sanctions for party's noncompliant behavior. Zouarhi v Colin Serv. Sys. (2004, SD NY) 223 FRD 315.

Court denied employees' motion for sanctions based on corporation's failure to maintain complete personnel files under *Fed. R. Civ. P. 37* where: (1) information in dispute was not sought by formal discovery request and consequently *Fed. R. Civ. P. 37(c)* did not apply; and (2) employees could not invoke *Fed. R. Civ. P. 37(d)* as basis for their motion for sanctions because that rule was inapplicable since information arose from agreement among parties and not from interrogatories or production requests properly served on corporation; moreover, employees were not entitled to sanction of adverse inference since employees produced no evidence of bad faith destruction of documents, and failed to rebut corporation's contention that any missing

documents merely were lost, and evidence presented by employees that lost material would have been favorable to their case was completely speculative and was epitome of fertile imagination. Alvariza v Home Depot (2007, DC Colo) 240 FRD 586, affd (2007, DC Colo) 2007 US Dist LEXIS 20964.

Lessor and corporation carried their burden with respect their motions for sanctions pursuant to *Fed. R. Civ. P. 37(c)(1)* because (1) lessor and corporation each demanded that insurer produce documents, and each argued that insurer failed timely to produce such documents; (2) insurer made fourteen separate productions, each untimely by terms of order; (3) certain documents were clearly responsive to document demands, and were clearly relevant within meaning of Rule 37; (4) insurer's culpable state of mind was established by evidence that it intended to delete, and deleted, electronic version of document, and by evidence that insurer or its attorneys, or both, had possession of printed version of document, but failed to produce it; and (5) counsel's failure to recognize importance of document, and to produce it timely manner, especially when alerted to its possible existence by opposing counsel, also constituted violation of discovery obligations. In re September 11th Liab. Ins. Coverage Cases (2007, SD NY) 243 FRD 114.

*Fed. R. Civ. P. 37* sanctions in amount of $ 500,000 were imposed on insurer and its attorneys to defray costs that lessor and corporation unreasonably incurred in wasted discovery proceedings because (1) insurer's and its attorneys' failure to disclose document and relevant underwriting guidelines and forms caused unnecessary litigation, and compounded their *Fed. R. Civ. P. 11* violations; (2) document showed insurer's understanding and intent that company's subsidiaries were to be named insureds on commercial general liability policy; (3) insurer's and its attorneys' delays and destructions multiplied proceedings and caused undue time and expense; and (4) precision in determining what amounts of time parties devoted to issue, separate from all other issues, was not possible. In re September 11th Liab. Ins. Coverage Cases (2007, SD NY) 243 FRD 114.

Sanctions must be weighed in light of full record in case. S. New Eng. Tel. Co. v Global NAPs, Inc. (2008, DC Conn) 251 FRD 82.

Designation of administrative officer pursuant to Fed. R. Civ. P. 30(b)(6) failed to comply with court's order to produce designee, or designees, capable of testifying about assignee's responses to insurer's interrogatories and document requests; designee was able to testify only regarding small portion of assignee's discovery responses; however, insurer failed to demonstrate prejudice, and, thus assignee was ordered to reimburse insurer for costs and expenses associated with taking deposition. Martin County Coal Corp. v Universal Underwriters Ins. Servs. (2011, ED Ky) 2011 US Dist LEXIS 22150, summary judgment gr, dismd (2011, ED Ky) 792 F Supp 2d 958.

**18. Purpose**

Function of sanctions against party who fails to comply with discovery order is to encourage adherence to discovery procedures. Di Gregorio v First Rediscount Corp. (1974, CA3 Del) 506 F2d 781, 19 FR Serv 2d 728.

Rule 37 sanctions serve threefold purpose in that they insure that party will not be able to profit from its own failure to comply, they are also specific deterrents and, like civil contempt, they seek to secure compliance with particular order at hand; courts are free to consider general deterrent effect their orders may have on instant case and on other litigation, provided that party on whom sanctions are imposed is, in some sense, at fault. Cine Forty-Second Street Theatre Corp. v Allied Artists Pictures Corp. (1979, CA2 NY) 602 F2d 1062, 1979-2 CCH Trade Cases P 62778, 27 FR Serv 2d 828, 49 ALR Fed 820.

One reason for imposition of sanctions is to punish those guilty of willful bad faith and callous disregard of court directives. Adolph Coors Co. v Movement against Racism & Klan (1985, CA11 Ala) 777 F2d 1538, 12 Media L R 1514, 3 FR Serv 3d 573.

Purpose of imposing sanctions is to assure both future compliance with discovery rules and to punish past discovery failures as well to compensate party for expenses incurred due to another party's failure properly to allow discovery. *Bell v Automobile Club of Mich. (1978, ED Mich) 80 FRD 228, 17 BNA FEP Cas 575, 17 CCH EPD P 8484, 25 FR Serv 2d 798,* app dismd without op (1979, CA6 Mich) *601 F2d 587, 32 BNA FEP Cas 1429, 19 CCH EPD P 9245,* cert den *(1979) 442 US 918, 61 L Ed 2d 285, 99 S Ct 2839, 41 BNA FEP Cas 584, 19 CCH EPD P 9246.*

Sanctions under *FRCP 37* are intended to ensure that party does not benefit from its failure to comply, and to deter those who might be tempted to such conduct in absence of such deterrent. Starbrite Waterproofing Co. v Aim Constr. & Contractor Corp. (1996, SD NY) 164 FRD 378, 34 FR Serv 3d 867.

*FRCP 37* sanctions must be applied diligently both to penalize those whose conduct may be deemed to warrant such sanction, and to deter those who might be tempted to such conduct in absence of such deterrent. Poole v Textron, Inc. (2000, DC Md) 192 FRD 494, 46 FR Serv 3d 572.

**19. Discretion of court, generally**

Although court should impose sanctions no more drastic than those actually required to protect rights of other parties, Rule 37 makes clear that application of sanctions is entrusted to discretion of trial judge, and overly lenient sanctions are to be avoided where inadequate protection of discovery process results. Diaz v Southern Drilling Corp. (1970, CA5 Tex) 427 F2d 1118, 71-1 USTC P 9236, 13 FR Serv 2d 1018, 26 AFTR 2d 5397, cert den *(1970) 400 US 878, 91 S Ct 118, 27 L Ed 2d 115,* reh den *(1971) 400 US 1025, 91 S Ct 580, 27 L Ed 2d 638* and (criticized in United States v Alisal Water Corp. (2004, CA9 Cal) 370 F3d 915, 58 Envt Rep Cas 1694, 58 FR Serv 3d 562).

Protections and sanctions found in discovery rules are not absolute and contemplate use of judicial discretion. Marshall v Ford Motor Co. (1971, CA10 Okla) 446 F2d 712.

Although sanctions available to trial judge are discretionary and imposition of such sanctions will not be reversed unless there has been abuse of discretion, where drastic sanctions of dismissal or default are imposed, range of discretion is more narrow and losing party's

noncompliance must be due to willfulness, fault, or bad faith. Fox v Studebaker-Worthington, Inc. (1975, CA8 Minn) 516 F2d 989, 20 FR Serv 2d 248.

Although Rule 37(a) and (b) provide broad discretion for trial court to impose sanctions for failure to comply with court's order, court is required to enter such orders in regard to failure as are just, and harsh remedies of dismissal and default should only be used when failure to comply has been due to willfulness, bad faith, or fault. Edgar v Slaughter (1977, CA8 Mo) 548 F2d 770, 22 FR Serv 2d 1448.

District Court has discretion under Rule 37 to impose appropriate sanctions for failure to make discovery; it follows that Rule 37 sanction is not grounds for reversal unless it constitutes abuse of discretion. Laclede Gas Co. v G. W. Warnecke Corp. (1979, CA8 Mo) 604 F2d 561, 27 FR Serv 2d 1409.

Magistrate did not abuse his discretion under *Fed. R. Civ. P. 37* or under his inherent power to impose sanctions when he denied appellants' motion for sanction, arising from alleged spoliation of evidence and appellee's purported misleading and false discovery responses where (1) appellants contended that appellee had duty to preserve information contained on bus's electronic control module (ECM) and that it should be sanctioned because that information had been erased prior to trial by bus's engine manufacturer; (2) appellants failed to present any evidence showing that appellee intentionally destroyed ECM evidence, which was necessary to show spoliation of evidence; (3) appellants were not prejudiced by erasing of information on ECM because it was aware of cause of bus's mechanical failure and other witnesses testified about bus's operation just prior to time that it was rear-ended; and (4) magistrate had found that appellees' discovery answers were responsive and that appellants were not prejudiced by untimely disclosure of those responses. Greyhound Lines, Inc. v Wade (2007, CA8 Neb) 485 F3d 1032.

Pursuant to *Fed. R. Civ. P. 37(c)(1)*, district court responded appropriately to employers' delay in producing discovery materials by ordering them to pay portion of employee's attorney's fees and by informing jury of allegedly late disclosure and their answering questions about circumstances; it could have excluded additional delayed evidence, but employee offered no convincing reason why alternative sanctions chosen by district court were not sufficient remedies. Hicks v Avery Drei, LLC (2011, CA7 Ind) 654 F3d 739, 18 BNA WH Cas 2d 20, 161 CCH LC P 35938.

Record fully supported holding that denied discovery requests were not "substantially justified," court did not err in deeming those requests overbroad, irrelevant, or redundant and finding that reasonable people could not differ as to appropriateness of denied requests was not "clearly erroneous," or "clear error of judgment"; moreover, past good behavior was no defense against present misconduct. Josendis v Wall to Wall Residence Repairs Inc. (2011, CA11 Fla) 662 F3d 1292, 18 BNA WH Cas 2d 577, 23 FLW Fed C 567.

Courts do not impose sanctions lightly; underlying misconduct, however, warranted it; accordingly, under *Fed. R. Civ. P. 37(b)*, district court sanctioned defendants by finding, as matter of law, that defendant had engaged in general solicitation; this decision meant that defendant's federal preemption defense was rendered inapplicable. Fencorp v Ohio Ky. Oil Corp. (2012, CA6 Ohio) 675 F3d 933, 2012 FED App 91P.

Imposition of sanctions, even harshest of sanctions such as those under former Rule 37(b)(2)(C), lies within sound discretion of court, limited only by requirements of justice to parties. Roberson v Christoferson (1975, DC ND) 65 FRD 615, 19 FR Serv 2d 1160.

Decision to impose sanctions, as well as appropriate sanction to be fashioned, lie within sound discretion of trial court. Shaffer v RWP Group (1996, ED NY) 169 FRD 19.

Court has wide discretion in imposing sanctions under *FRCP 37(d)* and in addressing parties' interests when protective order is also sought. Stone v Morton Int'l (1997, DC Utah) 170 FRD 498, 37 FR Serv 3d 1356 (criticized in Jamsports & Entm't, LLC v Paradama Prods. (2005, ND Ill) 2005-1 CCH Trade Cases P 74672).

Court has wide discretion to impose sanctions under *FRCP 37*. Bayoil, S.A. v Polembros Shipping, Ltd. (2000, SD Tex) 196 FRD 479, 48 FR Serv 3d 606.

Where former employees showed that their former employer's failure to provide requested discovery materials was within employer's control, due to employer's negligence, and that evidence was relevant, pursuant to *Fed. R. Civ. P. 37* adverse inference instruction and monetary sanction were awarded. Harkabi v Sandisk Corp. (2010, SD NY) 275 FRD 414.

District court did not abuse its discretion by declining to impose sanction under *Fed. R. Civ. P. 37* on defendant's employee--who destroyed her computer's hard drive, which plaintiff alleged contained information relevant to litigation--when case did not proceed to trial because nothing in record suggested that district court based its ruling dismissing all outstanding motions as moot on legal error or clearly erroneous assessment of evidence. Monarch Fire Prot. Dist. v Freedom Consulting & Auditing Servs. (2011, CA8 Mo) 644 F3d 633.

Unpublished Opinions

Unpublished: Given that plaintiff former employee had not opposed defendant former employer's *Fed. R. Civ. P. 26(c)(3)* motion for protective order with regard to employee's third and fourth sets of requests for admissions, but that she then opposed employer's motion for attorneys fees, since request for fees complied with form requirements and was timely for being filed within time limit set by order granting protective order, fee award in favor of employer under *Fed. R. Civ. P. 37(a)(5)* was not abuse of discretion. Gossard v JP Morgan Chase & Co. (2010, CA11 Fla) 2010 US App LEXIS 15369.

Unpublished: While plaintiff customer's motion for sanctions accused defendant store of not making initial disclosures under *Fed. R. Civ. P. 26(a)* and failing to respond to discovery, it was not abuse of discretion to have denied imposing sanctions because neither party made timely initial disclosures, customer had not submitted motion to compel discovery under *Fed. R. Civ. P. 37(a)(3)(B)*, nor did she certify that she in good faith had conferred or attempted to confer with store to obtain discovery responses without court action under Rule 37(d)(1)(B), and, though store did not respond to discovery requests or serve any of its own until more than two years after suit was filed, it did communicate with customer in effort to agree to new extended deadlines. Johnson v Schnuck Mkts., Inc. (2012, CA7 Ill) 2012 US App LEXIS 22874.

Unpublished: In patent infringement action, defendants' motion for sanction under *Fed. R. Civ. P. 37* was denied because court accepted plaintiffs' representation that they had produced all

responsive documents within their possession, custody, or control and were not withholding any relevant documents. Reckitt Benckiser Inc. v Tris Pharma, Inc. (2011, DC NJ) 2011 US Dist LEXIS 120045.

**20. Authority of court**

District court erred by sanctioning attorney $ 10,000 for misconduct during arbitration pursuant to its purported inherent authority because attorney's conduct of failing to disclose prior professional relationship with arbitrator was neither before district court nor in direct defiance of its orders; thus, conduct during arbitration was beyond reach of district court's inherent authority to sanction. Positive Software Solutions, Inc. v New Century Mortg. Corp. (2010, CA5 Tex) 619 F3d 458.

District court's considerable discretion in arena of discovery sanctions easily embraces right to dismiss or enter default judgment in case under *Fed. R. Civ. P. 37(b)* when litigant has disobeyed two orders compelling production of same discovery materials in its possession, custody, or control. Lee v Max Int'l, LLC (2011, CA10 Utah) 638 F3d 1318.

Nothing in rule, source of judicial power to impose sanctions for disobeying discovery order, and stated ground of sanctions order here, purported to enlarge judicial power to impose such orders against foreigners. In re Boehringer Ingelheim Pharms., Inc. (2014, CA7 Ill) 745 F3d 216.

In Foreign Sovereign Immunities Act (FSIA) case brought pursuant to 28 USCS § 1605(a)(6) in which Democratic Republic of Congo (DRC), joined by U.S. as amicus, appealed district court's imposition of civil contempt citation on DRC for its failure to comply with district court's post--default judgment discovery order, FSIA did not abrogate court's inherent power to impose contempt sanctions on foreign sovereign, and district court did not abuse its discretion in doing so in present case. FG Hemisphere Assocs., LLC v Democratic Republic of Congo (2011, App DC) 637 F3d 373.

Although discovery abuses lay beyond Rule 37, court would rely on its inherent power to sanction parties for destroying documents by levying double attorneys' fees and costs. Capellupo v FMC Corp. (1989, DC Minn) 126 FRD 545, 50 BNA FEP Cas 153, 51 CCH EPD P 39441.

Discovery is pretrial matter, and magistrate judges have general authority to order discovery sanctions; however, magistrate judge cannot issue sanctions which fall within eight dispositive motions excepted in *28 USCS § 636(b)(1)(A)*. Burns v Imagine Films Entertainment (1996, WD NY) 164 FRD 594.

*Fed. R. Civ. P. 37(a)* inherently provides authority for imposition of sanctions for violation of *Fed. R. Civ. P. 26(b)(4)(C)*. New York v Solvent Chem. Co. (2002, WD NY) 210 FRD 462, motion den, motion gr, judgment entered (2002, WD NY) 235 F Supp 2d 238, 55 Envt Rep Cas 1827, summary judgment den, motion to strike den, claim dismissed, motion gr, motion den (2002, WD NY) 242 F Supp 2d 196.

Fed. R. Civ. P. 16(f)(1)(C) gives court authority to enforce its pretrial orders by, among other things, imposing sanctions authorized by *Fed. R. Civ. P. 37(b)(2)(A)(ii)* to (vii). Bray & Gillespie Mgmt. LLC v Lexington Ins. Co. (2009, MD Fla) 259 FRD 591.

Unpublished Opinions

Unpublished: Court was entitled to impose sanctions, including striking answers and entry of default, upon couple and their attorney for failure to submit proper accounting, to attend final pretrial conference, and to participate in drafting of pretrial statement due to its inherent power and authorities set forth in scheduling order, which included Fed. R. Civ. P. 16(f) and *37*, M.D. Fla. Gen. R. 9.05(c) and (e), and 28 USCS § 1927. Central Fla. Council BSA, Inc. v Rasmussen (2009, MD Fla) 2009 US Dist LEXIS 77439.

**21. Due process and other constitutional considerations**

Although application of Rule 37 is fully within discretion of trial court, court must be mindful of demands of Due Process Clause in its proceedings under Rule. Dunbar v United States (1974, CA5 Fla) 502 F2d 506, 74-2 USTC P 9744, 19 FR Serv 2d 359.

Only where sanction invoked is more stern than reasonably necessary does denial of due process result. Di Gregorio v First Rediscount Corp. (1974, CA3 Del) 506 F2d 781, 19 FR Serv 2d 728.

Prior to dismissal or entering default judgment for noncompliance with discovery, fundamental fairness requires Federal District Court to enter order to show cause and hold hearing, if necessary, to determine whether assessment of costs and attorney fees or even attorney's citation for contempt would be more just and effective sanction, and when noncompliance is result of dilatory conduct by counsel, court should investigate attorney's responsibility as officer of court, and, if appropriate, impose on client sanctions less extreme than dismissal or default, unless it is shown that client is deliberately or in bad faith failing to comply with court's order. Edgar v Slaughter (1977, CA8 Mo) 548 F2d 770, 22 FR Serv 2d 1448.

Sanctions issued arbitrarily and in violation of due process rights will render judgment void. Brown v McCormick (1979, CA10 Kan) 608 F2d 410.

Due process is limitation upon court's power to select and impose sanctions for violation of discovery orders. Falstaff Brewing Corp. v Miller Brewing Co. (1983, CA9 Cal) 702 F2d 770, 1983-1 CCH Trade Cases P 65300, 36 FR Serv 2d 455.

There is no merit to attorney's claim that he was not afforded constitutionally adequate notice of charges against him or given adequate opportunity to defend himself against them, prior to imposition of monetary sanctions under Rule 37, where relevant findings of bad faith conduct had already been made prior to issuance of order to show cause, record reflects that attorney had ample opportunity in each case to be heard on factual matters being considered, and express purpose of final hearing was only to consider issue of sanctions. Carlucci v Piper Aircraft Corp. (1985, CA11 Fla) 775 F2d 1440, 3 FR Serv 3d 325.

District court properly imposed sanctions against debt collector for its failure to produce certain documents during discovery because its noncompliance with discovery order was sanctionable and it received due process as it had notice of conduct that district court found to be sanctionable, had opportunity to be heard, and received review and ruling from different judge concerning its conduct. McLaughlin v Phelan Hallinan & Schmieg, LLP (2014, CA3 Pa) 756 F3d 240.

Principles of due process require court to impose Rule 37 sanctions if defendant refuses to produce documents which are essential for plaintiff to prove his allegations or for plaintiff to negate defendant's defense; sanctions are not imposed as deterrent or punishment alone, rather, sanctions relieve plaintiff of burden he should not have to bear without documents. Black v United States (1975, DC Dist Col) 389 F Supp 529, remanded (1977, App DC) 184 US App DC 46, 564 F2d 531, 23 FR Serv 2d 1490.

Counsel, who was sanctioned under Fed. R. Civ. P. 30(d)(2) and *37(a)(5)(A)* for his inaction in face of pervasive misconduct by his client's witness during deposition, received due process in connection with sanctions as he received notice several times of reason for sanction, he was put on notice of type of sanctions being considered and given opportunity to object thereto, and notice enabled him to mount meaningful defense to charges. GMAC Bank v HTFC Corp. (2008, ED Pa) 252 FRD 253.

Unpublished Opinions

Unpublished: Where district court sanctioned judgment debtor and his counsel for failing to comply with plaintiff's discovery requests, counsel did not suffer violation of his due process rights because plaintiff's motion to compel, which included request for sanctions, gave counsel adequate notice that sanctions could be imposed on him. Porter Bridge Loan Co. v Northrop (2014, CA10 Okla) 2014 US App LEXIS 8956.

**22. Necessity of order and disobedience thereof**

Direct order by court as provided in Rule 37(a) and (b) is not prerequisite to imposition of sanctions under Rule 37(d), and Rule 37(d) sanctions are proper only where there has been complete or nearly total failure of discovery. Fox v Studebaker-Worthington, Inc. (1975, CA8 Minn) 516 F2d 989, 20 FR Serv 2d 248.

Rule 37 does not require noncompliance with court order before sanctions may be imposed. Szilvassy v United States (1979, SD NY) 82 FRD 752, 27 FR Serv 2d 1404; Bowmar Instrument Corp. v Continental Microsystems, Inc. (1980, SD NY) 497 F Supp 947, 208 USPQ 496, 31 FR Serv 2d 805.

Sanctions of Rule 37(d) may be imposed even in absence of order compelling discovery. Coon v Froehlich (1983, SD Ohio) 573 F Supp 918, 38 FR Serv 2d 773.

Intentional violation of court order is not required for imposition of sanctions, but negligence in handling of case which causes unreasonable delays and interferes with expeditious management of trial preparation may be basis for sanctions. Resolution Trust Corp. v Williams (1996, DC Kan) 165 FRD 639.

Direct order by court as provided in *FRCP 37(a)* and (b) is not prerequisite to imposition of sanctions under *FRCP 37(d)*, which permits immediate sanctions against parties for willful failure to comply with discovery rules. Alexander v FBI (1998, DC Dist Col) 186 FRD 6.

Imposition of sanctions depends upon party seeking to compel discovery first, moving court for order compelling discovery, and party opposing discovery refusing to comply with court's order. Pioneer Hi-Bred Int'l, Inc. v Ottawa Plant Food, Inc. (2003, ND Iowa) 219 FRD 135.

Defendant manufacturer's motion for attorney's fees was denied where it failed to describe plaintiff's counsel's conduct as violating to *Fed. R. Civ. P. 11*, or 28 USCS § 1927, and failed to follow procedures set forth under *Fed. R. Civ. P. 26* and *37*, and D. Me. R. 26(b) for resolving discovery disputes. New Eng. Surfaces v E. I. Dupont De Nemours & Co. (2008, DC Me) 558 F Supp 2d 116.

*Fed. R. Civ. P. 11* reached written representations in pleading, written motion or other paper, *Fed. R. Civ. P. 11(b)*, not oral representations of which defendant complained; further, defendant showed no violation by government of any discovery order compelling production of agents' notes, nor had he shown any basis for disregarding asserted work product privilege; thus, sanctions were not appropriate. United States ex rel. Westrick v Second Chance Body Armor, Inc. (2012, DC Dist Col) 893 F Supp 2d 258.

Unpublished Opinions

Unpublished: District court did not abuse its discretion in allowing discovery in ERISA case as to whether independent evaluator of defendant plan violated plan by failing to contact plaintiff employee's physicians because question raised concern about whether plan's procedure was fair which was matter on which discovery was appropriate; district court did not abuse its discretion when it imposed sanction under *Fed. R. Civ. P. 37(b)(2)(A)* on defendant for failing to comply with its discovery order, nor when it refused to impose further orders in response to defendant's disobedience because discovery sought would not have impacted ultimate outcome of case. Bell v Ameritech Sickness & Accident Disability Benefit Plan (2010, CA6 Mich) 2010 FED App 651N.

Unpublished: District court did not err in rejecting plaintiff's repeated efforts to compel discovery and requests for sanctions after defendants purportedly refused to comply with his discovery demands because plaintiff was not entitled to prevail on his motion to compel discovery where he failed to make good-faith effort to resolve discovery disputes before asking court to intervene under *Fed. R. Civ. P. 37(a)(1)*, and plaintiff's calls for sanctions were frivolous because defendants did not violate any court order under R. 37(b). Omegbu v Milwaukee County (2009, CA7 Wis) 2009 US App LEXIS 9217.

**23. Willfulness**

In determining sanctions courts will consider "willfulness" on part of person or party failing to act in accordance with discovery procedures. Diaz v Southern Drilling Corp. (1970, CA5 Tex) 427 F2d 1118, 71-1 USTC P 9236, 13 FR Serv 2d 1018, 26 AFTR 2d 5397, cert den *(1970) 400 US 878, 91 S Ct 118, 27 L Ed 2d 115,* reh den *(1971) 400 US 1025, 91 S Ct 580, 27 L Ed 2d 638*

and (criticized in United States v Alisal Water Corp. (2004, CA9 Cal) 370 F3d 915, 58 Envt Rep Cas 1694, 58 FR Serv 3d 562).

Amendment of 1970 was intended to authorize court, where it deemed appropriate, to impose more flexible and softer sanction for Rule 37 violations than theretofore provided, but there was no intent to eliminate wilfulness element when harsh sanction of dismissal of complaint or striking of answer was ordered. Flaks v Koegel (1974, CA2 NY) 504 F2d 702, CCH Fed Secur L Rep P 94803, 19 FR Serv 2d 1.

Elimination of term "willfully", which had operated to characterize type of conduct for which sanction of dismissal could be imposed, did not alter guidelines to be considered before imposing sanction of dismissal; "willfulness" continues to play role along with various other factors, including gross indifference to rights of adverse party, deliberate callousness, or gross negligence, in choice of sanctions. In re Professional Hockey Antitrust Litigation (1976, CA3 Pa) 531 F2d 1188, 1976-1 CCH Trade Cases P 60747, 21 FR Serv 2d 391, revd on other grounds (1976) 427 US 639, 96 S Ct 2778, 49 L Ed 2d 747, 1976-1 CCH Trade Cases P 60941, 21 FR Serv 2d 1027, reh den *(1976) 429 US 874, 97 S Ct 196, 97 S Ct 197, 50 L Ed 2d 158.*

Plaintiffs missed discovery deadlines, violated court orders, and failed to respond to interrogatories and counsel failed to either decline case or enlist outside counsel, so district court was within its discretion to find plaintiffs acted willfully, in bad faith, or with fault and to dismiss pursuant to *Fed. R. Civ. P. 37(b)*. Brown v Columbia Sussex Corp. (2011, CA7 Ind) 664 F3d 182.

Open and unequivocal defiance of court order is sufficient to support finding of willful misconduct. Burns v Imagine Films Entertainment (1996, WD NY) 164 FRD 594.

Although showing of willful disobedience or gross negligence is required to impose harsher sanction of order of dismissal or entry of default judgment, finding of willfulness or contumacious conduct is not necessary to support sanctions which are less severe. Martinelli v Bridgeport Roman Catholic Diocesan Corp. (1998, DC Conn) 179 FRD 77, 41 FR Serv 3d 817.

Defendant's motion to exclude the testimony of plaintiffs' expert as a sanction under *Fed. R. Civ. P. 37(c)* because the expert failed to bring his entire file to the deposition in violation of the court's order, failed to disclose exactly what information the expert relied upon in forming his opinions in violation of *Fed. R. Civ. P. 26(a)(2)(B)*, failed to supplement his report as required under R. 26(a)(2)(D), and destroyed discoverable documents, was denied because it was not clear that any missing information related to the narrow opinion that the expert could offer after the court limited the scope of his testimony, so it was appropriate that the expert should stand for a second supplemental deposition, limited to the opinion he could offer, and as to the allegation that the expert destroyed discoverable documents, there was no evidence to support a finding that the expert's failure to preserve the evidence was willful or that defendant was prejudiced by the expert's failure to retain draft reports and correspondence. Peterson v Union Pac. R.R. Co. (2008, CD Ill) 71 FR Serv 3d 714.

Because employer's willful and repeated failure to respond to employees' written discovery requests prejudiced employees and disrespected court, entry of order of default against

employer was appropriate under *Fed. R. Civ. P. 37(b)(2)(A)*, (d)(1)(A). Azamar v Stern (2010, DC Dist Col) 269 FRD 53.

Unpublished Opinions

Unpublished: District court did not abuse its discretion when it issued sanctions against plaintiff's counsel for violating court's orders regarding discovery pursuant to *Fed. R. Civ. P. 37(b)* because district court docket alone was sufficient to demonstrate flagrant manner with which plaintiff repeatedly violated district court's discovery orders and deadlines as district court had issued no fewer than three orders to compel plaintiff's appearance at deposition, and those orders were in addition to district court's initial order that set discovery deadline. Barbee v SEPTA (2009, CA3 Pa) 2009 US App LEXIS 7286.

Unpublished: District court did not clearly err in finding plaintiff's violations of court orders willful (particularly plaintiff's failure to produce all relevant tax returns and his destruction of evidence), and record supported district court's conclusion plaintiff's actions prejudiced defendants by preventing them from accurately assessing plaintiff's claims. Schubert v Pfizer, Inc. (2012, CA8 Iowa) 2012 US App LEXIS 1922.

**24. Bad faith**

There is no requirement of bad faith as prerequisite to application of sanctions under Rule 37. Bergman v United States (1983, WD Mich) 565 F Supp 1353, 37 FR Serv 2d 442, later op (WD Mich) 579 F Supp 911, later proceeding (WD Mich) 648 F Supp 351, 6 FR Serv 3d 803, later proceeding (CA6 Mich) 844 F2d 353, 10 FR Serv 3d 625.

Open and unequivocal defiance of court order is sufficient to support finding of bad faith. Burns v Imagine Films Entertainment (1996, WD NY) 164 FRD 594.

Patentee's request for sanctions was denied where company with infringing catheter had not acted in bad faith in failing to disclose two modified catheter lines. Voda v Cordis Corp. (2007, WD Okla) 506 F Supp 2d 868.

In employer's counterclaim against former employee for fraudulent inducement based on employee's alleged misrepresentation of having college degree, employer was not entitled to sanctions pursuant to *Fed. R. Civ. P. 37* because employee did not destroy computer hard drive in bad faith when employee replaced hard drive on computer prior to employer's discovery request for it; however, employer's motion for sanctions was not unreasonable; therefore, employee was not entitled to sanctions under *Fed. R. Civ. P. 11* based on employer's motion for sanctions. Hendricks v Smartvideo Techs., Inc. (2007, MD Fla) 511 F Supp 2d 1219, 25 BNA IER Cas 1056.

Even if court improperly made finding of bad faith based on certain alleged conduct of attorney in failing to control his client during deposition, that finding had no bearing on sanctions imposed against attorney under Fed. R. Civ. P. 30(d)(2) and *37(a)(5)(A)* because those rules did not require finding of bad faith. GMAC Bank v HTFC Corp. (2008, ED Pa) 252 FRD 253.

Sanctions under *Fed. R. Civ. P. 37(d)* were inappropriate for counsel's failure to attend depositions because there was no evidence of bad faith on part of defendants' counsel;

deposition under Fed. R. Civ. P. 30(b)(6) was subject of motion for protective order under *Fed. R. Civ. P. 26(c)*, and other depositions were stayed by court. Amobi v D.C. Dep't of Corr. (2009, DC Dist Col) 257 FRD 8.

Plaintiff's motion to compel was denied because communications between defendants' counsel and witness at meeting, counsel's handwritten notes, and draft and final statements counsel drafted for witness to sign were privileged under *Fed. R. Evid. 501*, and counsel's notes, draft statement counsel created that witness refused to sign, and revised statement she did sign were entitled to protection as work-product under *Fed. R. Civ. P. 26(b)(3)(A)*, in addition to attorney-client privilege which protected communications reflected in them; sanctions were denied under *Fed. R. Civ. P. 37(a)(5)(B)* because although plaintiff's position was not compelling enough to override attorney-client privilege or work-product protection, motion was not unreasonable or baseless, especially in light of dispute about choice of law. Babych v Psychiatric Solutions, Inc. (2010, ND Ill) 271 FRD 603.

Insurer's motion for sanctions under *Fed. R. Civ. P. 37(b)* was denied as to assignee's vice-president who was designated for deposition pursuant to Fed. R. Civ. P. 30(b)(6) because, although vice-president failed to authenticate tax return excerpts, there was no evidence that assignee either failed to prepare vice president for deposition or was acting in bad faith. Martin County Coal Corp. v Universal Underwriters Ins. Servs. (2011, ED Ky) 2011 US Dist LEXIS 22150, summary judgment gr, dismd (2011, ED Ky) 792 F Supp 2d 958.

Plaintiff's motion for sanctions was denied where (1) in light of defendants' efforts, mere fact that single email was deleted in contravention of instruction to preserve did not reflect either bad faith, intentional destruction of evidence, or gross negligence; and (2) plaintiff had not proven that deleted email was relevant evidence that would have been favorable to plaintiff. Centrifugal Force, Inc. v Softnet Commun., Inc. (2011, SD NY) 783 F Supp 2d 736.

In patent infringement claim, court declined to impose sanctions on manufacturers of accused products where although its non-infringement position was extremely weak, it was not so baseless as to warrant sanctions, nor had manufacturers engaged in discovery misconduct. Volterra Semiconductor Corp. v Primarion, Inc. (2011, ND Cal) 796 F Supp 2d 1025.

Because employees destroyed emails in ordinary course of business unmotivated by any bad faith, pursuant to *Fed. R. Civ. P.* 37(e) court would not impose sanctions for spoliation of evidence. *Denim N. Am. Holdings, LLC v Swift Textiles, LLC (2011, MD Ga) 816 F Supp 2d 1308.*

Unpublished Opinions

Unpublished: Dismissal was appropriate sanction because plaintiff debtors' adversary complaint was not dismissed because they were unable to locate 20-year-old documents; case was dismissed because they tried repeatedly to stop state from asking about matters that would have illuminated whether they were required to file Wisconsin tax returns. Pansier v Wisc. Dep't of Revenue (In re Pansier) (2011, CA7 Wis) 2011 US App LEXIS 7324.

Unpublished: Where district court found defendant, principal of employer, against whom judgments had entered in favor of plaintiff union and were being enforced as foreign judgments,

could have, given multiple opportunities, complied with discovery but failed to do so without good reason, and engaged in bad faith conduct, and district court also found principal's misconduct substantially increased potential for fraud and loss of important evidence, and found lesser sanction was inappropriate under circumstances, sanctions order under *Fed. R. Civ. P. 37(b)(2)(vi)* preventing principal from contesting his status as officer or director of employer was not improper. Local 1-1000 United Steel Workers v Forestply Indus. (2012, CA6 Mich) 2012 US App LEXIS 8636.

Unpublished: Although plaintiff company destroyed electronic evidence that it had duty to preserve, no spoliation sanction under *Fed. R. Civ. P.* 37(e) was appropriate because its automatic overwriting of backup tapes did not involve bad faith; automatic overwriting of its server backup tapes was part of company's routine document management policy. Southeastern Mech. Servs. v Brody (2009, MD Fla) 2009 US Dist LEXIS 69830.

**25. Pro se litigants, generally**

If pro se litigant ignores discovery order, he is subject to sanction like any other litigant. Watkis v Payless Shoesource (1997, MD Fla) 174 FRD 113, 38 FR Serv 3d 1274, 11 FLW Fed D 65.

Fact that plaintiff is proceeding pro se is not enough to spare her case from discovery sanctions, including dismissal; all litigants, including those proceeding pro se, have obligation to comply with court orders, and when they flout that obligation they, like all litigants, must suffer consequences of their actions. Mathews v U.S. Shoe Corp. (1997, WD NY) 176 FRD 442.

Despite fact that debtor was pro se, he was still subject to Federal Rules of Civil Procedure and thus, subject to sanctions under *Fed. R. Civ. P. 37(b)(2)(A)(vi)*, *37(d)(1)*, including entry of default judgment, for failure to attend his own deposition. Sidney v Ragucci (In re Ragucci) (2010, BC MD Fla) 433 BR 889.

**26. As between parties**

Because consolidated actions are independent from each other, they are subject to general rule that one party to litigation will not be subjected to sanctions for failure to cooperate in discovery because of failure of another to comply with discovery, absent showing that party controlled actions of non-complying party. Patton v Aerojet Ordnance Co. (1985, CA6 Tenn) 765 F2d 604, 2 FR Serv 3d 900.

District Court properly denies defendant's request for award of fees and costs pursuant to Rules 16 and 37 as sanctions for plaintiff's allegedly vexatious conduct, where both parties were equally responsible for long delays and protracted battles over discovery that marred litigation. Sobel v Yeshiva University (1985, SD NY) 619 F Supp 839, 39 BNA FEP Cas 16, 39 CCH EPD P 35903.

Sanctions for failure to disclose report would not be ordered where moving party had also engaged in sanctionable conduct. Anderson v Beatrice Foods Co. (1989, DC Mass) 129 FRD 394, 31 Envt Rep Cas 1071, affd (1990, CA1 Mass) 900 F2d 388, 31 Envt Rep Cas 1161, 16 FR Serv 3d 572, 20 ELR 20806, reh den (1990, CA1) 31 Envt Rep Cas 1584 and cert den *(1990) 498 US 891, 112 L Ed 2d 193, 111 S Ct 233.*

Having determined that both sides have been unreasonable in discovery disputes, appropriate sanction may include order in which court declines to undertake burdensome task of working out some compromise position that is reasonable accommodation within range counsel should have agreed upon and instead determine only which side has been more unreasonable and, as sanction for misconduct, enter order that discovery proceed in accordance with more reasonable position. Martin v Brown (1993, WD Pa) 151 FRD 580, CCH Fed Secur L Rep P 98145, RICO Bus Disp Guide (CCH) P 8438, subsequent app, remanded (1995, CA3 Pa) 63 F3d 1252, 33 FR Serv 3d 551 (criticized in Satcorp Int'l Group v China Nat'l Silk Import & Export Corp. (1996, CA2 NY) 101 F3d 3, 36 FR Serv 3d 463).

In action in which plaintiff company filed suit against defendant company alleging that defendant violated Telephone Consumer Protection Act of 1991, 47 USCS § 227, defendant's motion under *Fed. R. Civ. P. 37* to dismiss plaintiff's complaint or to strike plaintiff's answers to discovery and requests to admit, and deem those requests admitted was denied because although evidence showed that former employee was real party in interest, not plaintiff, former employee ultimately corrected his verifications, he appeared to have honestly answered questions during his deposition, and there was no evidence that discovery responses he provided were incorrect. Eclipse Mfg. Co. v M & M Rental Ctr., Inc. (2007, ND Ill) 496 F Supp 2d 937.

Where bankruptcy court awarded attorneys' fees to creditors as sanction under *Fed. R. Civ. P. 37* in adversary proceeding with debtor, debtor waived right to challenge award on appeal because she did not oppose creditors' motion for sanctions in bankruptcy court. Hansen v Moore (In re Hansen) (2007, BAP9) 368 BR 868.

### 27. Nonparties

Rule 37 does not authorize sanctions for failure of non-party witness to comply with subpoena duces tecum. In re Application of Sumar (1988, SD NY) 123 FRD 467.

When requested to issue order or impose sanctions upon nonparty, court's first inquiry must of necessity be court's jurisdiction over person to whom court's order would be directed; generally, court acquires jurisdiction over nonparties during discovery process by issuance and service of subpoena upon person. Cuthbertson v Excel Indus. (1998, DC Kan) 179 FRD 599.

### 28. Attorneys

Rule identifies attorneys advising or overseeing discovery as possible subjects of sanctions along with their clients and vests trial court with broad discretion to apportion fault between them. DeVaney v Continental Am. Ins. Co. (1993, CA11 Ala) 989 F2d 1154, 25 FR Serv 3d 815, 7 FLW Fed C 293.

*Fed. R. Civ. P. 37(c)(1)* does not permit sanctions against counsel, but applies only to a party. Grider v Keystone Health Plan Cent., Inc. (2009, CA3 Pa) 580 F3d 119.

Sanctions order under *Fed. R. Civ. P. 37*, which assessed monetary sanctions on lead counsel for plaintiff in patent infringement case, was affirmed because this was not case where counsel

was sanctioned for failing to provide information he did not have; counsel had sufficient information to respond to contention interrogatory at issue. Rates Tech., Inc. v Mediatrix Telecom, Inc. (2012, CA FC) 688 F3d 742, 103 USPQ2d 1471.

Phrase "may make such orders as are just" permits imposition of sanction against attorney in form of monetary fine paid to court and not to opposing party as reimbursement for cost and attorney's fees and such sanction can be imposed without proceeding to finding of contempt. Pereira, v Narragansett Fishing Corp. (1991, DC Mass) 135 FRD 24, 19 FR Serv 3d 560.

Court would not impose sanctions under either objective or subjective standards in case where 2 experienced senior litigators surrounded by usual support troops went after each other hammer and tongs from first day of litigation to last. Zink Communications v Elliott (1992, SD NY) 141 FRD 406.

Under *FRCP 37(b)*, court may impose sanctions against either party or party's counsel, whoever is responsible for conduct that gives rise to imposition of sanctions. Resolution Trust Corp. v Williams (1996, DC Kan) 165 FRD 639.

In trade secrets misappropriation case, plaintiff's lead attorney was publicly reprimanded, pursuant to *Fed. R. Civ. P. 37(d)*, because attorney failed to appear at depositions. Wolters Kluwer Fin. Servs. v Scivantage (2007, SD NY) 525 F Supp 2d 448.

Both plaintiff and some of its retained attorneys had to be sanctioned because plaintiff intentionally withheld tens of thousands of decisive documents from its opponent in effort to win patent infringement case and gain strategic business advantage over defendant; plaintiff could not have achieved this goal without some type of assistance or deliberate ignorance from its retained attorneys. Qualcomm Inc. v Broadcom Corp. (2008, SD Cal) 2008 US Dist LEXIS 911, vacated, in part, remanded (2008, SD Cal) 88 USPQ2d 1169, dismd, in part, motion gr (2008, CA FC) *274 Fed Appx 875* and app dismd, motion gr, motion gr, in part (2008, CA FC) 2008 US App LEXIS 18934.

In case where certain transactions were challenged as fraudulent transfers under Illinois Uniform Fraudulent Transfer Act (UFTA), 740 ILCS 160/5, affidavit and ledger that were produced by defendant corporation four years after case was filed and after trial were stricken pursuant to *Fed. R. Civ. P. 37 (b)(2)(A)(ii)* and *37(c)(1)(C)* because plaintiff bank had asked for all financial records in discovery. Wachovia Sec., LLC v Jahelka (2008, ND Ill) 586 F Supp 2d 972.

In wrongful death suit, although default was not warranted, pursuant to *Fed. R. Civ. P. 37(a)(4)*, sanctions of payment of certain discovery costs and costs of sanctions motion as well as permitting plaintiff widow to inform jury that certain evidence was withheld in violation of discovery orders was properly imposed on defendants' counsel because he was aware of defendants' numerous discovery violations, including failures to disclose and intentional withholding of discovery information and false statements made during discovery. Tom v S.B., Inc. (2012, DC NM) 280 FRD 603.

Where creditors gave no indication that they were prejudiced by lack of discovery, none of debtor's evidence was objected to on basis of surprise, and parties had difficulty agreeing on

anything of consequence, as evidenced by fact that court was required to take extraordinary step of sequestering counsel in order to obtain any semblance of pre-trial order, creditors' motion for discovery sanctions against debtor's counsel was denied. Crane v Morris (In re Morris) (2003, BC ND Okla) 302 BR 728.

Unpublished Opinions

Unpublished: Just as courts retain jurisdiction to apply *Fed. R. Civ. P. 37* sanctions after case has been dismissed, court may hold attorney responsible for discovery noncompliance even after he or she has been relieved as counsel. Hakim v Leonhardt (2005, CA2) 126 Fed Appx 25, sanctions allowed, in part, sanctions disallowed, in part, dismd (2006, DC Conn) 2006 US Dist LEXIS 45812.

Unpublished: It was not abuse of discretion to impose sanctions against attorney, because (1) record supported findings that attorney filed documents that materially changed key expert witness's testimony after deposition and outside filing deadline and behaved in abusive, unprofessional, and obstructionist manner during deposition, and (2) magistrate judge considered attorney's asserted justifications. Deville v Givaudan Fragrances Corp (2011, CA3 NJ) 2011 US App LEXIS 6245.

Unpublished: Where defendant asserted in discovery dispute that his tax returns were privileged under California law, principle that Federal law of privilege applied to dispute in bankruptcy court was well-settled, and defendant's attorney was subject to sanctions under *Fed. R. Civ. P. 37(a)*. Kipperman v Quiroz (In re Commercial Money Ctr., Inc.) (2006, BC SD Cal) 2006 Bankr LEXIS 4708.

**29. --Findings required**

Rule does not require court to make specific finding that attorney instigated discovery misconduct before imposing sanctions upon attorney. DeVaney v Continental Am. Ins. Co. (1993, CA11 Ala) 989 F2d 1154, 25 FR Serv 3d 815, 7 FLW Fed C 293.

Discovery sanctions against defense counsel were reversed where district court made no explicit findings of misconduct by defense counsel and at no time did plaintiff's counsel confer with defense counsel in good faith prior to motion to compel discovery or motion for contempt or sanctions. Naviant Mktg. Solutions, Inc. v Larry Tucker, Inc. (2003, CA3 NJ) 339 F3d 180, 56 FR Serv 3d 553.

District court abused its discretion in ordering patentees' attorney to pay defendants' attorney's fees as sanctions without considering his ability to pay; award of $ 121,107 was four times his reported net income for 2006. ClearValue, Inc. v Pearl River Polymers, Inc. (2009, CA FC) 560 F3d 1291.

Court order awarding monetary sanctions against party's attorney must set forth court's findings with reasonable specificity in terms of perceived misconduct and sanctioning authority. Arons v Lalime (1996, WD NY) 167 FRD 364, 36 FR Serv 3d 608, magistrate's recommendation (1997, WD NY) 1997 US Dist LEXIS 22194, magistrate's recommendation (1997, WD NY) *3 F Supp 2d 314.*

**30. Destruction or spoliation of evidence, generally**

District court did not err in refusing to sanction defendant for destruction of file by its IRS disclosure officer since it in no way prejudiced plaintiff's capacity to bring or prosecute action; shredded materials were merely copies of original IRS reports concerning plaintiff's tax liabilities and plaintiff received copies of them. Ingham v United States (1999, CA9 Wash) 167 F3d 1240, 99 CDOS 1126, 99 *Daily Journal DAR 1403, 99-1 USTC P 50249, 43 FR Serv 3d 535, 83 AFTR 2d 833.*

Where routine document retention policy has been followed by party in destroying relevant evidence, there must be some indication of intent to destroy evidence for purpose of obstructing or suppressing truth in order to impose sanction of adverse inference instruction. Stevenson v Union Pac. R.R. (2004, CA8 Ark) 354 F3d 739, 63 Fed Rules Evid Serv 166, 57 FR Serv 3d 617.

There was no clear error in district court's finding that employer had not acted in bad faith when it lost applicant's interview notes; it could not be said that finding was without factual support or that finding was mistake; there was no abuse of discretion in refusing to impose sanction under *Fed. R. Civ. P. 37* for spoliation when there was no evidence of actual prejudice from loss. Turner v Public Serv. Co. (2009, CA10 Colo) 563 F3d 1136, 106 BNA FEP Cas 113.

Destruction of evidence, or spoliation, is discovery offense, and in order for party to demonstrate that it is entitled to sanctions for opponent's alleged actions, it must present evidence which meets or satisfies elements of offense. Gates Rubber Co. v Bando Chem. Indus. (1996, DC Colo) 167 FRD 90, subsequent app (2001, CA10 Colo) *246 F3d 680,* reported in full (2001, CA10) 4 Fed Appx 676, 2001 Colo J C A R 1008.

Because preservation of documents and their availability for production is essential to orderly and expeditious disposition of litigation, document destruction impedes litigation process and merits imposition of sanctions. In re Prudential Ins. Co. of Am. Sales Practices Litig. (1997, DC NJ) 169 FRD 598, 36 FR Serv 3d 767, findings of fact/conclusions of law (1997, DC NJ) *962 F Supp 450* (criticized in Rothwell v Chubb Life Ins. Co. of Am. (1998, DC NH) 191 FRD 25) and stay lifted, transf (1998, Jud Pan Mult Lit) 1998 US Dist LEXIS 13962 and affd (1998, CA3 NJ) 148 F3d 283, 41 FR Serv 3d 596, later proceeding sub nom *Steele v Prudential Ins. Co. of Am. (In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions) (1998, CA3 NJ) 159 F3d 1353* and cert den *(1999) 525 US 1114, 142 L Ed 2d 789, 119 S Ct 890* and cert den *(1999) 525 US 1114, 119 S Ct 890* and (criticized in In re Linerboard Antitrust Litig. (2004, ED Pa) 2004 US Dist LEXIS 10532).

While employee satisfied first two prongs of spoliation test, where employer had duty to preserve backup tapes and was negligent in their loss, employee failed to show that lost tapes contained relevant information; therefore, it was inappropriate to give adverse inference instruction to jury, but employee was granted sanctions as to costs to re-depose witnesses about lost information. Zubulake v UBS Warburg LLC (2003, SD NY) 220 FRD 212, 92 BNA FEP Cas 1539.

One who anticipates that compliance with discovery rules and resulting production of damning evidence will produce adverse judgment, will not likely be deterred from destroying that

decisive evidence by any sanction less than adverse judgment she is tempted to thus evade; in case at hand, defendant's conduct showed such blatant contempt for Court and fundamental disregard for judicial process that behavior could only be adequately sanctioned with default judgment. Arista Records, L.L.C. v Tschirhart (2006, WD Tex) 241 FRD 462.

In employee's personal injury action against contractor, sanctions pursuant to *Fed. R. Civ. P. 37* for contractor's alleged failure to maintain employee wage and hour records as required by state law were unnecessary, as evidence did not suggest that contractor destroyed any records; rather, evidence only showed that contractor never created any records. *Cordero Ramirez v Pride Dev. & Constr. Corp. (2007, ED NY) 244 FRD 162,* magistrate's recommendation (2007, ED NY) *244 FRD 162.*

Party seeking sanctions for destruction of evidence must establish: (1) that party having control over evidence had obligation to preserve it at time it was destroyed; (2) that records were destroyed with culpable state of mind; and (3) that destroyed evidence was relevant to party's claim or defense such that reasonable trier of fact could find that it would support that claim or defense. In re WRT Energy Secs. Litig. (2007, SD NY) 246 FRD 185.

In action under Longshore and Harbor Workers' Compensation Act (LHWCA), 33 USCS § 905(b), administratrix of estate of longshoreman who was killed in accident on vessel was not entitled to sanctions under *Fed. R. Civ. P. 37(c)* against various defendants in action because there was no evidence of deliberate attempt to conceal evidence. *Wheelings v Seatrade Groningen, BV (2007, ED Pa) 516 F Supp 2d 488.*

Federal district court may impose sanctions under *Fed. R. Civ. P. 37(b)* when party spoliates evidence in violation of court order. S. New Eng. Tel. Co. v Global NAPs, Inc. (2008, DC Conn) 251 FRD 82.

*Fed. R. Civ. P.* 37(e) is not applicable when court sanctions party for spoliation of electronic evidence pursuant to its inherent powers. Nucor Corp. v Bell (2008, DC SC) 251 FRD 191.

In employment discrimination case involving high school coach who was terminated, where school officials failed in their obligation to preserve evidence relevant to this litigation by permitting key official to continue to work on his laptop computer and failing to make imaging of computer's contents, even though it was apparent from beginning of lawsuit that laptop likely contained evidence pertinent to terminated coach's contract claims, imposition of sanction under *Fed. R. Civ. P. 37* was warranted; while there was insufficient evidence of bad faith to warrant harsh judgment of default, officials were precluded from arguing that official did not draft document forming basis for coach's contract claims and were also charged with coach's costs and fees incurred in bringing sanction motion and in paying forensic examiner to examine officials' computers. Bryant v Gardner (2008, ND Ill) 587 F Supp 2d 951.

In breach of contract action, defendant's motion for discovery abuse sanctions was denied where, as example of meritless allegation of discovery abuse, defendant complained that plaintiff violated Fed. R. Civ. P. 34(b) by producing roughly 153,000 pages of documents that were "jumbled mess"; and defendant had not experienced any prejudice by dismantling of Sarnia facility because, although this action was initiated in January 2005, defendant waited

until December 2007 (almost three years) before making its initial request to inspect Sarnia facility. Dow Chem. Canada, Inc. v HRD Corp. (2009, DC Del) 259 FRD 81, summary judgment gr, in part, summary judgment den, in part,, partial summary judgment den, motion to strike den, in part, motion to strike gr, in part (2009, DC Del) 2009 US Dist LEXIS 88815.

In seller's breach of contract suit, imposition of sanctions under *Fed. R. Civ. P. 37* against wife, who was one of buyers, was appropriate because she spoliated relevant evidence by allowing reinstallation of her computer's operating system after suit was filed and after seller requested all evidence, including computerized data, that related to parties' transaction. Green v McClendon (2009, SD NY) 262 FRD 284.

Alleged patent infringer made no showing that its loss of electronic information was within safe harbor provision of *Fed. R. Civ. P.* 37(e); infringer's system architecture of questionable reliability, which had evolved rather than been planned, acted to deny patent assignee access to evidence. Phillip M. Adams & Assocs., L.L.C. v Dell, Inc. (2009, DC Utah) 621 F Supp 2d 1173.

Where defendants had not proffered any evidence that they took any steps to prevent spoliation of exemplars of large-link pieces, such as implementing litigation-hold policy at outset of litigation or monitoring their receipts and shipments of product for relevant evidence during litigation, plaintiff was entitled to offer evidence of spoliation and false or misleading statements at trial. *R.F.M.A.S., Inc. v So (2010, SD NY) 271 FRD 13,* adopted, sanctions disallowed, request den (2010, SD NY) 271 FRD 55.

Spoliation sanctions were not warranted because there was no showing that certain electronically stored evidence was actually destroyed, particularly as removal of certain data from servers was done for reasons entirely independent of any potential lawsuit, and data was archived and not lost, and removal of desktop computer was not spoliation since hard drive was recovered and produced. Orbit One Communs. v Numerex Corp. (2010, SD NY) 271 FRD 429.

Sanctions under *Fed. R. Civ. P. 37* and court's inherent authority were appropriate in case where defendants intentionally deleted emails after duty to preserve had clearly arisen and at least some of this lost evidence would have been relevant and favorable to plaintiff's case; while plaintiff suffered some prejudice, it was not irreparable and, therefore, sanction on defendants was adverse inference instruction which would be left to jury to impose, if it so chose after hearing evidence regarding spoliation. Rimkus Consulting Group, Inc. v Cammarata (2010, SD Tex) 688 F Supp 2d 598.

Where arrestees sought to hold city and others in contempt for continuing to enforce three loitering statutes after they had been declared unconstitutional, and where city had lost at least 34 hard copy summonses issued pursuant to void laws, arrestees were entitled to discovery sanctions consisting of inferences that narratives contained in summonses would not have been favorable to city and monetary sanctions in form of attorneys' fees. Casale v Kelly (2010, SD NY) 710 F Supp 2d 347.

Plaintiff's obligation to preserve was clear, as it was sophisticated commercial actor to whom likelihood of dispute over liability for corrupted phenol was so evident that they notified

defendants that they were holding them liable for phenol delivered within days of discovering that it was off-specification, but there was no evidence that plaintiff acted in bad faith in failing to preserve product samples; because it did not have physical control over samples, did not affirmatively act to destroy them, and in fact acted to ensure that samples were retained for year following initial discovery that phenol was defective, and because defendant was not prejudiced by spoliation of these samples, sanctions were inappropriate. Cedar Petrochemicals, Inc. v Dongbu Hannong Chem. Co. (2011, SD NY) 769 F Supp 2d 269.

Pursuant to *Fed. R. Civ. P. 37*, attorney's fees and termination sanctions were appropriate where court orders were disobeyed, documents were intentionally and irretrievably destroyed, efforts were made to erase evidence of destruction, defendant's employees lied under oath, and lesser sanction would have failed to have deterrent effect given egregiousness of defendant's actions. *Philips Elecs. N. Am. Corp. v BC Tech. (2011, DC Utah) 773 F Supp 2d 1149* (criticized in In re Hitachi TV Optical Block Cases (2011, SD Cal) 2011 US Dist LEXIS 90882).

Though court found no intentional, malicious destruction, defendant's spoliatory conduct was not accidental where, after computer crash, defendant failed to make serious effort to recover data, so *Fed. R. Civ. P. 37* sanctions were appropriate, but attorney fees and costs sanction had to be modified. Beck v Test Masters Educ. Servs. (2013, DC Dist Col) 289 FRD 374, 84 FR Serv 3d 1218.

Preclusion of evidence under *Fed. R. Civ. P. 37(c)* as sanction for spoliation of evidence should be imposed at court's discretion because rule expressly states that other sanctions can be imposed in lieu of preclusion, not just in addition to preclusion, and because sanction of preclusion of evidence is harsh punishment which should be imposed only in most extreme circumstances; in choosing appropriate sanction for spoliation of evidence, courts should select least onerous sanction corresponding to willfulness of destructive act and prejudice suffered by victim, and assessment of sanctions depends most significantly on blameworthiness of offending party and prejudice suffered by opposing party. Teleglobe USA, Inc. v BCE Inc. (In re Teleglobe Communs. Corp.) (2008, BC DC Del) 392 BR 561.

Court held that U.S. Government employees negligently failed to preserve evidence contractor needed to prove claim filed under Contract Disputes Act of 1978, 41 USCS § 609(a), that contractor was entitled to equitable adjustment under requirements contract because government purchased supplies from other sources which should have been purchased from contractor, prohibited government from cross-examining contractor's expert witnesses about testimony that attempted to extrapolate total amount of diversions that occurred, precluded government from introducing expert testimony on that topic, and ordered government to reimburse contractor for discovery-related costs, including attorney's fees; court rejected government's argument that court could not impose sanctions because government employees did not willfully destroy evidence or act in bad faith. United Med. Supply Co. v United States (2007) 77 Fed Cl 257.

Unpublished Opinions

Unpublished: District court did not abuse its discretion when it denied plaintiff's motion for sanctions against life insurance company in which plaintiff alleged that company destroyed

emails during course of litigation because district court did not abuse its discretion in determining that plaintiff did not carry burden of proving company's intent to destroy relevant evidence; plaintiff offered no specific evidence that any of destroyed emails contained relevant information. Drnek v Variable Annuity Life Ins. Co. (2007, CA9 Ariz) 2007 US App LEXIS 29972.

Unpublished: Denial of employee's request for sanctions for employer's spoliation of evidence was not abuse of discretion, as district court found that employer lacked culpable state of mind when it destroyed copy of meeting minutes; employer was under no duty to maintain minutes and destroyed its copy in usual course; employer destroyed evidence before employee made any allegation that might have alerted employer to potential relevance, and employee did not seek to obtain evidence from union, which produced and maintained minutes. Smith v UPS (2011, CA9 Nev) 2011 US App LEXIS 10225.

Unpublished: In accordance with traditional view that spoliation sanctions must be predicated on bad faith, *Fed. R. Civ. P.* 37(e) sanctions have been deemed inappropriate where 1) electronic communications are destroyed pursuant to computer system's routine operation and 2) there is no evidence that system was operated in bad faith. Southeastern Mech. Servs. v Brody (2009, MD Fla) 2009 US Dist LEXIS 69830.

**31. Failure to answer or respond**

In products liability case involving death caused by ladder, plaintiffs properly requested information about all previous lawsuits against ladder's manufacturer; manufacturer's request for sanctions for request for irrelevant information was simply manufacturer's disagreement with what constituted "substantially similar" incidents to incident at issue. Crump v Versa Prods. (2005, CA8 Mo) 400 F3d 1104, 61 FR Serv 3d 148.

Sanctions for party's failure to answer deposition questions were not warranted where party raised issue of privilege and no court order compelling discovery had been made. SEC v Rehtorik (1991, SD Fla) 135 FRD 204, 19 FR Serv 3d 233.

In excessive force claim against corrections officers, dismissal was denied as sanction for plaintiff inmate's refusal to answer deposition questions relating to incident that generated claim; magistrate's order specified that non-compliance with deposition could lead to *Fed. R. Civ. P. 37* sanctions, including dismissal, but order did not compel inmate to answer questions, and inmate's refusal to answer was based on fear of his life. Dawes v Coughlin (2002, WD NY) 210 FRD 38.

In federal employee's Title VII case against Department of Treasury, although imposition of sanctions was warranted under *Fed. R. Civ. P. 37(c)(1)* based on employee's multiple failures to timely or completely reply to discovery requests, sanction of dismissal for failure to prosecute under Fed. R. Civ. P. 41(b) was too harsh, even though case was almost five years old, because court had stayed case, and judicial system strongly favored adjudication of cases on their merits. Walls v Paulson (2008, DC Dist Col) 250 FRD 48, dismd (2008, DC Dist Col) 2008 US Dist LEXIS 48021.

Refusal by party's corporate officer to answer questions on deposition on ground that he believed that they were improper was one basis for imposition of sanctions per *Fed. R. Civ. P.*

*37* in form of attorneys fee and costs because Fed. R. Civ. P. 30 did not authorize officer to unilaterally refuse to answer questions unless motion for protective order per *Fed. R. Civ. P. 26* was pending (which it was not) and anticipated that witnesses answer all questions subject to objections that were later reviewed by court. United Consumers Club, Inc. v Prime Time Mktg. Mgmt.Inc. (2010, ND Ind) 271 FRD 487.

Entry of default and default judgment was appropriate given that evidence showed that licensee completely failed to respond to any discovery request, or to realty company's correspondence about discovery, licensee failed to attend his deposition after receiving repeated notification from realty company, and licensee did not explain his failure to comply with discovery, as he had not filed any response to realty company's motion. Costar Realty Info., Inc. v Field (2010, DC Md) 737 F Supp 2d 496, findings of fact/conclusions of law (2010, DC Md) 2010 US Dist LEXIS 135016.

Motion to compel expert witness to appear and answer nonprivileged questions about unrelated litigation was granted where trustee's instructions not to answer during deposition were unnecessary to preserve privilege, enforce court limitation, or protect witness from bad faith or unreasonable examination. Brincko v Rio Props. (2011, DC Nev) 278 FRD 576.

Defendant's behavior merited imposition of sanctions under *Fed. R. Civ. P. 37(c)(1)*; defendant repeated failed to respond fully to discovery requests and misled plaintiff as to nature of defendant's search for documents; default judgment was not warranted, but plaintiff was entitled to additional deposition and attorney's fees. Owen v No Parking Today, Inc. (2011, SD NY) 280 FRD 106.

Guaranty agency under Federal Family Education Loan Program (agency) was not entitled to default judgment under Fed. R. Civ. P. 55 as record did not permit calculation of amount due as employer did not participate in case, and agency had not requested discovery to determine amount of actual damages, so *Fed. R. Civ. P. 37(b)* provided no basis for award of entire loan amount; agency also did not show that it was entitled to 15 percent of minimum wage as it did not show that borrower worked full-time. Educ. Credit Mgmt. Corp. v Optimum Welding (2012, DC Md) 285 FRD 371.

In products liability action wherein Oregon law governed involving plaintiffs alleging that plaintiff was injured after ingesting generic form of drug, district court adopted magistrate judge's recommendation to deny plaintiffs' motion for sanctions under *Fed. R. Civ. P. 26* and *Fed. R. Civ. P. 37* against generic drug manufacturer for failing to produce copies of its relevant drug labels for time period between 2003 and 2008 because record indicated that generic drug manufacturer's counsel responded to plaintiffs' request for labeling and packaging inserts by stating that it would produce that evidence after protective order was entered and such response did not indicate that requested production was complete; thus, it did not improperly certify discovery response, and its failure to produce labeling evidence before discovery closed did not prejudice plaintiffs since after discrepancies were discovered, plaintiffs were allowed to amend their complaint to include claims for failure to update. *Phelps v Wyeth, Inc. (2012, DC Or) 857 F Supp 2d 1114, CCH Prod Liab Rep P 18910.*

In case alleging that flea market operator engaged in contributory trademark and copyright infringement, plaintiff's motion to compel production of flea market's tax returns and other

financial information was denied because such information would not prove ill-gotten profits damages under 15 USCS § 1117 or 17 USCS § 504 and plaintiff could otherwise pursue statutory damages. Sanctions were also denied under either *Fed. R. Civ. P. 37* or Fed. R. Civ. P. 30(d) for instruction that flea market's deponent not answer questions regarding such information because there was no suggestion that any unprofessional obstructionism occurred here and neither side produced any authority on issue. Coach, Inc. v Hubert Keller, Inc. (2012, SD Ga) 911 F Supp 2d 1303.

**32. Failure to produce**

District court did not abuse its discretion in denying insured's motion under *Fed. R. Civ. P. 37* to exclude evidence of underwriting standards based on insurer's Fed. R. Civ. P. 30(b)(6) witness having limited knowledge of such standards because insurer provided report addressing underwriting issues and disclosed another person with knowledge of these issues. Cedar Hill Hardware & Constr. Supply v Ins. Corp. of Hannover (2009, CA8 Mo) 563 F3d 329.

Dismissal pursuant to *Fed. R. Civ. P. 37(b)* was proper because plaintiffs' thrice repeated failure to produce materials that had always been and remained within their control was strong evidence of willfulness and bad faith, and in any event was easily fault enough to warrant dismissal or default judgment. Lee v Max Int'l, LLC (2011, CA10 Utah) 638 F3d 1318.

Although government failed to comply with *Fed. R. Civ. P. 26(a)(2)(E)* by not supplementing medical expert's disclosure to reflect interview with detective on which expert intended to rely at trial, violation was harmless because expert had reached his opinion before interviewed detective, and interview did not change his opinion; moreover, district court did not abuse its discretion in declining to strike expert's testimony pursuant to *Fed. R. Civ. P. 37(c)(1)* because doing so would have imposed sanction that exceeded discovery violation. English v District of Columbia (2011, App DC) 651 F3d 1.

Right to litigate action on merits can be forfeited where parties choose to defend by repeatedly refusing to produce, during pretrial discovery, factual information essential to adversary's prima facie case, but caution should be exercised before applying ultimate sanction. Charron v Meaux (1975, SD NY) 66 FRD 64, 20 FR Serv 2d 724.

Failure of defendant in action by trustees of various employee funds alleging violation of collective bargaining agreements to produce payroll records sought by plaintiffs necessary to prosecute their case justifies imposition by court of more severe sanctions where defendant claims that documents were destroyed in fire but where it is shown that documents were available during period of time that plaintiffs initiated their discovery and at time of previous sanction orders by magistrate and court. Hammond v Coastal Rental & Equipment Co. (1982, SD Tex) 95 FRD 74, 34 FR Serv 2d 1108.

If litigants are to have any faith in discovery process, they must know that parties cannot fail to produce highly relevant documents within their possession with impunity; parties cannot be permitted to jeopardize integrity of discovery process by engaging in halfhearted and ineffective efforts to identify and produce relevant documents. Bratka v Anheuser-Busch Co. (1995, SD Ohio) 164 FRD 448.

In employment discrimination suit, where during depositions, employer became aware that employee had not produced certain documents that it had previously requested, and where employer had previously obtained order directing employee's attorney to refrain from inappropriate objections and interruptions during depositions, and where employee's attorney continued to disrupt depositions, although employer was entitled to order under *Fed. R. Civ. P. 37(b)* compelling production and reimbursement of its costs on two discovery motions, court declined to impose requested sanctions of either dismissal of lawsuit or revocation of admission of employee's attorney because such sanctions were too harsh and not warranted at this stage of proceedings, although court warned employee that such harsh sanctions could still be imposed, particularly if there was continued failure to produce documents and continued unnecessary interruptions during depositions. Ofoedu v St. Francis Hosp. & Med. Ctr. (2006, DC Conn) 234 FRD 26, 64 FR Serv 3d 155, summary judgment gr, motion to strike gr, in part, motion to strike den, in part (2006, DC Conn) 2006 US Dist LEXIS 68704.

Where proposed purchaser of franchised dealership alleged that car manufacturer deleted e-mails concerning purchaser's dealership application, sanctions were not warranted under *Fed. R. Civ. P. 37(b)* because there was no evidence that alleged e-mails ever existed, there was no evidence to refute manufacturer's assertion that it produced all relevant e-mails before backup tapes were accidentally overwritten, there was no evidence of bad faith on part of manufacturer, and purchaser did not timely raise issues regarding alleged discovery misconduct. Tri-County Motors, Inc. v Am. Suzuki Motor Corp. (2007, ED NY) 494 F Supp 2d 161.

Insurer was subject to sanctions under *Fed. R. Civ. P. 37* for its failure to produce witness for deposition under Fed. R. Civ. P. 30(b)(6) because its position was not substantially justified as request was clear and was not vague or unduly burdensome. J&M Assocs. v Nat'l Union Fire Ins. Co. (2008, SD Cal) 70 FR Serv 3d 1470.

Life insurer was sanctioned in amount of $ 9,000 pursuant to *Fed. R. Civ. P. 37* because insurer failed to conduct reasonable search for surveillance video that should have been disclosed to insured in her suit for wrongful termination of disability benefits; insurer's initial disclosure process was undermined when administrative assistant did not look for file in filing cabinet, where file would have been stored, and insurer's reliance on system which contained few checks and balances was unreasonable. Finley v Hartford Life & Accident Ins. Co. (2008, ND Cal) 249 FRD 329.

Class plaintiffs, who claimed that defendant allegedly failed to produce evidence pursuant to its obligations under *Fed. R. Civ. P. 26*, were not entitled to their requested sanctions under former *Fed. R. Civ. P.* 37(e) because declaration and attachments submitted by defendant were relevant to certification inquiry in that they tended to counter plaintiffs' claim that common questions would predominate. Parkinson v Hyundai Motor Am. (2008, CD Cal) 258 FRD 580.

Bank was entitled to motion to compel under *Fed. R. Civ. P. 37* in its RICO action because defendants failed to provide timely responses to document requests and failed to comply with S.D. Fla. Gen. R. 26.1(g) and *Fed. R. Civ. P. 26* and 34 to explain why requests were vague or overbroad or why they failed to timely respond to requests. Bank of Mong. v M&P Global Fin. Servs. (2009, SD Fla) 258 FRD 514.

In arrestee's *42 USCS § 1983* suit against city, two detectives, and lieutenant (defendants) after her acquittal of narcotics possession charges, arrestee was not entitled to full exclusion of certain witness affidavit from summary judgment record as *Fed. R. Civ. P. 37(c)(1)* sanction for defendants' late disclosure of this witness because neither party provided nor pressed for initial witness disclosures, and no discovery was sought regarding other potentially liable officers; however, since arrestee had no notice that certain affiant was key witness in contested search, as Rule 37(c)(1) sanction, court declined to consider this affidavit in considering defendants' summary judgment motion, but it considered affidavit used as opposition to arrestee's partial summary judgment motion. Rogers v Apicella (2009, DC Conn) 606 F Supp 2d 272.

Court could not determine whether ERISA claimant was entitled to discovery sanctions under *Fed. R. Civ. P. 37* until further briefing was provided as to whether under Fed. R. Civ. P. 34, requested discovery regarding structural conflict of interest was in possession of plan or whether claimant had to request documents from administrator by subpoena under Fed. R. Civ. P. 45. Zewdu v Citigroup Long Term Disability Plan (2010, ND Cal) 264 FRD 622.

After employee prevailed in retaliation case against defendants, under *Fed. R. Civ. P. 37*, her former employer and supervisor, defendants were not entitled to new trial as discovery sanction, but were entitled to reasonable attorneys' fees and costs associated with compelling production after employee withheld notes she took of patient medical records. Mugavero v Arms Acres, Inc. (2010, SD NY) 680 F Supp 2d 544, 108 BNA FEP Cas 388.

In products liability action, expert on behalf of plaintiffs was prohibited from testifying about study he performed because he failed to provide underlying patient charts for that study and patient charts were driving force behind expert's determination that continuous infusion could cause chondrolysis. *Fed. R. Civ. P. 26* and *37* required exclusion of opinion testimony as it related to patient charts or study because, absent production of records, defendants were precluded from meaningful cross-examination or challenging his causation opinion. McClellan v I-Flow Corp. (2010, DC Or) 710 F Supp 2d 1092, 82 Fed Rules Evid Serv 498 (criticized in Kilpatrick v Breg, Inc. (2010, CA11 Fla) 613 F3d 1329, CCH Prod Liab Rep P 18469, 22 FLW Fed C 1322).

In judgment creditor's turnover suit against foreign bank, judgment creditor was entitled to award of costs and fees under *Fed. R. Civ. P. 37(a)(5)(A)* as result of foreign bank's repeatedly requested extensions of time to respond to discovery requests and its ultimate failure to do so. *Milliken & Co. v Bank of China (2010, SD NY) 758 F Supp 2d 238.*

Assignee's failure to produce balance sheets and provide related testimony constituted violation of court's order and warranted imposition of sanctions. Martin County Coal Corp. v Universal Underwriters Ins. Servs. (2011, ED Ky) 2011 US Dist LEXIS 22150, summary judgment gr, dismd (2011, ED Ky) 792 F Supp 2d 958.

Defendants did not disclose discovery prior to discovery deadline because it was created eight days prior to discovery deadline and after they had completed their search for documents, and they did not discover it until after discovery deadline; furthermore, they first learned of evidence on Friday and produced it for plaintiff following Monday, so they timely supplemented their

production in accordance with *Fed. R. Civ. P. 26* and *37* and exclusion of evidence and award of attorney fees would not be proper under circumstances. Murray v Geithner (2011, ED Mich) 763 F Supp 2d 860.

Defendants in adversary proceeding were subject to preclusion sanctions under *Fed. R. Civ. P. 37(b)*, as well as potential monetary sanctions, because they repeatedly failed to prove certain discovery materials and also repeatedly disregarded court's orders to produce Fed. R. Civ. P. 30(b)(6) representative on designated dates. SageCrest II, LLC v ACG Credit Co. II, LLC (In re SageCrest II LLC) (2010, BC DC Conn) 2010 Bankr LEXIS 4035, vacated, remanded, request den (2011, DC Conn) 444 BR 20 10-05042; 10-05066.

Unpublished Opinions

Unpublished: Although employee properly relied on prior order for employer to produce documents in requesting sanctions, and it was error to deny relief based on incorrect assessment of order, sanctions were not warranted since employee could not have established any fact not already in evidence by tendering documents and thus employee was not prejudiced. Algie v N. Ky. Univ. (2012, CA6 Ky) 2012 FED App 17N.

Unpublished: Because sellers failed in every respect to comply with their obligations under Fed. R. Civ. P. 34(b) despite manufacturer's good faith efforts to resolve matter short of formal litigation, pursuant to *Fed. R. Civ. P. 37(a)(5)(A)*, sellers were to pay manufacturer's reasonable expenses incurred in filing motion. Coach, Inc. v Gata Corp. (2011, DC NH) 2011 US Dist LEXIS 32543.

Unpublished: Creditor was precluded from further briefing issue of standing, pursuant to *Fed. R. Civ. P. 37(c)*, for failure to comply with *Fed. R. Civ. P. 26(a)(1)(B)* by concealing existence of alleged power of attorney, which was necessary for him to have standing to avoid discharge of note payable to his elderly father. Catanzaro v Alvaro (In re Alvaro) (2005, BC SD NY) 2005 Bankr LEXIS 3483.

Unpublished: Pursuant to Fed. R. Civ. P. 16(f) and *37(b)(2)(A)*, bankruptcy court recommended exclusion of exhibits and testimony offered by defendants because, by not timely producing financial information represented by exhibit despite repeated discovery requests for such information, defendants deprived Trustee of opportunity to examine and test accuracy of defendants' financial records prior to trial. Kartzman v Affordable Luxury Limousine SErv. (In re Claire Transp., Inc.) (2010, BC DC NJ) 2010 Bankr LEXIS 3512.

**33. Costs and fees**

Court, when awarding attorney's fees as sanction, may award lodestar amount (number of hours reasonably spent on litigation multiplied by reasonable hourly rate). Trbovich v Ritz-Carlton Hotel Co. (1996, ED Mo) 166 FRD 30, 70 BNA FEP Cas 991, 68 CCH EPD P 44129.

Compensation for incurred expenses is mildest of all sanctions listed in *FRCP 37*. Neufeld v Neufeld (1996, SD NY) 169 FRD 289.

District court had discretion to impose substantial award of attorney's fees and costs for discovery misconduct where fees were specifically related to particular claim which was at

issue in order to provide discovery. Pepsico, Inc. v Cent. Inv. Corp. (2002, SD Ohio) 216 FRD 418.

In context of *Fed. R. Civ. P. 37* and attorney fees, term "substantial justification" was defined by substitution of "substantial justification" for good faith. Mitchell v AMTRAK (2003, DC Dist Col) 217 FRD 53.

Employer was in violation of Fed. R. Civ. P. 30(b)(6) because it failed to designate proper witness that could speak on behalf of employer and witness lacked sufficient knowledge to confirm or deny existence of search and seizure policy or to provide testimony regarding search of employee's belongings in employee's challenge of policy; thus, fees and costs were appropriate as sanctions under *Fed. R. Civ. P. 37*, but issue-related sanctions were refused. Myrdal v State (2008, DC Dist Col) 248 FRD 315.

Because trademark owner was granted relief sought by its motion to compel except with respect to privilege and protection issues, owner was entitled to recover expenses pursuant to *Fed. R. Civ. P. 37* incurred in filing motion to compel. Knights Armament Co. v Optical Sys. Tech., Inc. (2008, MD Fla) 254 FRD 463, affd (2008, MD Fla) 254 FRD 470.

Fees associated with calls and e-mails made by counsel were useful and of type ordinarily necessary to properly file motion to compel, *Fed. R. Civ. P. 37*, particularly in light of judge's explicit request that parties contact court prior to filing and meet and confer requirement of local rules. Woodland v Viacom, Inc. (2008, DC Dist Col) 255 FRD 278.

Insurer's motion for reconsideration of award of attorney's fees under *Fed. R. Civ. P. 37(a)(5)(A)* was denied because insurer failed to show good cause for prohibiting discovery on insureds' requested information, that work product doctrine properly applied to matter, and how dispute as to whether estoppel applied to instant litigation was proper basis for refusing to answer interrogatories; thus, insurer failed to show that its objections to interrogatories were substantially justified. *State Farm Fire & Cas. Co. v Nokes (2009, ND Ind) 263 FRD 518.*

Defendants were not entitled to compel compliance with protective order containing "claw back" provision under *Fed. R. Civ. P. 26(c)* because defendants failed to meet their burden under Rule 26 and *Fed. R. Evid. 502* to show that documents were inadvertently produced to plaintiff were privileged documents; thus, plaintiff's were entitled to reasonable fees under *Fed. R. Civ. P. 37(a)(5)(B)*. Callan v Christian Audigier, Inc. (2009, CD Cal) 263 FRD 564.

In manufacturer's patent infringement suit against competitors, competitors were not entitled to fees and costs associated with competitors' motion to compel manufacturer's response to requests for certain documents because, (1) as to some documents, manufacturer's refusal to comply was substantially justified on good faith basis that requests were either subject to protective order or were not sufficiently relevant, and (2) as to another document request, manufacturer produced some responsive documents after motion to compel was filed. Inventio AG v Thyssenkrupp Elevator Americas Corp. (2009, DC Del) 662 F Supp 2d 375.

None of three exceptions in *Fed. R. Civ. P. 37(a)(5)* were satisfied where cross-plaintiff tried to obtain on numerous occasions to obtain documents in question from defendant and plaintiff's

attorney before filing motion to compel, and there was no substantial justification for defendant's refusal to produce documents requested; award of reasonable costs and attorney's fees associated with filing motion to compel and reply memoranda was justified given protracted litigation, which to some degree had been caused by defendant's failure to produce documents requested by cross-plaintiff, and as such, defendant was ordered to pay cross-plaintiff $ 1,000 in attorney's fees. *Colon v Blades (2010, DC Puerto Rico) 268 FRD 129.*

Although Fed. R. Civ. P. 45(c)(2)(B)(i) authorized plaintiff seller to move for order compelling production or inspection, there was no provision in Rule 45 for award of expenses for bringing such motion, and while such provision could be found in *Fed. R. Civ. P. 37(a)(5)(A)*, Rule 37(a) did not appear to govern motions to compel production of documents made pursuant to Rule 45, thus, seller was not entitled to award of fees and costs in bringing its motion to compel against defendant competitor even thought seller prevailed on its motion. Bailey Indus. v CLJP, Inc. (2010, ND Fla) 270 FRD 662.

As any objections made in untimely motion could not serve as acceptable excuse for failure to appear for depositions, and given their refusal of employee's offer to withdraw deposition notices, corporate representatives had been unreasonable in believing that employee was no longer seeking depositions, any reliance on such belief was unjustified; accordingly, corporate representatives were not substantially justified in failing to appear for their depositions and employee was entitled to expenses. Kamps v Fried, Frank, Harris, Shriver & Jacobson L.L.P. (2011, SD NY) 274 FRD 115.

In buyers' suit regarding purchase of secondary-market life insurance policies, *Fed. R. Civ. P. 26(e)* and *Fed. R. Civ. P. 37(c)* sanctions of fees and costs associated with sanctions motion and with additional discovery were imposed because buyers' late disclosure of amount of damages they sought was inadequate, without justification, and prejudicial. Ritchie Risk-Linked Strategies Trading (Ir.), Ltd. v Coventry First LLC (2012, SD NY) 280 FRD 147, 81 FR Serv 3d 1336, objection denied, request den (2012, SD NY) 2012 US Dist LEXIS 79524.

Defendant did not provide any legitimate justification, let alone substantial justification, as to why complete answer to request for admission was not provided to plaintiff prior to submission of defendant's response to plaintiff's motion to compel; further, no other circumstances were present that would render award of expenses unjust; therefore, because none of exceptions stated in *Fed. R. Civ. P. 37(a)(5)(A)* applied, and because defendant failed to meet its obligations with respect to request for admission until after plaintiff filed his motion, plaintiff was awarded expenses and fees, but only related to making of motion to compel that particular request for admission, as well as any additional discovery requests that were granted by court and for which sanctions were awarded. Lynn v Monarch Recovery Mgmt. (2012, DC Md) 285 FRD 350.

Because defendant provided complete response to plaintiff's request for admission, plaintiff's motion to compel was denied; however, plaintiff was entitled to attorney's fees and costs under *Fed. R. Civ. P. 37(a)(5)(A)* with respect to motion to compel responsive answer to request for admission because defendant's original answer to plaintiff's request was evasive, and complete response was provided only after plaintiff filed his motion to compel; moreover, none of rule's

exceptions applied: (1) plaintiff made variety of efforts to obtain discovery without court action, under *Fed. R. Civ. P. 37(a)(5)(A)(i)*; (2) defendant provided no explanation for failing to provide additional information included in its response to plaintiff's motion in its original answer to plaintiff's request for admission, under *Fed. R. Civ. P. 37(a)(5)(A)(ii)*; and (3) no other circumstances rendered award of expenses unjust, under *Fed. R. Civ. P. 37(a)(5)(A)(iii)*; therefore, plaintiff was awarded expenses and fees incurred in making motion to compel with regard to request for admission. Lynn v Monarch Recovery Mgmt. (2012, DC Md) 285 FRD 350.

When trade group contested prong of Mass. Gen. Laws ch. 149, § 148B, barring classification of employees as independent contractors, and protective order barring Attorney General's subpoenas to customers of one of group's members was issued, group was not entitled to award of fees and costs because (1) protective order was based on dismissal of certain of group's claims, which made subpoenas irrelevant, and, (2) absent dismissal, subpoenas could have had merit. Mass. Delivery Ass'n v Coakley (2013, DC Mass) 21 BNA WH Cas 2d 696.

Where debtor had no operating business which would have allowed suit against trustee under limited exception of 28 USCS § 959(a), plaintiffs' actions in seeking discovery failed to comply with applicable rules, trustee was entitled to proceed on his request for attorneys' fees and costs for discovery abuses under *Fed. R. Civ. P. 37 (a)(5)(B)*. In re GTI Capital Holdings, L.L.C. (2008, BC DC Ariz) 399 BR 247.

Unpublished Opinions

Unpublished: In case in which property owners had engaged in numerous and flagrant discovery violations, district court did not abuse its discretion in imposing sanctions against them pursuant to *Fed. R. Civ. P. 37*; mortgage company was awarded approximately $ 8,000 in fees and approximately $ 3,500 in costs. Neely v Regions Bank Inc. (2008, CA5 Miss) 2008 US App LEXIS 1474.

Unpublished: While district courts could defer assessment of attorney's fees, court declined to defer assessment of attorney's fees in case because one of purposes of awarding sanctions was to deter future improper conduct over course of litigation, and given corporation and officers' pre-trial conduct thus far, delaying imposition of fees until conclusion of case would not properly deter continued misdeeds; therefore, sanctioned parties had 30 days from date of order to pay monetary sanctions levied against them. Mikhlyn v Bove (2011, ED NY) 2011 US Dist LEXIS 110956.

**34. --Actual expenses incurred**

Rule 37 by its terms limits assessment thereunder to fees and expenses flowing from abuse of discovery process, and since sanctions authorized under Rule must pertain to discovery process, no assessment may be made for expenses which were incurred independent of that process. Stillman v Edmund Scientific Co. (1975, CA4 Md) 522 F2d 798, 188 USPQ 417, 20 FR Serv 2d 1103.

Absence of provision for delay damages does not prevent application in federal diversity case of state rule which is designed to promote settlement and has effect of compensating plaintiff for

lost time value of money when defendant fails to make reasonable offer of settlement. Fauber v Kem Transp. & Equipment Co. (1989, CA3 Pa) 876 F2d 327.

Where Securities and Exchange Commission (SEC) eventually stipulated that call was not made from chief executive officer's office, but could have done so at some point earlier, saving time and money for its opponent and enabling both parties to focus on many real disputes in case, district court did not abuse its discretion in ordering SEC to pay insider trading defendant costs incurred in preparing to prove this fact at trial. SEC v Happ (2004, CA1 Mass) 392 F3d 12, CCH Fed Secur L Rep P 93049, 65 Fed Rules Evid Serv 1303.

Although court found that due to plaintiff's persistent and egregious noncompliance with series of discovery orders, sanctions were fully warranted, court could not ascertain where fault for that noncompliance was; court had to make determination if it was through plaintiff's noncompliance, or its counsel's, or both. Exact Software N. Am., Inc. v Infocon, Inc. (2006, ND Ohio) 479 F Supp 2d 702.

Because there was no substantial justification for its failure to comply with *Fed. R. Civ. P. 26(a)(2)(B)* and that failure was not harmless, court granted university's request to allow more time to produce its rebuttal experts' reports; the court also granted university's request for attorney's fees under *Fed. R. Civ. P. 37(c)*. United States ex rel. O'Connell v Chapman Univ. (2007, CD Cal) 245 FRD 652.

In trustee's suit alleging constructive transfer and fraud, court imposed monetary sanctions against corporation and others (defendants) pursuant to *Fed. R. Civ. P. 26(g)(3)* and *37(b)(2)* as well as its inherent power because defendants engaged in numerous instances of discovery delay and misconduct, which prejudiced trustee in its preparation of its lawsuit. Kipperman v Onex Corp. (2009, ND Ga) 260 FRD 682.

**35. --Reasonableness**

*FRCP 37(d)* implicitly requires district court to make finding that attorney's fees and costs which party requests are reasonable before ordering opposing party to pay such fees and costs. Gordon v New England Tractor Trailer Training Sch. (1996, DC Md) 168 FRD 178, 36 FR Serv 3d 616.

When imposing monetary sanctions pursuant to FRCP 16 or *37*, reasonableness requirement of *FRCP 11* should be applied; thus, court may only award reasonable expenses and attorney's fees. Lithuanian Commerce Corp. v Sara Lee Hosiery (1997, DC NJ) 177 FRD 205, motions ruled upon (1997, DC NJ) 177 FRD 245, 49 Fed Rules Evid Serv 84, vacated in part on other grounds, summary judgment gr, in part, summary judgment den, in part (1998, DC NJ) 179 FRD 450.

Although plaintiff was entitled to fees and costs under *Fed. R. Civ. P. 37* as sanctions for filing its second motion to compel for defendant's failure to comply with certain interrogatories, number of hours was reduced to establish reasonable award by reducing hours spent on document review, ordinary and necessary litigation activities, and redundant time. Tequila Centinela, S.A. de C.V. v Bacardi & Co. (2008, DC Dist Col) 248 FRD 64.

Where sanctions were awarded pursuant to Fed. R. Cir. P. 37, though plaintiff's attorneys sought $ 365 per hour, $ 325 was reasonable as it was top of market range in district, and, while one attorney earned $ 365 in complex copyright case, case at bar involved only breach of employment agreement and misappropriation of trade secrets; further, number of hours claimed for travel, though it included delays and time spent traveling to and from airport, was upheld. Moreover, attorney's assertion that he did not, despite defendants' contentions to contrary, travel to California for business besides that pertaining to case, were believed, and number of hours claimed for motion work were found to be reasonable. Astro-Med, Inc. v Plant (2008, DC RI) 250 FRD 28.

Although sued company was entitled to recover some amount of costs and attorney fees pursuant to *Fed. R. Civ. P. 37(d)(3)* after plaintiff's president failed to appear for her scheduled deposition, company's $ 12,000 fee request was breathtaking and unreasonable; plaintiff and its counsel was ordered to pay $ 2,500 as sanction, which was reasonable fee for filing and pursuing R. 37 sanction motion, as it represented 10 hours from junior partner, and three hours from senior partner. Criterion 508 Solutions, Inc. v Lockheed Martin Servs., Inc. (2008, SD Iowa) 255 FRD 489.

Credit reporting bureau had reasonable grounds to believe it could prevail, and indeed, did prevail on most significant claim, for punitive damages; consequently, request was denied for expert witness fees pursuant to *Fed. R. Civ. P. 37(c)(2)* based on bureau's failure to admit certain requests for admission. Valentine v Equifax Info. Servs. LLC (2008, DC Or) 543 F Supp 2d 1232.

In breach of contract suit, where owner was entitled to order compelling contractor to produce certain requested documents, owner was also entitled to recovery of its fees incurred in obtaining order compelling production, but requested amount was reduced to reflect actual time expended on motion to compel and to reflect reasonable fee amount. Global Ampersand, LLC v Crown Eng'g & Constr. (2009, ED Cal) 261 FRD 495.

Defendant's application for court-ordered attorney's fees and costs pursuant to *Fed. R. Civ. P. 37(a)(5)(A)* was granted because court had already determined that award related to motion to compel was necessary, and fees stated and hours worked were reasonable, as was associated computerized legal research charge. *Guantanamera Cigar Co. v Corporacion Habanos (2009, DC Dist Col) 263 FRD 1.*

On request for attorney's fees and costs pursuant to *Fed. R. Civ. P. 37(a)(5)(A)*, hours defendant spent working on motion to compel and reply were reasonable and were compensated; defendant spent 7.9 hours trying to obtain compliance with plaintiff before going to court, 17.8 hours working on motion, 7 hours working on reply, and 6.6 hours working on fee application. *Guantanamera Cigar Co. v Corporacion Habanos (2009, DC Dist Col) 263 FRD 1.*

On request for attorney's fees and costs pursuant to *Fed. R. Civ. P. 37(a)(5)(A)*, fees associated with protective order were reasonable because protective order was prepared at plaintiff's insistence as condition for its voluntary compliance with document requests and, after court signed protective order, plaintiff continued to refuse to produce documents until motion to

compel was brought. *Guantanamera Cigar Co. v Corporacion Habanos (2009, DC Dist Col) 263 FRD 1.*

On request for attorney's fees and costs pursuant to *Fed. R. Civ. P. 37(a)(5)(A)*, costs for computerized research for motion to compel in amount of $ 265.87 and for fee application in amount of $ 173.92 were allowed as reasonable. *Guantanamera Cigar Co. v Corporacion Habanos (2009, DC Dist Col) 263 FRD 1.*

In contractor's defamation and intentional infliction of emotional distress suit against two home owners, although contractor's *Fed. R. Civ. P. 37* motion to compel was denied without prejudice as being premature, owners were not entitled to attorney's fees and costs under *Fed. R. Civ. P. 37(a)(5)(B)* because court did not rule that owners properly asserted attorney-client privilege and work product doctrine to all of withheld documents, and further, court utilized motion to compel to provide guidance to parties in conjunction with contractor's request for production of documents. Metzler Contr. Co. LLC v Stephens (2009, DC Hawaii) 642 F Supp 2d 1192.

With regard to request for attorney's fees as sanctions, defendants' offer to reduce fees by 10 percent for eventual production of some documents by plaintiff without judicial intervention was adopted. Covad Communs. Co. v Revonet, Inc. (2010, DC Dist Col) 267 FRD 14, magistrate's recommendation (2010, DC Dist Col) 2010 US Dist LEXIS 39224.

Because counsel for company did not appear at hearing, request for In Camera Review of Attorney's Fees was denied and company was entitled to $ 900, which constituted three hours of work at rate of $ 300 per hour, as reasonable attorney's fees for prevailing in its opposition to realty company's Motion to Compel. Costar Realty Info., Inc. v Field (2010, DC Md) 737 F Supp 2d 496, findings of fact/conclusions of law (2010, DC Md) 2010 US Dist LEXIS 135016.

Although mother's counsel sought remuneration at hourly rate of $ 500 and claimed he expended 13 hours researching and drafting instant motion, mother's counsel had not indicated his primary area of practice, his customary hourly rate or his prior experience litigating actions under Employee Retirement Income Security Act of 1974 (ERISA), 29 USCS §§ 1001 et seq., and although mother provided information about past fee awards in ERISA actions in district, she had not demonstrated that her counsel was of comparable skill, experience and reputation with attorneys who received those fee awards, in light of scant evidence provided to court to justify hourly rate sought, court could not conclude that mother's counsel was entitled to hourly rate of $ 500, and rate of $ 300 was more appropriate; moreover, court awarded mother's counsel fees for only 8 hours, rather than 13, to account for fact that, in support of instant motion, mother's counsel submitted improper affirmation that added no value, totaling 26 pages in length and presenting countless legal arguments and facts of which he had no personal knowledge. Ulyanenko v Metro. Life Ins. Co. (2011, SD NY) 275 FRD 179.

Unpublished Opinions

Unpublished: District court did not abuse its discretion when it allowed attorney's fees and costs in favor of defendant for plaintiff's continual failure to comply with discovery responses and the amount of fees and costs awarded were reasonable when they were calculated pursuant to the

lodestar method. Smith v Atlanta Postal Credit Union (2009, CA11 Ga) 2009 US App LEXIS 21381.

**36. --Pro se litigants**

Employee, who was pro se litigant, failed to show that extraordinary circumstances existed that justified reconsideration, pursuant to *Fed. R. Civ. P. 60(b)*, of order requiring her to pay defendants' deposition-related costs and attorney fees: (1) district court issued order after finding that employee's refusal to be deposed with regard to her employment discrimination claims was willful and egregious; (2) one defendant had mailed itemized statement of its costs and fees to employee's home address, as permitted by Fed. R. Civ. P. 5(b)(2)(C); (3) district court awarded requested costs and fees after employee failed to file objections to that defendant's statement within 14 day response period allowed under C.D. Ill. Civ. R. 7.1(B); and (4) fact that employee might be disadvantaged as against other litigants who filed and received service of pleadings and documents electronically did not constitute extraordinary circumstance that justified *Fed. R. Civ. P. 60(b)* relief. Collins v Illinois (2009, CA7 Ill) 554 F3d 693, 105 BNA FEP Cas 760.

Pro se lawyer was not permitted to receive fees for his own time as discovery sanctions, because *Fed. R. Civ. P. 37* required that the expenses be "incurred," and the lawyer could not incur fees payable to himself. Pickholtz v Rainbow Techs., Inc. (2002, CA FC) 284 F3d 1365, 62 USPQ2d 1340, 52 FR Serv 3d 210, reh den (2002, CA FC) 2002 US App LEXIS 11820.

Where plaintiff was proceeding pro se in employment discrimination action and had not provided all of his mandatory disclosure, had not answered demands for interrogatories and request for production of documents, and had failed to appear for scheduled deposition, court found that sanctions in amount of $ 325 to reimburse defendant employer for costs arising from plaintiff's failure to appear at his deposition, and directions to comply with discovery and participate in another deposition were reasonable and promoted substantial justice. LaGrande v Adecco (2005, ND NY) 233 FRD 253.

**37. --Miscellaneous**

Magistrate judge and district court reasonably found that defendant frustrated discovery process and stalled resolution of case and amount of fee award was proper; in particular, plaintiff was entitled to award under *Fed. R. Civ. P. 37* even though its attorneys were working for fixed fee; fixed-fee arrangement was undoubtedly based on assumption by both attorney and client that attorney would be performing typical services in litigation conducted under governing law. Centennial Archaeology, Inc. v Aecom, Inc. (2012, CA10 Wyo) 688 F3d 673.

Fixed fee was irrelevant to value of services performed because of defendant's misconduct; in light of clear purposes of fee-shifting provisions of *Fed. R. Civ. P. 37*, plaintiff was entitled to attorney-fee award even though its lawyers were working under fixed fee; award was undoubtedly intended to be compensatory; record was clear that sanction was imposed under Rule 37. Centennial Archaeology, Inc. v Aecom, Inc. (2012, CA10 Wyo) 688 F3d 673.

Award was undoubtedly intended to be compensatory; record was clear that sanction was imposed under *Fed. R. Civ. P. 37*; defendant failed to show that district court did not follow

proper procedures under that Rule or imposed sanctions not permitted by Rule. Centennial Archaeology, Inc. v Aecom, Inc. (2012, CA10 Wyo) 688 F3d 673.

Portions of record referenced by defendant did not support its contention that district court imposed sanction for defendant's opposing plaintiff's amendment to its complaint, nor did record support contention that district court believed that defendant's attorney misrepresented scheduling conflict; as for defendant's motion to continue, district court's sanction included plaintiffs attorney fees to oppose motion because district court characterized motion as in effect motion for stay of or to delay ongoing discovery. Centennial Archaeology, Inc. v Aecom, Inc. (2012, CA10 Wyo) 688 F3d 673.

Award of fees and expenses alone is not sufficient sanction, where such sanction was imposed at earlier stage in litigation but apparently failed to impress party with seriousness of its responsibilities. Bratka v Anheuser-Busch Co. (1995, SD Ohio) 164 FRD 448.

Defendants in medical malpractice case were not entitled to costs and attorney fees under *Fed. R. Civ. P. 37(c)(1)* related to their successful motion to exclude expert testimony because plaintiffs' untimely disclosure resulted in part from defendants' disclosure of its own expert at close of discovery, which provided coherent explanation for plaintiffs' erroneous conduct; further, plaintiffs had already been subjected to Rule 37(c)(1) exclusionary sanction so that additional sanctions were inappropriate. Morrison v Mann (2007, ND Ga) 244 FRD 668.

In patent action, if defendant incurred excessive litigation expenses due to plaintiff's misconduct during discovery, relief could be sought pursuant to Fed. R. Civ. P. 30(g) and *Fed. R. Civ. P. 37*. *Great Lakes Intellectual Prop. v Sakar Int'l, Inc. (2007, WD Mich) 516 F Supp 2d 880.*

Sufficient relationship existed between defense counsel's phone calls and e-mails to opposing counsel to justify award of attorney's fees based on those activities because calls and e-mails were useful and of type of activity ordinarily necessary to properly file motion to compel, particularly in light of district court's explicit request that parties contact court prior to filing motion and meet and confer requirement of D.D.C. Civ. R. 7(m). Woodland v Viacom, Inc. (2008, DC Dist Col) 255 FRD 1, vacated, reinstated (2008, DC Dist Col) 2008 US Dist LEXIS 96015.

In product liability case where there was motion to compel discovery filed, sanctions were not awarded because circumstances made such award unjust; during three year course of litigation, there, until this dispute, had been no disruption in generally professional and cordial inter-personal relations between all counsel in case. In re Heparin Prods. Liab. Litig. (2011, ND Ohio) 273 FRD 399.

Plaintiff was entitled to fees incurred for having to file *Fed. R. Civ. P. 37* motion to compel discovery because by definition, its petition for such fees could not have been erroneously filed, and defendants' response was thinly veiled, unpersuasive, conclusory attempt to reconsider court's prior ruling granting motion to compel. LM Ins. Corp. v ACEO, Inc. (2011, ND Ill) 276 FRD 592.

Motion to compel and motion for sanctions filed by trustee in bankruptcy in adversary proceeding was granted and defendant was ordered to pay compensatory sanction to trustee

at rate of $ 200 per day because defendant had not cooperated for many months with discovery requests without excuse. E.J. Sciaba Contr. Co. v Sciaba, (In re E.J. Sciaba Contr. Co.) (2006, BC DC Mass) 45 BCD 249.

Court awarded sanctions in amount of $ 341,029 to Chapter 11 liquidating trustee and against law firm and their counsel pursuant to *Fed. R. Civ. P. 37*, as adopted by Fed. R. Bankr. P. 7037, due to discovery misconduct, which included multiple appeals from nonappealable discovery orders, including application for writ of mandamus to 11th Circuit filed after its wrongful appeals were denied, frivolous claims of privilege designed to impede discovery, and failure to preserve documents, records, and data relevant to ongoing litigation. Oscher v The Solomon Tropp Law Group, P.A. (In re Atl. Int'l Mortg. Co.) (2007, BC MD Fla) 373 BR 159, 48 BCD 219, 20 FLW Fed B 556.

Unpublished Opinions

Unpublished: District court properly awarded attorney's fees and expenses to defendants, pursuant to *Fed. R. Civ. P. 37(a)(5)(A)*, because plaintiffs failed to respond fully to defendants' discovery requests, even after two follow-up requests for complete responses. Villa v Dona Ana County (2012, CA10 NM) 2012 US App LEXIS 22402.

Unpublished: There was no basis to conclude that magistrate judge abused his discretion in denying attorneys' fees to both parties pursuant to *Fed. R. Civ. P. 37(c)* because magistrate judge concluded, in essence, that both parties were justified in their respective positions regarding motion for protective order and, based on that conclusion, declined to award any expenses. Robotic Parking Sys. v City of Hoboken (2010, DC NJ) 2010 US Dist LEXIS 27180.

**38. Dismissal**

Admonition of Rule 37(b) that courts are to impose only such sanctions as are just and drastic nature of order dismissing complaint without reaching merits have led courts to employ sanctions of Rule 37(b) only on clearest showing that such action is required. Dunbar v United States (1974, CA5 Fla) 502 F2d 506, 74-2 USTC P 9744, 19 FR Serv 2d 359.

Sanction of dismissal of action can be imposed even though other sanctions short of dismissal have not been exhausted. Damiani v Rhode Island Hospital (1983, CA1 RI) 704 F2d 12, 1983-1 CCH Trade Cases P 65297, 36 FR Serv 2d 40.

District court did not err in affirming magistrate judge's recommendation of dismissal under *Fed. R. Civ. P. 37* because plaintiff employee's noncompliance with magistrate judge's discovery orders was willful, and employee's alleged health problems and fact that English was his second language did not excuse failures to comply; employee defied all of magistrate judge's orders for approximately six months, and even when magistrate judge imposed lesser sanction, employee still failed to comply with any of defendant employer's discovery requests. Agiwal v Mid Island Mortg. Corp. (2009, CA2 NY) 555 F3d 298, 105 BNA FEP Cas 873.

In copyright litigation, as plaintiff's counsel failed to submit proper draft pretrial order to trial court, despite having had several opportunities to do so, suit was properly dismissed for want

of prosecution under Fed. R. Civ. P. 16(f)(1)(B) and *37(b)(2)(A)(v)*. FM Indus. v Citicorp Credit Servs. (2010, CA7 Ill) 614 F3d 335, 95 USPQ2d 1562.

Dismissal with prejudice under Fed. R. Civ. P. 41(b) of employees' race discrimination claims was proper because district court had previously imposed discovery sanctions under *Fed. R. Civ. P. 26* and *37(a)(5)*, dismissal was sanction for failing to comply with court's order to attend status conferences, and employees had been previously warned. Arnold v ADT Sec. Servs. (2010, CA8 Mo) 627 F3d 716, 110 BNA FEP Cas 1781, 93 CCH EPD P 44053.

Appellate court had jurisdiction over appeal from dismissal with prejudice, imposed pursuant to *Fed. R. Civ. P. 37(b)(2)(A)(v)* for failure to comply with order to respond to defendants' discovery demand; dismissal of entire suit as discovery sanction is final, and therefore appealable, judgment. Walton v Bayer Corp. (2011, CA7 Ill) 643 F3d 994, CCH Prod Liab Rep P 18649.

Determining whether dismissal is proper sanction under *FRCP 37* is fact specific inquiry. Adolph Coors Co. v American Ins. Co. (1993, DC Colo) 164 FRD 507.

If judge intends to order dismissal or default judgment because of discovery violations, judge should do so only if he is impressed to do so by evidence which is clear and convincing; to do otherwise would be to contravene strong public policy which favors adjudication of cases on their merits. Gates Rubber Co. v Bando Chem. Indus. (1996, DC Colo) 167 FRD 90, subsequent app (2001, CA10 Colo) *246 F3d 680,* reported in full (2001, CA10) 4 Fed Appx 676, 2001 Colo J C A R 1008.

Showing of willful disobedience or gross negligence is required to impose harsher sanction of order of dismissal. Martinelli v Bridgeport Roman Catholic Diocesan Corp. (1998, DC Conn) 179 FRD 77, 41 FR Serv 3d 817.

Although court must consider availability of lesser sanctions prior to dismissal, explicit discussion of those alternatives is not required. Gemisys Corp. v Phoenix Am., Inc. (1999, ND Cal) 186 FRD 551, 50 USPQ2d 1876.

Pursuant to Fifth Circuit, at least one of three possible aggravating factors must be present when dismissing action with prejudice: (1) delay caused by plaintiff himself and not his attorney, (2) actual prejudice to defendant, or (3) delay caused by intentional conduct. Hickman v Fox TV Station, Inc. (2005, SD Tex) 231 FRD 248, 63 FR Serv 3d 48, affd (2006, CA5 Tex) 177 Fed Appx 427.

In suit by former employees of fast-food restaurant, alleging that their former employer violated federal and state wage and hour laws, claims of two former employees were dismissed under *Fed. R. Civ. P. 37(b)* because they failed or refused to attend or complete their depositions, respond to employer's interrogatories, or to otherwise comply with court's discovery orders mandating their participation, and they failed to oppose employer's motion to dismiss their claims. Seever v Carrols Corp. (2007, WD NY) 528 F Supp 2d 159.

In trustee's suit alleging constructive transfer and fraud, where corporation and others (defendants) engaged in numerous instances of discovery delay and misconduct, which

prejudiced trustee in its preparation of its lawsuit, although monetary sanctions were warranted, sanction of striking defendants' answer and entry of default judgment as sanction under *Fed. R. Civ. P. 37(b)(2)* was not warranted due to novel issues of liability presented in lawsuit and fact that ad damnum clause sought hundreds of millions of dollars. Kipperman v Onex Corp. (2009, ND Ga) 260 FRD 682.

When employees alleged discrimination due to disability of one member of employees' stevedoring gang, it was not appropriate to dismiss two of employees for failing to respond to employer's discovery requests because employer did not allege that employer was prejudiced. Barkhorn v Ports Am. Chesapeake, LLC (2011, DC Md) 25 AD Cas 308.

Owner exhibited exactly type of serious misconduct *Fed. R. Civ. P. 37* was designed to deter where throughout litigation under N.Y. Ins. Law § 5106 for improper reimbursements, owner and his company resisted providing discovery or co-operating with insurance company in any meaningful way; their actions resulted in waste of judicial resources over course of last seven years and required court to become micromanager of discovery in litigation; therefore, insurance company's motion for case terminating sanctions against owner and his company was granted. State Farm Mut. Auto. Ins. Co. v Grafman (2011, ED NY) 274 FRD 442.

Defendant was not entitled to dismissal, pursuant to Fed. R. Civ. P. 41(b), for plaintiff's failure to comply with court orders, or dismissal as sanction, pursuant to *Fed. R. Civ. P. 37(b)(2)(A)(v)*, for plaintiff's failure of not responding to defendant's discovery requests, even though plaintiff's failures caused defendant inconvenience and unnecessary expenditure of resources, because plaintiff's failures had not caused defendant actual prejudice. Edmond v Am. Educ. Servs. (2011, DC Dist Col) 823 F Supp 2d 28, 80 FR Serv 3d 1308.

Clinic's motion to dismiss was denied and lesser sanctions issued because former employee ignored at least two deadlines for producing discovery and defied one court order; on other hand she submitted almost all required responses to clinic's requests for documents and interrogatories. Bluestein v Cent. Wis. Anesthesiology (2013, WD Wis) 296 FRD 597, summary judgment gr, judgment entered (2013, WD Wis) 28 AD Cas 1389, 120 BNA FEP Cas 1325.

Bankruptcy court dismissed claim filed by Chapter 11 debtor who sought determination under 11 USCS § 505 of amount of taxes he owed to county and three municipalities on real property he owned; court had already dismissed debtor's claim in order it issued under *Fed. R. Civ. P. 37* and Fed. R. Bankr. P. 7037 in June 2007 because debtor had not complied with court's order directing parties to exchange appraisals, and that order, which was upheld on appeal, was final order that barred debtor's new claim under doctrine of res judicata. Planavsky v County of Broome (In re Planavsky) (2010, BC ND NY) 432 BR 481.

Unpublished Opinions

Unpublished: Dismissal of action was affirmed because plaintiff's apparent inability to keep his counsel informed of his whereabouts and contact information demonstrated reckless disregard for effect that his conduct would have on underlying case and his continued failure to appear wasted court's time and resources, as well as defendants. Rogers v City of Warren (2008, CA6 Ohio) 2008 FED App 732N.

Unpublished: District court did not abuse its discretion in dismissing plaintiff's case pursuant to *Fed. R. Civ. P. 37* because district court properly considered five factors set forth in Ehrenhaus v. Reynolds, 965 F.2d 916 (10th Cir. 1992); district court found that: (1) defendants were severely prejudiced as result of attorney's wilful obstruction; (2) "inordinate amount of judicial time" was consumed by attorney's tactics; (3) plaintiffs were personally advised of consequences of attorney's actions by court, yet continued to employ him as their attorney; (4) plaintiffs were warned numerous times that sanctions, including dismissal, could be imposed; and (5) given number and degree of violations plaintiffs had committed and lack of any indication that plaintiffs intended to change course, lesser sanction did not appear effective. Drain v Accredited Home Lenders, Inc. (2007, CA10 NM) 2007 US App LEXIS 6070.

Unpublished: Because plaintiff employee was given 2 opportunities to comply with discovery orders, to no avail, and he flouted his obligations by testifying orders didn't matter to him and that he would not produce material though ordered to do so, dismissal of his claims against defendant employer under *Fed. R. Civ. P. 37(b)* was not error. Antonmarchi v Consol. Edison Co. of N.Y. (2013, CA2 NY) 2013 US App LEXIS 5164.

Unpublished: Because plaintiff employee was given 2 opportunities to comply with discovery orders, to no avail, and he flouted his obligations by testifying orders didn't matter to him and that he would not produce material though ordered to do so, dismissal of his claims against defendant employer under *Fed. R. Civ. P. 37(b)* was not error. Antonmarchi v Consol. Edison Co. of N.Y. (2013, CA2 NY) 2013 US App LEXIS 5164.

Unpublished: It was not abuse of discretion to dismiss contractor's claims as *Fed. R. Civ. P. 37* sanction because it was not clear error to find contractor (1) did not participate in discovery, (2) disregarded court orders, (3) had already been barred from using documents contractor did not produce, and (4) suggested no sanction short of default judgment on liability. Metro Found. Contrs., Inc. v Arch Ins. Co. (2014, CA2 NY) 2014 US App LEXIS 589.

Unpublished: Dismissal with prejudice of litigation between maritime employer and its injured employee was appropriate because employee repeatedly failed to attend properly noticed depositions and comply with court orders; that conduct was directly attributable to him, and not his attorney and employee's lack of action showed clear record of delay or contumacious conduct sufficient to warrant dismissal. Atl. Sounding Co. v Fendlason (2014, CA5 La) 2014 US App LEXIS 2821.

Unpublished: Former employee's claims under Title VII of Civil Rights Act of 1964, 42 USCS §§ 2000e et seq., Age Discrimination in Employment Act, 29 USCS §§ 621-634, and Americans with Disabilities Act, *42 USCS §§ 12112*-12117, against his former employer were dismissed for failing to comply with his discovery obligations, pursuant to *Fed. R. Civ. P. 37(b)(2)(A)(v)*, as his failure to comply with discovery orders, including appearing for his own deposition, was willful and unjustified, lesser sanction would be meaningless since former employee was proceeding pro se and in forma pauperis and was uncollectible with regard to any sanction, he was provided ample warning, and misconduct was repetitive over three month period. Agiwal v HSBC Mortgate Corp. (2010, ED NY) 2010 US Dist LEXIS 118889.

Unpublished: Magistrate's report and recommendation was adopted and plaintiff's Title VII of Civil Rights Act of 1964 claim was dismissed under *Fed. R. Civ. P. 37(b)(2)(A)(v)* as: (1) plaintiff

failed to comply with magistrate's three orders to appear at plaintiff's depositions; (2) two of those orders stated that if plaintiff failed to attend plaintiff's deposition, magistrate would recommend that case be dismissed; and (3) plaintiff failed to proffer any reasonable excuse for failing to attend. Brissett v Manhattan & Bronx Surface Transit Operating Auth. (2011, ED NY) 2011 US Dist LEXIS 53950.

Unpublished: While debtor was not entitled to damages for lost profits under former *11 USCS § 362(h)* or punitive damages against District of Columbia under *11 USCS § 106(c)(3)*, his complaint was not due to be dismissed where discovery violations did not meet level of *Fed. R. Civ. P. 37(b)(2)(A)(v)*, or based on laches defense. Miller v District of Columbia (In re Miller) (2009, BC DC Dist Col) 2009 Bankr LEXIS 4045.

**39. --On merits**

Where order of dismissal does not provide that it is "without prejudice" or words to that effect, dismissal of action for failure to answer interrogatories is dismissal on merits. Nasser v Isthmian Lines (1964, CA2 NY) 331 F2d 124, 8 FR Serv 2d 37D.42, Case 1.

Dismissal under Rule 37 operates as adjudication on merits. Syufy Enterprises v American Multicinema, Inc. (1983, ND Cal) 575 F Supp 431, 1983-2 CCH Trade Cases P 65516.

Where plaintiffs or their representatives had altered, lost, and destroyed evidence in case, actions warranted dismissal under court's inherent authority established in *Fed. R. Civ. P. 37* to address such abuses. Fharmacy Records v Nassar (2008, ED Mich) 248 FRD 507.

**40. --Miscellaneous**

In civil rights case, based on principles of agency, where police officer's attorney failed to obey court orders and rules on at least two occasions, and trial court warned attorney at least twice that failure to obey could result in dismissal, district court did not abuse its discretion by dismissing police officer's complaint against city, law enforcement officers, department store, and its managers. Gripe v City of Enid (2002, CA10 Okla) 312 F3d 1184, 54 FR Serv 3d 833.

Individual's filing of case under false name deliberately qualified as flagrant contempt for judicial process and amounted to behavior that transcended interests of parties in underlying action; district court did not abuse its discretion in dismissing individual's case with prejudice pursuant to *FRCP 37(a)*. Dotson v Bravo (2003, CA7 Ill) 321 F3d 663, 54 FR Serv 3d 1119.

It was not abuse of discretion to dismiss plaintiffs' claims, with prejudice, as sanction for discovery misconduct under *Fed. R. Civ. P. 37*, because, inter alia, plaintiffs repeatedly missed court-mandated deadlines, their purported explanations lacked merit or credibility, district court did not need to expressly hold that they had acted in bad faith, and they were put on notice of risk of dismissal. Vallejo v Santini-Padilla (2010, CA1 Puerto Rico) 607 F3d 1.

District court was well within its discretion in choosing to dismiss case, under *Fed. R. Civ. P. 37* and 41(b), because (1) although widow engaged in some discovery, her foot-dragging began with her first filing in district court and continued for almost three years; (2) widow ignored court

orders and flouted district court's warnings; (3) none of widow's excuses for her delays and violations was sufficient to save her case because widow's delay tactics were extreme and district court was more than justified in refusing to countenance them; and (4) prior to dismissal order, district court employed other methods in attempt to manage case and ensure that it proceeded apace, including issuing multiple warnings and granting motion to compel widow's deposition. Vazquez-Rijos v Anhang (2011, CA1 Puerto Rico) 654 F3d 122.

Review of Third Circuit's Poulis factors was not required when district court dismissed post-trial motion for noncompliance with procedural rules or court orders; when sanctions effectively dictated result, Poulis applied, but when sanctions did not preclude all claims or defenses such that party still had her day in court, Poulis did not apply; court declined to extent Poulis to post-trial context. Knoll v City of Allentown (2013, CA3 Pa) 707 F3d 406.

Plaintiff's utter failure to comply with discovery for two-year period despite many requests, demands and orders resulted in sanction of dismissal of action being imposed, pursuant to *Fed. R. Civ. P. 37*. Nieves v City of New York (2002, SD NY) 208 FRD 531, 53 FR Serv 3d 580.

Attorneys demonstrated by clear and convincing evidence that guarantor willfully and intentionally attempted to perpetuate fraud on parties, justice system, and court when he affirmed, under oath, authenticity of fabricated documents and admittedly generated and signed forged guaranty, which benefited him and contained lettering, document control numbers, and signature lines that were inconsistent with real guaranty that was printed only once on lender's standard form; therefore, dismissal of guarantor's third-party complaint against attorneys was appropriate and did not conflict with Seventh Amendment because flagrant bad faith misconduct involved fabricated documents that were central to guarantor's case and corrupted discovery record in high stakes case. REP MCR Realty, L.L.C. v Lynch (2005, ND Ill) 363 F Supp 2d 984, 61 FR Serv 3d 319, affd (2006, CA7 Ill) 200 Fed Appx 592.

Because plaintiff failed to appear for her deposition after receiving proper notice, as provided in *Fed. R. Civ. P. 37(d)(1)*, because her action was willful, and because it was not first time that plaintiff failed to comply with discovery rules, court would render judgment by default against plaintiff under R. 37(b)(2)(C); pursuant to R. 37(b), court also ordered plaintiff to pay defendants' fees and costs incurred in preparing for taking of plaintiff's deposition. Collins v Illinois (2007, CD Ill) 514 F Supp 2d 1106.

Defendants were not entitled to costs under *Fed. R. Civ. P. 54(d)* because their counterclaim for affirmative relief was dismissed with prejudice under *Fed. R. Civ. P. 37* as sanction for their misbehavior involving continuing egregious bad faith discovery violations, making it improper to award costs to defendants under circumstances. Wheatley v Moe's Southwest Grill, LLC (2008, ND Ga) 580 F Supp 2d 1319.

Where plaintiff in trade secrets case acted in bad faith and conducted fraud on court with respect to fabricating documents to improve case and then falsely claiming such documents to be demonstrative exhibit, sanctions were warranted under *Fed. R. Civ. P. 37* and court's inherent authority; however, evidentiary hearing was needed to determine whether suit should be dismissed. JFB Hart Coatings, Inc. v Am General, LLC (2011, ND Ill) 764 F Supp 2d 974.

Claims by plaintiff principal of debtor were dismissed with prejudice, pursuant to *Fed. R. Civ. P. 37(d)* and 41(a)(2), as to moving defendant, where principal acted in bad faith with callous disregard to his duty to comply with discovery orders of court and demonstrated inexcusable neglect in not prosecuting his claims. Cathcart v General Holding, Inc. (In re Derivium Capital, LLC) (2007, BC DC SC) 372 BR 777.

Unpublished Opinions

Unpublished: District court acted within its discretion in ordering dismissal of plaintiff's complaint because district court gave number of explicit warnings regarding possible dismissal and issued five orders directing plaintiff to respond to defendants' motion for *Fed. R. Civ. P. 37* dismissal. Reinhardt v United States Postal Serv. (2005, CA2 NY) 150 Fed Appx 105.

Unpublished: Because employee was warned repeatedly that if he continued to file frivolous motions, court would consider dismissing his case as sanction and employee then filed supplement to his previous motion for sanctions, in which he largely reiterated his previous arguments, employee willfully did not comply with district court's order to cease filing frivolous motions and that lesser sanctions would not suffice; district court properly exercised its authority to dismiss with prejudice under *Fed. R. Civ. P. 37*. Goodman v New Horizons Cmty. Serv. Bd. (2006, CA11 Ga) 2006 US App LEXIS 9040.

Unpublished: District court did not abuse its discretion in dismissing plaintiff's case pursuant to *Fed. R. Civ. P. 37* because, in part, plaintiffs' attorney filed numerous "objections" arguing that magistrate judge involvement without party's consent was unconstitutional and continued to do so after court informed him that referring matter to magistrate judge for recommendations did not require consent of parties and that proper method of objecting to order was to file motion under *Fed. R. Civ. P. 59* or *60*; court also warned him that making frivolous arguments could subject party to sanctions. Drain v Accredited Home Lenders, Inc. (2007, CA10 NM) 2007 US App LEXIS 6070.

Unpublished: District court did not abuse its discretion in dismissing inmate's *42 USCS § 1983* action under *Fed. R. Civ. P. 37(b)(2)(C)* for failure to comply with discovery order, because uncontroverted facts showed that inmate willfully refused to comply with court order to compel discovery, and inmate's disparaging remarks about defendants' counsel and magistrate judge tended to demonstrate willful misconduct and bad faith. Beck v Fabian (2007, CA8 Minn) 2007 US App LEXIS 23944.

Unpublished: District court properly dismissed plaintiff's complaint pursuant to *Fed. R. Civ. P. 37(b)* for failure to comply with district court's discovery orders because (1) any delay or failure to follow orders was directly attributable to plaintiff as he was representing himself pro se; (2) defendants were prejudiced by plaintiff's delay and failure to comply as plaintiff's refusal to respond to any of defendants' discovery requests precluded them from investigating and meaningfully responding to allegations contained in complaint; (3) plaintiff's refusal to participate in discovery and to follow court orders was ongoing and without justification; (4)based upon plaintiff's history, no sanction other than dismissal would be appropriate as monetary sanctions could not be imposed because plaintiff was proceeding in forma pauperis. Azkour v Aria (2009, CA3 NJ) 2009 US App LEXIS 10887.

Unpublished: Magistrate did not abuse his discretion in dismissing former employee's Title VII of Civil Rights Act of 1964 complaint under either *Fed. R. Civ. P. 37(d)* or 41(b) because (1) employee committed numerous discovery violations because he filed two deficient and meritless motions to compel and he failed to file timely responses to former employer's request for production of documents; (2) employee's failure to cooperate with employer to resolve discovery disputes indicated that employee's violations were willful, and that he made no good faith attempt to learn rules, comply with rules, or correct his errors; and (3) employee continued to violate rules after being warned. Kelly v Old Dominion Freight Line, Inc. (2010, CA11 Ga) 2010 US App LEXIS 8730.

Unpublished: Dismissal with prejudice under *Fed. R. Civ. P. 37(b)(2)(A)(v)* was appropriate where plaintiff repeatedly refused to comply with orders to appear for deposition; plaintiff failed to develop argument that district court was biased and did not show that deposition orders were premature. Norouzian v Univ. of Kan. Hosp. Auth. (2011, CA10 Kan) 2011 US App LEXIS 18319.

Unpublished: District court properly granted former employer's motion for sanction of dismissal because record conclusively established that former employee falsified document produced in discovery that was material to his claim of discrimination, and then testified falsely in his deposition regarding that document, employee had full and fair opportunity to respond to employer's motion for sanctions, and magistrate judge's findings and recommendations were result of sound legal analysis and not personal bias. Amfosakyi v Frito Lay, Inc. (2012, CA3 Pa) 2012 US App LEXIS 19147.

**41. Evidence prohibited**

Preclusion sanction under Rule 37 need not be used only to rectify Rule 37 violation since this would leave courts powerless to deal with discovery violations not arising in defiance of court order. Campbell Industries v M/V Gemini (1980, CA9 Cal) 619 F2d 24, 29 FR Serv 2d 869.

Because discharged employee failed to supplement his answers to interrogatories after economic damages were discussed at various depositions, evidence of his economic damages was excluded under *Fed. R. Civ. P. 37*; however, court permitted testimony regarding economic facts to lay groundwork or foundation for any emotional damages that employee may have suffered. Soto-Lebron v Fed. Express Corp. (2008, CA1 Puerto Rico) 538 F3d 45.

Where expert report submitted by plaintiff union provided single paragraph to explain expert's anticipated opinion and basis for it and did not state expert's anticipated opinion with sufficient specificity to allow defendant Columbian subsidary corporation to prepare for rebuttal or cross-examination, under *Fed. R. Civ. P. 37(c)(1)*, district court was entitled to exclude testimony of expert for failing to provide information as required by *Fed. R. Civ. P. 26(a)(2)(B)*, (e)(2). Romero v Drummond Co. (2008, CA11 Ala) 552 F3d 1303, 21 FLW Fed C 1341.

When, after alleged patent infringer was successful in patent holder's infringement suit, infringer sued holder for malicious prosecution, it was not error to exclude alleged infringer's evidence of loss of goodwill, under *Fed. R. Civ. P. 37(c)(1)*, because infringer did not disclose

this as damages category, under *Fed. R. Civ. P. 26(a)(1)(A)(iii)* or (e), until joint pretrial statement and gave no calculation for such damages. Mee Indus. v Dow Chem. Co. (2010, CA11 Fla) 608 F3d 1202, 22 FLW Fed C 963.

Pursuant to *Fed. R. Civ. P. 37(b)(2)(A)(ii)*, district court did not abuse its discretion in refusing to let employees testify at trial of sexual harassment suit and barring EEOC from seeking relief on their behalf when EEOC failed to present for deposition allegedly aggrieved women. EEOC v CRST Van Expedited, Inc. (2012, CA8 Iowa) 670 F3d 897, 114 BNA FEP Cas 719, 95 CCH EPD P 44432.

Exclusion of critical evidence is extreme sanction, not normally to be imposed absent showing of willful deception or flagrant disregard of court order by proponent of evidence. Bucher v Gainey Transp. Serv. (1996, MD Pa) 167 FRD 387, 36 FR Serv 3d 212.

Exclusion of evidence is severe sanction because it implicates due process concerns. In re Independent Serv. Orgs. Antitrust Litig. (1996, DC Kan) 168 FRD 651.

In determining whether preclusion of evidence was appropriate remedy, courts consider four key factors: (1) party's explanation for failure to comply with discovery order; (2) importance of testimony of precluded witness; (3) prejudice suffered by opposing party as result of having to prepare to meet new testimony; and (4) possibility of continuance. Weiss v La Suisse, Societe d'Assurances sur la Vie (2003, SD NY) 293 F Supp 2d 397.

Although agents could have met their *Fed. R. Civ. P. 26(a)* obligation by merely describing to detainees documents in their possession/custody/control that could have been used in support of their claims and defenses, agents voluntarily assumed further duty to produce initially disclosed documents forthcoming; *Fed. R. Civ. P. 26(a)(1)(B)* posed no bar for such conduct, and allowed for possibility that defendant produce documents subject to initial disclosures; under circumstances, exclusion of documents that agents identified as part of their initial disclosures was not warranted and agents could use those documents even if they did not timely produce them. Solis-Alarcon v United States (2007, DC Puerto Rico) 514 F Supp 2d 185.

Parties could not circumvent *Fed. R. Civ. P. 26* and its requirements by announcing that they would not make further disclosures in absence of interrogatories or requests for production of documents; accordingly, agents were subject to *Fed. R. Civ. P. 26*'s duty to disclose documents in their possession, custody, or control that they could use in support of their claims and defenses and to seasonably supplement such disclosures; having failed to do so, agents had to face penalties imposed by *Fed. R. Civ. P. 37 (c)(1)*, and court excluded evidence that had not been disclosed. Solis-Alarcon v United States (2007, DC Puerto Rico) 514 F Supp 2d 185.

In employee's pregnancy discrimination claim, declaration of former employee was not admissible under *Fed. R. Civ. P. 37(c)(1)* because employee did not disclose him in her initial or amended disclosure as required by *Fed. R. Civ. P. 26(a)* or *26(e)(1)*; she failed to demonstrate that failure to disclose was substantially justified or that it was harmless, and court concluded that failure to disclose former employee as likely witness before defendants' summary judgment was filed deprived them of opportunity to depose him. Medina v Multaler (2007, CD Cal) 547 F Supp 2d 1099.

Although dismissal was too harsh sanction in light of lack of advance warning to plaintiff manufacturer and efficacy of lesser sanction, pursuant to *Fed. R. Civ. P. 37(b)(2)(a)(i)* manufacturer was prevented from presenting trial evidence as to its alleged consequential damages for breach of warranties because manufacturer's misconduct raised questions as to its willfulness or bad faith in withholding and not timely disclosing discovery materials. Thunder Mt. Custom Cycles, Inc. v Thiessen (2008, DC Colo) 2008 US Dist LEXIS 17142, stay den, as moot, motion den, as moot, stay gr, motion den (2008, DC Colo) 2008 US Dist LEXIS 105853, motion den, motion den, as moot (2008, DC Colo) 72 FR Serv 3d 604.

Pursuant to *Fed. R. Civ. P. 37(b)(2)(A)*, as sanction for failure of defendants to attend their scheduled depositions in violation of *Fed. R. Civ. P. 37(d)*, they were barred from presenting evidence regarding any claims or defenses that existed before last deposition date. Michael v Liberty (2008, DC Me) 547 F Supp 2d 43, motions ruled upon, judgment entered (2008, DC Me) 2008 US Dist LEXIS 55231.

Insurance company's lay witnesses who were added after deadline and its expert witnesses were excluded as sanction for untimely disclosure under *Fed. R. Civ. P. 37*. Dunn v State Farm Mut. Auto. Ins. Co. (2009, ED Mich) 264 FRD 266, 81 Fed Rules Evid Serv 359, request den (2010, ED Mich) 2010 US Dist LEXIS 3177.

In slip and fall case, guest's motion to exclude any evidence involving hotel's use of nonslip surface on its bathtubs was granted to extent that hotel was barred from introducing any evidence concerning nonslip surface product's bottle and label for its failure to timely produce that evidence and denied with respect to work tickets of contractor who allegedly applied product since it was not in possession of such information. Nosal v Granite Park LLC (2010, SD NY) 269 FRD 284.

Plaintiff was precluded from presenting expert testimony in civil litigation against paint company involving one of its deck coating products where its expert disclosures were made three months late, plaintiff never sought extension of time, plaintiff's excuse for delay was unconvincing, and disclosures that were made were did not comply with Fed. R. Civ. P. (a)(2)(B). Hard Surface Solutions, Inc. v Sherwin-Williams Co. (2010, ND Ill) 271 FRD 612, 78 FR Serv 3d 318.

On motion for summary judgment, several of exhibits used by plaintiff in its response to proposed findings of fact were excluded under *Fed. R. Civ. P. 37(c)(1)* because plaintiff had not shown how it could have been substantially justified in failing to produce those documents as required by *Fed. R. Civ. P. 26(a)* or (e). Dry Dock, L.L.C. v Godfrey Conveyor Co. (2010, WD Wis) 717 F Supp 2d 825, 72 UCCRS2d 496.

Defendant's defense to plaintiff's discrimination claims was that it eliminated plaintiff's position for financial reasons, and challenged witnesses did not relate to that defense but only to rebuttal of that defense and were not within scope of *Fed. R. Civ. P. 26(a)(1)*; because information indicating that witnesses existed arose during discovery, and it was plaintiff's obligation to pursue it, plaintiff could move for alternative sanctions under *Fed. R. Civ. P. 37(c)(1)*, but court denied her motion to exclude witnesses from trial. Bennett v Bd. of Educ. Joint Voc. Sch. Dist. (2011, SD Ohio) 25 AD Cas 756.

In sanction for its blatant disregard of orders, plaintiff was barred from modifying its final contentions; from advancing any arguments for infringement or against defendants' claims of noninfringement, based solely on court's constructions of patents; from advancing arguments not specifically and explicitly set forth in final contentions; from making claims and contentions against certain parties; and plaintiff's final contentions were stricken to extent they made claims against certain parties. In re Papst Licensing GmbH & Co. KG Litig. (2011, DC Dist Col) 273 FRD 339.

Plaintiff in disparate treatment case would not be allowed to call 11 witnesses who plaintiff asserted would testify that their employer had also treated them differently based on their ethnicity where plaintiff's assertion that she only knew of identity of witnesses at time of her deposition (taken after discovery had closed) was frivolous. Ghawanmeh v Islamic Saudi Acad. (2011, DC Dist Col) 274 FRD 329, 79 FR Serv 3d 980.

In suit alleging failure to pay severance benefits under pension plan, suing former employee's failure to disclose four witnesses to defendant until November 8, 2010, at 10:51 p.m., less than two hours before discovery deadline was not harmless and, therefore, defendants' motion to strike untimely announcement of witnesses was granted as, due to employee's delay, defendants were unable to depose any of witnesses or carry out discovery related to individuals prior to discovery deadline. Cruz v Bristol Myers Squibb Co. PR, Inc. (2011, DC Puerto Rico) 777 F Supp 2d 321.

In suit alleging failure to pay severance benefits under pension plan, suing former employee's failure to disclose disparate impact analyses and expert report regarding analyses during discovery process prevented defending employers from conducting appropriate discovery regarding analyses and deprived them of opportunity to depose proposed expert, challenge his credentials, solicit expert opinions of its own, or conduct expert-related discovery; therefore, employers' motion to strike disparate impact analyses was granted. Cruz v Bristol Myers Squibb Co. PR, Inc. (2011, DC Puerto Rico) 777 F Supp 2d 321.

In buyers' suit regarding purchase of secondary-market life insurance policies, where *Fed. R. Civ. P. 26(e)* and *Fed. R. Civ. P. 37(c)* sanctions of fees and costs associated with sanctions motion and with additional discovery were imposed because buyers' late disclosure of amount of damages they sought was inadequate, without justification, and prejudicial, but sanction of evidence preclusion was too drastic particularly since continuance would be feasible and stakes in case where high. Ritchie Risk-Linked Strategies Trading (Ir.), Ltd. v Coventry First LLC (2012, SD NY) 280 FRD 147, 81 FR Serv 3d 1336, objection denied, request den (2012, SD NY) 2012 US Dist LEXIS 79524.

In adversary action, bankruptcy debtor's failure to identify one witness as expert prior to filing his affidavit and report was neither substantially justified nor harmless, so that evidence was struck from consideration by court on creditor's summary judgment motion. Fin. Fed. Credit Inc. v Walter B. Scott & Sons, Inc. (In re Walter B. Scott & Sons, Inc.) (2010, BC DC Idaho) 436 BR 582.

Unpublished Opinions

Unpublished: Magistrate judge did not abuse discretion in precluding appellant's treating physician from testifying as expert witness since physician's "expert report" was insufficiently detailed and testimony failed to meet reliability standard under Federal Rules of Evidence. Robinson v Suffolk County Police Dep't (2013, CA2 NY) 2013 US App LEXIS 22948.

Unpublished: Snow and ice removal company's motion under *Fed. R. Civ. P. 26(a)(2)(C)* and *37(c)(1)* to exclude evidence that pharmacy patron sustained permanent injuries or would require future medical treatment as result of her fall on snow and ice in pharmacy parking lot was granted where patron disclaimed any intention of presenting expert testimony on those issues. Boucher v CVS/Pharmacy, Inc. (2011, DC NH) 2011 DNH 186.

**42. --Destruction or spoliation of evidence**

Dismissal of personal injury complaint arising out of tire's exploding as it was being mounted on wheel rim, for spoliation of second wheel on which similar tire had been mounted successfully, was drastic sanction; alternative sanctions could have fully protected defendants from prejudice, including instructing jury to presume that second tire was overinflated and that tire mounting machine and air compressor malfunctioned, and precluding plaintiff from offering evidence on these issues. West v Goodyear Tire & Rubber Co. (1999, CA2 NY) 167 F3d 776, 42 FR Serv 3d 1161.

Adverse inference instruction to jury was appropriate only where spoliation or destruction of evidence was intentional and for purposes of suppression of truth; evidence that defendant railroad conducted routine destruction of maintenance documents should have been presented to jury. Stevenson v Union Pac. R.R. (2004, CA8 Ark) 354 F3d 739, 63 Fed Rules Evid Serv 166, 57 FR Serv 3d 617.

Defendants' request for sanctions based on plaintiffs' spoliation of evidence was granted, and plaintiffs were precluded from introducing evidence of their expert's report or testimony relative to expert's examination of vehicle in its post-crash state, where (1) vehicle that was involved in accident that gave rise to lawsuit was relevant and should have been preserved for inspection by defendants because it had potential of providing defendants with evidence that could have disproved plaintiffs' theory of cause of accident, (2) at very least, plaintiffs acted negligently when they permitted spoliation of evidence by failing to preserve vehicle in its post-crash state for inspection by defendants, and (3) defendants' inability to inspect vehicle in its post-crash state prejudiced their ability to mount adequate defense to plaintiffs' manufacturing defect claim. Perez-Velasco v Suzuki Motor Co. (2003, DC Puerto Rico) 266 F Supp 2d 266.

Pursuant to *Fed. R. Civ. P. 37*, district court exercised its discretion and sanctioned defendant in breach of contract action for destruction of financial and marketing reports, as parties have duty to preserve documents relevant to litigation after they are on notice that litigation may be brought against them. CSI Inv. Partners II, L.P. v Cendant Corp. (2007, SD NY) 507 F Supp 2d 384, CCH Fed Secur L Rep94402.

In injured bicycle rider's negligence/breach of warranty suit against bicycle manufacturer, manufacturer failed its burden of showing that suit should be dismissed as discovery sanction

for spoliation under *Fed. R. Civ P. 37* because disappearance of faulty bicycle part while in possession of plaintiff's counsel was not shown to have occurred in bad faith; manufacturer also failed to show that lesser sanction would not do. Ladner v Litespeed Mfg. Co. (2008, ND Ala) 537 F Supp 2d 1206.

In recreational vehicle (RV) owners' and insurer's products liability suit against RV manufacturer, court sanctioned owners and insurer under *Fed. R. Civ. P. 37* for spoliating evidence by allowing their expert witness to remove RV's gas lines before manufacturer inspected RV after fire allegedly caused by faulty propane system because owners and insurer breached duty to preserve that evidence, which was highly relevant, but because degree of prejudice was limited, appropriate sanction was exclusion of all testimony of expert that was based on his personal observation of gas lines before their removal, rather than being based exclusively on photographs taken of gas lines before their removal. Wade v Tiffin Motorhomes, Inc. (2009, ND NY) 686 F Supp 2d 174, 70 UCCRS2d 319.

Plaintiff's motion for sanctions was granted in part because defendants took repeated, deliberate measures to prevent discovery of relevant electronically stored information, clearly acting in bad faith, and defendant individual knew of preservation and production orders and acted willfully to thwart those orders, thereby causing harm to plaintiff. Victor Stanley, Inc. v Creative Pipe, Inc. (2010, DC Md) 269 FRD 497.

In determining, under *Fed. R. Civ. P. 37(c)*, whether extreme sanction of barring expert's report and testimony because of spoliation of evidence is warranted, test articulated by Third Circuit relies on certain key considerations, including degree of fault of party who altered or destroyed evidence, degree of prejudice suffered by opposing party, and whether there is lesser sanction that will avoid substantial unfairness to opposing party and, where offending party is seriously at fault, will serve to deter such conduct by others in future. Teleglobe USA, Inc. v BCE Inc. (In re Teleglobe Communs. Corp.) (2008, BC DC Del) 392 BR 561.

Unpublished Opinions

Unpublished: Magistrate judge did not abuse his discretion by denying former employee's motion for sanctions and subsequent motion for reconsideration because it did not appear that any of employee's "observations" concerning significance of documents former employer produced in discovery raised questions about whether employer engaged in litigation misconduct, and nothing in record indicated that employer destroyed or altered any records, or made any conscious or intentional misstatements in discovery. Amfosakyi v Frito Lay, Inc. (2012, CA3 Pa) 2012 US App LEXIS 19147.

**43. --Miscellaneous**

District Court did not err in excluding plaintiff's expert witnesses' testimony as sanction for alleged obfuscatory discovery practices where defendant had notice of witness more than 2 months before trial, defendant deposed witness before trial, made no specific showing of harm resulting from discovery schedule, and in fact its detailed cross-examination of witness belied any serious suggestion that defendant had inadequate time to prepare. Freeman v Package

Machinery Co. (1988, CA1 Mass) 865 F2d 1331, 49 BNA FEP Cas 1139, 48 CCH EPD P 38456, 27 Fed Rules Evid Serv 198.

District court properly limited employee's damages in her hostile work environment action brought under Title VII, Civil Rights Act of 1964, 42 USCS §§ 2000e et seq., because employee failed to provide testimony of mental health expert, failed to provide any additional analysis regarding her damages issue, and exclusion of expert testimony due to discovery misconduct pursuant to *Fed. R. Civ. P. 37* was not abuse of discretion. Pena-Crespo v Puerto Rico (2005, CA1 Puerto Rico) 408 F3d 10, 95 BNA FEP Cas 1287, 86 CCH EPD P 41944.

There was no error in district court's application of *Fed. R. Civ. P. 37(c)* sanctions where plaintiff's late report sought to substantiate deposition testimony that was taken early in discovery process. untimeliness was neither justified nor harmless. Daniel v Coleman Co. (2010, CA9 Wash) 599 F3d 1045, CCH Prod Liab Rep P 18389.

Plaintiff's failure to provide defendant expert reports within meaning of *Fed. R. Civ. P. 26(a)* violated that rule and court's orders and was not "substantially justified," *Fed. R. Civ. P. 37(c)(1)*; indeed, there was no justification and failure was not "harmless"; so it was not abuse of discretion to exclude testimony. Walter Int'l Prods. v Salinas (2011, CA11 Fla) 650 F3d 1402, 23 FLW Fed C 297.

District court did not err in admitting expert's testimony in insurance coverage action because it fell within scope of his previously disclosed report; while expert's report suggested that both stroke and skull fracture contributed to insured's death, expert's report clearly focused on stroke. Gay v Stonebridge Life Ins. Co. (2011, CA1 Mass) 660 F3d 58.

In patent infringement case, district court did not abuse its discretion by ruling that expert could not testify on matters not disclosed in his expert report or deposition, and that he could not rely on testing that was not disclosed during discovery because exclusion was proper pursuant to both *Fed. R. Civ. P. 26* and *Fed. R. Civ P. 37*. Siemens Med. Solutions USA, Inc. v Saint-Gobain Ceramics & Plastics, Inc. (2011, CA FC) 637 F3d 1269, 97 USPQ2d 1897, reh den, reh, en banc, den (2011, CA FC) 2011 US App LEXIS 11413.

In employee's action for wrongful termination of employment in breach of contract and in bad faith, and for violations of Americans with Disability Act, 42 USCS §§ 12101 et seq., and Arizona Civil Rights Act, Ariz. Rev. Stat. § 41-1461 et seq., evidence produced after close of discovery in opposition to employer's motion for summary judgment was stricken under *Fed. R. Civ. P. 37(a)*. Fallar v Compuware Corp. (2002, DC Ariz) 202 F Supp 2d 1067.

Although patent holder acted unreasonably in failing to expedite its infringement litigation under *35 USCS § 271* after generic drug manufacturers made certification under 21 USCS § 355(j)(2)(A)(vii)(IV) that patent was invalid, manufacturers were not entitled under *Fed. R. Civ. P. 37* to preclude patent holder from waiving attorney-client privilege and introducing evidence supporting its advice of counsel defense to manufacturers' counterclaim for inequitable conduct. Dey. L.P. v Ivax Pharms., Inc. (2005, CD Cal) 233 FRD 567.

In suit under 26 USCS § 6672 to recover from decedent's estate employee income taxes and FICA contributions that decedent allegedly failed to pay, personal representatives of estate

were allowed to assert defense based on decedent's alleged cognitive problems even though they had failed to raise defense in their answer pursuant to *Fed. R. Civ. P. 8(c)*; however, five witnesses who were identified for first time in last-minute supplement to personal representatives' *Fed. R. Civ. P. 26(a)(1)* disclosures were precluded from testifying about decedent's cognitive problems as sanction under *Fed. R. Civ. P. 37* for improper disclosure. United States v Dunn (2007, ND Ill) 99 AFTR 2d 2205.

Where plaintiff's expert witness's fourth report was untimely pursuant to *Fed. R. Civ. P. 26(e)(2)*, it was not excluded pursuant to *Fed. R. Civ. P. 37(c)* because untimeliness was largely result of defendants' actions and defendants would suffer no prejudice by its admission; any references therein, however, to plaintiff's misappropriation of trade secrets claim was precluded because there was no reason that such issue could not have been discussed in prior reports. Edizone, L.C. v Cloud Nine (2008, DC Utah) 76 Fed Rules Evid Serv 779.

Expert testimony on issue of damages other than that previously disclosed in expert's reports was barred by *Fed. R. Civ. P. 37(c)* because of plaintiff's non-disclosure; however, lay witness could testify on issue of damages, so long as testimony was otherwise admissible. Edizone, L.C. v Cloud Nine (2008, DC Utah) 76 Fed Rules Evid Serv 779.

In insurer's life insurance coverage action against beneficiaries, report of forensic document expert of beneficiaries was stricken because it did not comply with *Fed. R. Civ. P. 26(a)(2)* by stating compensation received and including list of publications or cases in which he had testified, making report excludable under *Fed. R. Civ. P. 37(c)(1)*; further, alleged expert did not qualify under Daubert and *Fed. R. Evid. 702* in that he was not certified by American Board of Forensic Document Examiners and his job duties did not exclusively or even particularly focus on document examination and he also did not show that opinions were sufficiently reliable. Am. Gen. Life & Accident Ins. Co. v Ward (2008, ND Ga) 530 F Supp 2d 1306, 75 Fed Rules Evid Serv 441.

In case brought under Title VII of Civil Rights Act of 1964, as amended, in which federal employee propounded *Fed. R. Civ. P. 26(b)(1)* interrogatory seeking identities of all persons with knowledge, personal or otherwise, on which employer relied in support of first, second, third, and fourth affirmative defenses of employer's answer to complaint and employer did not disclose witness that it intended to rely on to support its defenses at trial until joint pretrial statement was filed, just two weeks before originally scheduled trial date and well after discovery had closed, testimony of witness would be excluded under *Fed. R. Civ. P. 37*; employer argued unsuccessfully that witness was offered solely for impeachment purposes, and employee had unsuccessfully sought to learn identity of witness or substance of testimony by discovery. Elion v Jackson (2008, DC Dist Col) 544 F Supp 2d 1.

In plan participant's suit for disability benefits, affidavit was struck and, therefore, medical records were disregarded because (1) participant failed to timely disclose affidavit, (2) participant did not show that affidavit was to be used solely for impeachment since affidavit sought admission of documents to make affirmative showing of essential element of claim that defendants breached their fiduciary duty, and (3) failure to disclose affidavit was not harmless. Niles v Am. Airlines, Inc. (2008, DC Kan) 563 F Supp 2d 1208, 44 EBC 2135.

Errata sheet corrections of witnesses' deposition testimony submitted by a former franchisee in a contract dispute with a franchisor exceeded the boundaries of permissible corrections under Fed. R. Civ. P. 30(e) because the errata sheet testimony included new evidence in support of the franchisee's claim; franchisor was entitled to sanctions under *Fed. R. Civ. P. 37* in the form of an order barring the franchisor from adducing any evidence about the subject of the attempted correction. Citgo Petroleum Corp. v Ranger Enters. (2009, WD Wis) 632 F Supp 2d 878.

Affidavit of bank's corporate representative regarding whether account agreements were mailed to bank customer was not subject to exclusion based on failure to disclose representative or most of evidence relied upon prior to close of discovery; customer was not prejudiced or surprised by affidavit, and it had plenty of time to cure any prejudice it might have suffered. Envtl. Equip. & Serv. Co. v Wachovia Bank, N.A. (2010, ED Pa) 741 F Supp 2d 705.

Having considered record, court concluded that extreme sanction under *Fed. R. Civ. P. 37(c)(1)* of precluding corporation from relying on opinions expressed in expert's declaration was not warranted because expert's noninfringement opinions were critical to corporation's defense and court was not persuaded that company was unduly prejudiced by timing or substance of purportedly "new" opinions; scheduling order, as amended, governing case was silent as to whether parties may file new expert declarations in connection with summary judgment motions, and company failed to demonstrate that corporation acted in flagrant disregard of court order or with willful deception. B. Braun Melsungen AG v Teramo Med. Corp. (2010, DC Del) 749 F Supp 2d 210, motion den, motion for new trial denied, judgment entered, injunction gr (2011, DC Del) 2011 US Dist LEXIS 43205.

Bankruptcy court abused its discretion in permitting debtor to present evidence of damages that had never been disclosed as required by *Fed. R. Civ. P. 26(a)(1)* where claimant never had opportunity to prepare and present evidence in opposition to debtor's lost profits computation, and debtor's actions could not be justified on grounds that claimant failed to request computation before trial or failed to move in limine to preclude debtor from presenting evidence that *Fed. R. Civ. P. 37(c)* already precluded. Corwin v Gorilla Cos. LLC (In re Gorilla Cos. LLC) (2011, DC Ariz) 454 BR 115, reh gr, in part, reh den, in part (2011, DC Ariz) 2011 US Dist LEXIS 62709.

Pursuant to *Fed. R. Civ. P. 37(c)(1)*, alleged expert opinions regarding IRS's records and procedures were excluded where taxpayer had failed to timely disclose opinions and that failure was neither harmless not substantially justified. United States v Smith (2012, DC Ariz) 2012-1 USTC P 50409, 109 AFTR 2d 2637, request den, as moot (2012, DC Ariz) 2012 US Dist LEXIS 127156.

Defendant's motion in limine to exclude building photographs was granted under *Fed. R. Civ. P. 37(c)(1)* because photographs were not timely produced as required by *Fed. R. Civ. P. 26(a)* and plaintiff did not contend inclusion of photographs was needed to prevent manifest injustice. Morris v Long (2012, ED Cal) 89 Fed Rules Evid Serv 112.

Defendant's motion to preclude plaintiff from requesting specific dollar amount of emotional distress damages during argument was granted as it would have been unfair to defendant for

plaintiff to submit specific dollar amount for damages to jury without defendant having opportunity to discover basis for claim and opportunity before trial to rebut that basis. Maharaj v Cal. Bank & Trust (2013, ED Cal) 288 FRD 458.

Unpublished Opinions

Unpublished: In employee's suit against his employer under Federal Employers' Liability Act, *45 USCS §§ 51*-60, for injuries allegedly incurred from defective switch, employee's late-filed affidavit regarding inspection of switch was properly struck under *Fed. R. Civ. P. 37(c)(1)* because (1) employee failed to identify affiant as fact witness or timely amend his discovery answers to include this information; (2) employee did not offer adequate explanation for untimely disclosure; and (3) consideration of late-produced affidavit would have significantly prejudiced employer. Haas v Del. & Hudson Ry. Co. (2008, CA2) 2008 US App LEXIS 13417.

Unpublished: Under *Fed. R. Civ. P. 37(c)(1)*, employee who alleged that employer failed to promote him to engineering manager because he was not Asian was properly prohibited from admitting testimony of witnesses who were not timely disclosed under *Fed. R. Civ. P. 26* because employee did not argue that his lack of disclosure was substantially justified and employer would have been prejudiced by introduction of undisclosed witnesses' testimony given that employee relied upon those witnesses to support his argument that employer had policy of discriminating against non-Asians. Nance v Ricoh Elecs., Inc. (2010, CA11 Ga) 2010 US App LEXIS 11385.

Unpublished: District court did not abuse its discretion in striking plaintiff's expert reports because although she claimed she had trouble locating affordable expert, that did not excuse her failure to comply with district court's deadline for expert disclosure or request extension of that deadline. Martinez v Target Corp. (2010, CA10 NM) 2010 US App LEXIS 13489.

**44. Miscellaneous**

Sanctions against defendant and its attorneys were appropriate where they were imposed for massive and unnecessary discovery requests after defendant found no additional evidence to support its counterclaim, in what District Court characterized as straightforward breach of contract case, and for failure to disclose existence of taped conversation between one of defendant's attorneys and witness. Chapman & Cole v Itel Container Int'l B.V. (1989, CA5 Tex) 865 F2d 676, 13 FR Serv 3d 124, cert den *(1989) 493 US 872, 107 L Ed 2d 155, 110 S Ct 201.*

Sanction order may be enforced prior to entry of final judgment so long as it does not impede litigant's access to courts. *Schaffer v Iron Cloud, Inc. (1989, CA5 La) 865 F2d 690, 13 FR Serv 3d 47.*

Inability to show how adversary's wrongful conduct caused any harm is proper basis for denying sanctions. Sheets v Yamaha Motors Corp. (1990, CA5 La) 891 F2d 533, 13 USPQ2d 1637, 15 FR Serv 3d 643, reh den, en banc (1990, CA5 La) *897 F2d 528.*

Court would not impose flat prohibition on Rule 37 sanction motions after entry of judgment, but such motion should be filed without unreasonable delay. *Lancaster v Independent Sch. Dist. No. 5 (1998, CA10 Okla) 149 F3d 1228, 14 BNA IER Cas 257, 41 FR Serv 3d 552.*

Former inmate was not entitled to sanctions for defendant's appending to summary judgment motion affidavits of four allegedly new witnesses, since names were in plaintiff's medical records which consisted of only 8 pages. Higgins v Correctional Med. Servs. (1999, CA7 Ill) 178 F3d 508.

Pursuant to former *Fed. R. Civ. P. 37(b)(2)*, sanctions against counsel himself would not have been inappropriate where plaintiffs' counsel attributed delay in responding to discovery requests--even after motion to compel was granted--to his inexperience practicing law, incompetence of his support staff, and his own deliberate decision to direct his attention to cases of paying clients instead of plaintiffs' pro bono matter. Malloy v WM Specialty Mortg. LLC (2008, CA1 Mass) 512 F3d 23.

Where insureds sued insurer regarding residential barn fire and antiques appraiser's testimony that appraiser was shown photograph of second floor was apparently contradictory to insureds' earlier assertion during pre-trial discovery that they had no such photographs, it was not error to give adverse inference jury instruction, because it was not sanction and did not require findings since district court left jury in full control of all fact finding. Mali v Fed. Ins. Co. (2013, CA2 Conn) 720 F3d 387.

Nothing in either Rule 37(a) or 37(b)(2) authorizes award of attorneys' fees for successfully defending against petition seeking to hold allegedly recalcitrant witness in contempt of court for refusing to permit petitioner to videotape deposition absent court order for videotaping. Westmoreland v CBS, Inc. (1985, App DC) 248 US App DC 255, 770 F2d 1168, 2 FR Serv 3d 1451.

In action in which plaintiff filed suit against defendants alleging claims of false and misleading advertising in violation of § 43(a) of Lanham Act, *15 USCS § 1125*, and Pennsylvania common law of unfair competition, defendant did not engage in any bad faith effort to surprise plaintiff with last-minute evidence, inasmuch as one surveyor seemed to have conducted such additional research in response to one of plaintiff's challenges to technical validity of her survey. Merisant Co. v McNeil Nutritionals, LLC (2007, ED Pa) 242 FRD 315, 2007-1 CCH Trade Cases P 75680, 73 Fed Rules Evid Serv 173.

Plaintiff was denied sanctions, *Fed. R. Civ. P. 37(b)(2)*, because any prejudice suffered by plaintiff did not warrant default judgment and it would have been unjust to prohibit defendants from calling individuals at issue as witnesses; as to spoliation, plaintiff presented no evidence in response to defendants' assertion that recording device was not in operation on relevant date; as to document requests, defendants provided all relevant documents and produced supplemental initial disclosures before court's order. Rude v Dancing Crab at Wash. Harbour, LP (2007, DC Dist Col) 245 FRD 18.

In action in which plaintiff contended that electronic files destroyed by college supported her claim that college had actual notice of professor's sexually inappropriate conduct prior to alleged sexual assault of which plaintiff complained, college could not take advantage of *Fed. R. Civ. P. 37(f)*'s good faith exception to imposition of sanctions for failing to preserve electronic information because (1) college did not suspend its routine destruction of back up tapes at any

time, and (2) college did not have one consistent electronic information system in place. Doe v Norwalk Cmty. College (2007, DC Conn) 248 FRD 372.

Defendant filed approximately 6,000 pages of responsive documents more than one month after plaintiffs filed underlying motion to compel; this conduct alone merited imposition of sanctions under *Fed. R. Civ. P. 37(a)(5)(A)*. DL v District of Columbia (2008, DC Dist Col) 251 FRD 38.

Reasonable people could not differ as to appropriateness of bulk of plaintiffs' motion to compel, as defendant's pattern of tardy and piecemeal disclosure, and fact that approximately 6,000 pages of responsive documents were turned over after plaintiffs' renewed motion to compel was filed, demonstrated that filing motion to compel was only adequate remedy available to plaintiffs; moreover, there was no genuine dispute with respect to vast majority of plaintiffs' requests; indeed, many of objections raised by District were plainly inapplicable; accordingly, plaintiffs' request for award of reasonable expenses, including attorney's fees, was granted. DL v District of Columbia (2008, DC Dist Col) 251 FRD 38.

All defendants willfully violated court's discovery orders by failing to turn over their general ledgers and other business records, lying to court about inability to obtain documents from third parties, and destroying and withholding documents that were within scope of discovery requests and orders; these defendants have committed fraud upon court and these willful violations have prejudiced, indeed likely destroyed, plaintiff's ability to prove its case, and have squandered judicial resources by dragging court into frequent policing of discovery disputes over inordinate period of time; in light of defendants' history of violations, and explicit warning that failure to comply would result in default judgment entering, court found that lesser sanctions would not deter defendants from further delaying discovery. S. New Eng. Tel. Co. v Global NAPs, Inc. (2008, DC Conn) 251 FRD 82.

Default judgment is proper remedy as long as party had notice of discovery order. S. New Eng. Tel. Co. v Global NAPs, Inc. (2008, DC Conn) 251 FRD 82.

Homeowners' motion for sanctions was denied because discovery sanctions were not warranted since although homeowners repeatedly failed to comply with various court-ordered discovery deadlines and never took attorney's deposition, attorney committed no abuse of discovery. Roberts v Crowley (2008, DC Mass) 538 F Supp 2d 413.

Although the Port Authority of New York and New Jersey failed to preserve certain documents relevant to Hispanic police officers' claims that the Port Authority denied them promotions based on their national origin, race, and ethnicity, the court declined to impose spoliation sanctions pursuant to *Fed. R. Civ. P. 37(c)* because there was insufficient evidence indicating that the Port Authority lacked document preservation and destruction policies, there was no evidence suggesting that the Port Authority intended to destroy evidence that it believed would be adverse to its interest, and the destroyed documents were not necessary to prove that commanding officers used varying criteria for recommending officers for promotions. Adorno v Port Auth. (2009, SD NY) 73 FR Serv 3d 10.

In lawsuit filed by taxpayer for abatement of tax penalties, taxpayer had not complied with discovery requests made by government during two phases of litigation because taxpayer's

attorney had not conducted reasonable investigation in effort to find documents that were related to government's discovery requests, including taxpayer's financial records that had been kept for number of years by taxpayer's accountant; taxpayer's last-minute use of ledgers and check copies as exhibits in taxpayer's responsive motion was precluded as sanction pursuant to *Fed. R. Civ. P. 37*. Am. Friends of Yeshivat Ohr Yerushalayim, Inc. v United States (2009, ED NY) 73 FR Serv 3d 1183, 103 AFTR 2d 2571, motion gr, complaint dismd, judgment entered (2009, ED NY) 2009-2 USTC P 50541, 104 AFTR 2d 5747.

Magistrate's decision to impose sanctions against plaintiff, including attorney's fees and imposition of $ 10,000 fee against plaintiff's attorney, was supported by substantial evidence and was not clearly erroneous because plaintiff delayed in disclosing relevant documents that were responsive to defendant's discovery requests. Travel Sentry, Inc. v Tropp (2009, ED NY) 669 F Supp 2d 279.

In disability discrimination case based on employee's mental condition, where defendants' motion to compel employee to submit to independent mental examination (IME) was granted in part, sanctions against employee were not warranted, because there was lack of clear and binding precedent governing conduct of IME. Letcher v Rapid City Reg'l Hosp., Inc. (2010, DC SD) 23 AD Cas 225, 14, 14 CCH Accommodating Disabilities Decisions P 14-95.

Parties' motions in limine were denied in part because fact that some evidence was not disclosed from some witnesses under *Fed. R. Civ. P. 26* was not severe enough to warrant complete preclusion of testimony at trial particularly when witnesses and information were known to other party and any failure was harmless. Joy Global, Inc. v Wis. Dep't of Workforce Dev. (In re Joy Global, Inc.) (2010, DC Del) 423 BR 445.

Plaintiff's witness, who was employee of plaintiff, could provide testimony in support of plaintiff's motion for summary judgment, even though formal report was not provided as required by *Fed. R. Civ. P. 26*, because defendants did receive information about opinions that witness would express, data or other information considered, exhibits witness would use and witness's title of employment with plaintiff; any failure to provide more formalized report was harmless error. *Fendi Adele S.R.L. v Burlington Coat Factory Warehouse Corp. (2010, SD NY) 689 F Supp 2d 585,* reconsideration gr, amd (2010, SD NY) 2010 US Dist LEXIS 30391.

In case in which employer moved for sanctions associated with motion to compel employee's deposition, employer's attorney's assertion that she had not received any communication from employee's counsel regarding their absence did not satisfy requirement in *Fed. R. Civ. P. 37(d)(1)(B)* that she had in good faith conferred or attempted to confer with party failing to act in effort to obtain answer or response without court action. Simms v Ctr. for Corr. Health & Policy Studies (2011, DC Dist Col) 272 FRD 36, 78 FR Serv 3d 733.

In this negligence action, defendant's motion for sanctions was denied in part because there was no basis to conclude that former theatre employee's testimony was obtained in violation of rules prohibiting practice of law by non-attorneys; taking sworn factual statement from witness did not per se involve exercise of professional legal judgment sufficient to constitute practice of law. Jackson v UA Theatre Circuit, Inc. (2011, DC Nev) 278 FRD 586.

Plaintiff's untimely disclosure of its expert witness did not warrant preclusion or sanctions pursuant to *Fed. R. Civ. P. 37(b)(2)(A)(ii)*-(vii) because plaintiff demonstrated that it relied, in good faith, on 90-day rule contained in *Fed. R. Civ. P. 26(a)(2)(D)* and, more importantly, there was no evidence to suggest that plaintiff's conduct was in callous disregard for applicable rules governing expert disclosures. Optigen, LLC v Int'l Genetics, Inc. (2012, ND NY) 877 F Supp 2d 33.

Bankruptcy trustee was not entitled to sanctions pursuant to *Fed. R. Civ. P. 37(c)(2)* where transferee's refusal to admit during discovery that it was subject to federal anti-money laundering regulation was relatively harmless. Brincko v Rio Props. (In re Nat'l Consumer Mortg., LLC) (2013, DC Nev) 90 Fed Rules Evid Serv 560.

Unpublished Opinions

Unpublished: District court was within its discretion when it interpreted its own extension order to leave unchanged due dates of individual discovery elements and concluded that plaintiff had missed those deadlines because willfulness, fault, or bad faith is not required for *Fed. R. Civ. P. 37(c)* sanctions, and plaintiff's failure to meet deadlines was not substantially justified or harmless; confusion over deadlines is not substantial justification for discovery violation, and plaintiff was on notice that district court might not have shared his interpretation of interpretation of extension order in February 2004, and he could have complied with original due dates or asked district court for another extension; interference with trial schedule, even if court can reschedule dates, is not harmless; furthermore, plaintiff never argued to district court that his failure to meet deadlines was harmless and never asked for findings on harmlessness. Drnek v Variable Annuity Life Ins. Co. (2007, CA9 Ariz) 2007 US App LEXIS 29972.

Unpublished: Imposition of sanctions was properly denied under *Fed. R. Civ. P. 37(b)* for alleged discovery violations because all depositions and affidavits were filed prior to determination of summary judgment motion and movant had not filed motion to compel discovery. Steward v Int'l Longshoreman's Ass'n, Local No. 1408 (2009, CA11 Fla) 2009 US App LEXIS 116.

Unpublished: Sanctions imposed against lender under *Fed. R. Civ. P. 37* and *26(g)* were not abuse of discretion because district court had determined that more severe sanctions of default judgment to curb abuse of judicial process were not warranted where borrower had withdrawn his motion to compel and lender had not violated court discovery order. Steed v EverHome Mortg. Co. (2009, CA11 Ga) 2009 US App LEXIS 991.

Unpublished: Plaintiff failed to show that district court abused its discretion when it failed to impose sanctions when city's attorney terminated Fed. R. Civ. P. 30(b)(6) deposition of city's designated representative and no motion for leave to terminate deposition was filed because district court explained that termination was provoked by actions of plaintiff's counsel, which included screaming at top of his lungs to defense counsel, "Stop talking now!," and, in lieu of imposing sanctions, district court reminded counsel for both parties of their obligations as members of Florida Bar and cautioned that future nonprofessional conduct would have been met with severe sanctions. Baker v Welker (2011, CA11 Fla) 2011 US App LEXIS 17750.

Unpublished: In sanctioning appellant by denying claims for future wages and limiting witness's testimony, magistrate judge erred by failing to expressly consider whether appellant's noncompliance with discovery rules was substantially justified or harmless; magistrate also failed to make proper findings in denying appellant's motion for sanctions. Bailey v Christian Broad. Network (2012, CA4 Va) 2012 US App LEXIS 12249.

Unpublished: Since judge did not abuse his discretion in finding that plaintiff had not violated scheduling order, judge did not err in refusing to impose sanctions under *Fed. R. Civ. P. 37(b)(2)(A)*. V.Mane Fils S.A. v Int'l Flavors & Fragrances, Inc. (2011, DC NJ) 2011 US Dist LEXIS 38637.

Unpublished: In patent infringement action, defendants' motion for sanction under *Fed. R. Civ. P. 37* was denied because although court acknowledged that plaintiffs may be responsible for late supplementation at issue, there was no indication that plaintiffs' conduct was willful or in bad faith, they had not demonstrated any history of dilatoriness, and they had demonstrated that their claims may have merit during pendency of litigation; plus, defendants failed to show any prejudice from late supplementation. Reckitt Benckiser Inc. v Tris Pharma, Inc. (2011, DC NJ) 2011 US Dist LEXIS 120045.

### C. Appeal and Review

### 45. Appealability and finality

Where defendant-railroad failed to produce reports and statements of witnesses relative to train-crossing accident as directed by court, defendant-railroad is in criminal, not civil, contempt from which appeal may be taken at once as means of testing discovery order. Southern R. Co. v Lanham (1968, CA5 Ga) 403 F2d 119, 12 FR Serv 2d 860, 33 ALR3d 427, reh den (1969, CA5 Ga) 408 F2d 348.

Discovery sanctions did not represent final order appealable as of right. Cromaglass Corp. v Ferm (1974, CA3 Pa) 500 F2d 601, 18 FR Serv 2d 1293.

Order by district court under Rule 37(b)(2) imposing sanction of expenses and reasonable attorney's fees is appealable order. David v Hooker, Ltd. (1977, CA9 Cal) 560 F2d 412, 3 BCD 857, 14 CBC 303, CCH Bankr L Rptr P 66564, 24 FR Serv 2d 159.

Denial of motion to compel production of allegedly classified government documents, although usually routine, non-appealable order, was reviewable where very basis for order of dismissal was motion for discovery. Clift v United States (1979, CA2 Conn) 597 F2d 826, 203 USPQ 561, 27 FR Serv 2d 155, summary judgment gr, dismd (1991, DC Conn) 808 F Supp 101.

Order of District Court denying motion to compel discovery is "final" and therefore appealable within meaning of *28 USCS § 1291*. National Life Ins. Co. v Hartford Acci. & Indem. Co. (1980, CA3 Pa) 615 F2d 595, 28 FR Serv 2d 1165.

Order of contempt for refusal to answer deposition entered by judge of Second Circuit Court of Appeals sitting in multidistrict case is not reviewable by Fifth Circuit Court of Appeals. In re

Corrugated Container Anti-Trust Litigation (1980, CA5 Tex) 620 F2d 1086, 1980-2 CCH Trade Cases P 63435, 29 FR Serv 2d 1108, reh den (1980, CA5 Tex) 625 F2d 1016 and cert den *(1981) 449 US 1102, 101 S Ct 897, 66 L Ed 2d 827.*

Civil contempt orders and orders imposing sanctions under Rule 37 are interlocutory and may not be appealed until entry of final judgment. United States v Westinghouse Electric Corp. (1981, CA9 Cal) 648 F2d 642, 1981-1 CCH Trade Cases P 64112, 31 FR Serv 2d 952.

When sanction is imposed pursuant to Rule 37 party may not appeal order immediately; to permit such appeal would be to undermine Rule for if every sanction imposed to deter delay were immediately appealable, litigant could forestall resolution of its case almost indefinitely, or for as long as trial judge sought to impose sanction and court's only recourse would be to withhold sanctions and thereby negate any effect Rule 37(a)(4) could ordinarily have. Eastern Maico Distributors, Inc. v Maico-Fahrzeugfabrik, G.m.b.H. (1981, CA3 Pa) 658 F2d 944, 32 FR Serv 2d 584.

Sanction order against association and its attorneys for deliberately withholding discovery material was immediately appealable since 25 percent surcharge on plaintiffs' actual expenses and attorneys' fees was not compensatory nor avoidable by complying with court's order and thus was criminal. Law v NCAA (1998, CA10 Kan) 134 F3d 1438, 1998-1 CCH Trade Cases P 72045, 1998 Colo J C A R 621, 39 FR Serv 3d 1278.

Trial court's published findings of attorney's misconduct were not independently appealable once monetary sanctions imposed by court for that conduct had been nullified; federal appellate courts review decisions, judgments, orders, and decrees, not factual findings, reasoning, or explanations. Williams v United States (In re Williams) (1998, CA1 RI) 156 F3d 86, reh, en banc, den (1998, CA1) 158 F3d 50 and cert den *(1999) 525 US 1123, 142 L Ed 2d 904, 119 S Ct 905* and (criticized in Butler v Biocore Med. Techs., Inc. (2003, CA10 Kan) 348 F3d 1163, 57 FR Serv 3d 32).

Denial of individual's discovery order, which was directed to non-party witness to underlying litigation that was pending in different circuit, was immediately appealable because order denying discovery that was directed to non-party to underlying litigation that was pending in another circuit conclusively resolved only issues that were before district court, discovery issues affecting nonparty, and independent of merits of underlying lawsuit, and thus, individual would have had no means of obtaining appellate review of that order absent immediate appeal; moreover, individual's appeal of motion to compel, which sought to enforce non-party witness's compliance with subpoena, was logically appeal of quashing of underlying subpoena. Wiwa v Royal Dutch Petroleum Co. (2004, CA5 Tex) 392 F3d 812, 60 FR Serv 3d 192, 35 ELR 20003.

Ninth Circuit expressly interprets U.S. Supreme Court's decision in Cunningham, which prohibited *28 USCS § 1291* collateral-order appeal of *Fed. R. Civ. P. 37* sanction order, as extending to sanctions under 28 USCS § 1927 and district court's inherent powers, and Ninth Circuit overrules its prior conflicting cases. Stanley v Woodford (2006, CA9 Cal) 449 F3d 1060, cert den (2007, US) *127 S Ct 1127, 166 L Ed 2d 897.*

Sanction order determining that defendant falsely answered interrogatories and deeming certain facts established is not final order and is nonappealable; interlocutory appeal from

sanction order will not be permitted where facts taken as proven go to merits of case involving matters enmeshed in factual and legal issues comprising cause of action but will be permitted where such facts are too important to be denied review and too independent of cause itself to require that appellate consideration be deferred until whole case is adjudicated. Evanson v Union Oil Co. (1980, Em Ct App) 619 F2d 72, 29 FR Serv 2d 878, cert den *(1980) 449 US 832, 66 L Ed 2d 38, 101 S Ct 102.*

Plaintiff's motion for *Fed. R. Civ. P. 37* sanctions based on defense counsel's alleged misconduct during discovery was partially allowed as counsel admitted to "dropping ball" on discovery and he improperly objected to certain questions, and improperly interfered with plaintiff's questioning, during non-party's deposition. Booker v Mass. Dep't of Pub. Health (2007, DC Mass) 498 F Supp 2d 383, adopted, motions ruled upon (2007, DC Mass) 2007 US Dist LEXIS 58264.

Unpublished Opinions

Unpublished: Although like sanctions imposed under *Fed. R. Civ. P. 37(a)*, 28 USCS § 1927, and court's inherent power, *Fed. R. Civ. P. 11* sanctions invoked concerns regarding finality, avoiding piecemeal appeals, and availability of effective appellate review, but where plaintiff's attorney had filed his Notice of Appeal (NOA) of sanctions order same day judgment entered and had not amended his NOA, any defect in his appeal was cured almost instantly, and since he had filed appeal of interlocutory order, and was not using it to challenge *28 USCS § 1291* final dismissal of plaintiffs' claims, "subsequent events" doctrine applied to cure any defects in NOA such that appellate court had jurisdiction. Gonzales v Texaco Inc. (2009, CA9 Cal) 2009 US App LEXIS 18370.

Unpublished: Debtor's argument that creditors' original failure to produce documents within discovery period and continued failure to produce additional documents and witness in opposing motion for summary judgment prejudiced debtor at trial was waived, as it was not presented to bankruptcy court; moreover, lack of meaningful prejudice clearly supported decision not to impose sanctions. Lavender v Manheim's Pa. Auction Servs. (In re Lavender) (2010, CA2) 2010 US App LEXIS 23021.

**46. Standing to appeal**

Two oil companies which entered nolo contendere pleas in criminal antitrust cases have standing to appeal order entered in related civil litigation permitting civil plaintiffs discovery of testimony and materials which companies provided grand jury even though companies were not named as parties and United States, only named party respondent, declined to participate in appeal, on grounds that: (1) proceeding directly affects interests of oil companies, (2) they are only parties who could provide adversity necessary for full presentation of issues, and (3) they are arguably within zone of interests which grand jury secrecy protects. Petrol Stops Northwest v United States (1978, CA9 Cal) 571 F2d 1127, 1978-1 CCH Trade Cases P 61935, 25 FR Serv 2d 765, revd on other grounds (1979) 441 US 211, 99 S Ct 1667, 60 L Ed 2d 156, 1979-1 CCH Trade Cases P 62560, 27 FR Serv 2d 269.

Appellant's attorneys had standing under U.S. Const. art. III, § 2, and could appeal *Fed. R. Civ. P. 37* sanction order entered by district court, even though monetary sanctions were not

imposed, because district court had repeatedly, explicitly publicly reprimanded attorneys for failing to comply with their discovery obligations under *Fed. R. Civ. P. 26(e)* and district court had made clear, when it entered its sanction order, that it was sanctioning not only appellant but attorneys as well; attorneys' due process rights were violated because, until sanction order was entered, they had no idea that district court was contemplating sanctioning them and they were not afforded opportunity to defend themselves before sanction order was entered. Bowers v NCAA (2007, CA3 NJ) 475 F3d 524.

Although not party to litigation, deponent, as person affected, is entitled to reasonable notice of motion to compel discovery, reasonable notice of ruling thereon, and reasonable access to judicial review, pursuant to Rules 1, 26(c), and 37(a); inasmuch as no precise time is prescribed for filing of appeal by non-party, such filing must be made within reasonable time. Fischer v McGowan (1984, DC RI) 585 F Supp 978, 10 Media L R 1650, 38 FR Serv 2d 1475.

Where bankruptcy court awarded attorneys' fees to creditors as sanction under *Fed. R. Civ. P. 37* in adversary proceeding with debtor, debtor waived right to challenge award on appeal because she did not oppose creditors' motion for sanctions in bankruptcy court. Hansen v Moore (In re Hansen) (2007, BAP9) 368 BR 868.

**47. Jurisdiction**

Appellate court lacks jurisdiction where judgment appealed from, by which court orders judgment debtors to answer interrogatories of judgment creditor after finding no matter tending to incriminate involved, is not final judgment; judgment debtors have opportunity remaining in any contempt proceeding for failure to obey order to show incriminating tendency of answers to interrogatories propounded. Childs v Kaplan (1972, CA8 Mo) 467 F2d 628, 16 FR Serv 2d 723, 16 FR Serv 2d 1338.

Amount of attorneys' fees plaintiffs were entitled to because of company's discovery abuse had not been quantified, and plaintiffs' appeal was dismissed for lack of jurisdiction because questions about attorneys' fees remained pending in district court and appeal was, therefore, premature. Sonii v GE (2004, CA7 Ill) 359 F3d 448, 93 BNA FEP Cas 382, 85 CCH EPD P 41627, 57 FR Serv 3d 1248, subsequent app (2005, CA7 Ill) 146 Fed Appx 852.

Court lacked pendent interlocutory appellate jurisdiction over district court's order denying party's motion for sanctions for violation of discovery order; fact that other party's interlocutory appeal from denial of dismissal motion on sovereign immunity grounds was appealable under collateral order doctrine did not mean that discovery order qualified for such treatment. McKesson Corp. v Islamic Republic of Iran (1995, App DC) 311 US App DC 197, 52 F3d 346 (criticized in LaShawn A. v Barry (1995, App DC) 314 US App DC 392, 69 F3d 556) and cert den *(1996) 516 US 1045, 133 L Ed 2d 660, 116 S Ct 704.*

**48. Scope of review**

Evaluation of appropriateness of discovery sanctions against attorney under former Rule 37(a)(4) of Federal Rules of Civil Procedure may require reviewing court to inquire into importance of information sought or adequacy or truthfulness of response. Cunningham v

Hamilton County (1999) 527 US 198, 144 L Ed 2d 184, 119 S Ct 1915, 99 CDOS 4630, 99 Daily Journal DAR 5896, 1999 Colo J C A R 3444, 43 FR Serv 3d 739, 12 FLW Fed S 349, subsequent app (2001, CA6 Ohio) 7 Fed Appx 459.

Appellate court reviewing dismissal pursuant to FRCP 16 and *37* does not ask whether it would have imposed same sanction as district court; instead, proper inquiry is whether district court abused its discretion in imposing that sanction. Riggs v City of Pearland (1997, SD Tex) 177 FRD 395, 40 FR Serv 3d 804.

Appellate review of court's *FRCP 37* sanctions is narrow. Bayoil, S.A. v Polembros Shipping, Ltd. (2000, SD Tex) 196 FRD 479, 48 FR Serv 3d 606.

**49. Abuse of discretion**

Court of Appeals cannot reverse trial court unless its discretion in imposing sanctions is abused. General Dynamics Corp. v Selb Mfg. Co. (1973, CA8 Mo) 481 F2d 1204, 17 FR Serv 2d 1221, cert den *(1974) 414 US 1162, 39 L Ed 2d 116, 94 S Ct 926.*

Rule 37, which empowers District Court to make such orders as are just when party fails to comply with discovery order, places court's handling of such matters beyond appellate review when there has been no abuse of discretion. Local Union No. 251 v Town Line Sand & Gravel, Inc. (1975, CA1 RI) 511 F2d 1198, 19 FR Serv 2d 1521.

Although sanctions available to trial judge are discretionary and imposition of such sanctions will not be reversed unless there has been abuse of discretion, where drastic sanctions of dismissal or default are imposed, range of discretion is more narrow and losing party's noncompliance must be due to willfulness, fault, or bad faith. Fox v Studebaker-Worthington, Inc. (1975, CA8 Minn) 516 F2d 989, 20 FR Serv 2d 248.

Although default judgments under both Rules 37 and 55 are reviewed for abuse of discretion, underlying review may differ in case where court relied on factors other than discovery abuses in granting default judgment. Ackra Direct Mktg. Corp. v Fingerhut Corp. (1996, CA8 Minn) 86 F3d 852, 35 FR Serv 3d 477.

Appellate court reviewing dismissal pursuant to FRCP 16 and *37* does not ask whether it would have imposed same sanction as district court; instead, proper inquiry is whether district court abused its discretion in imposing that sanction. Riggs v City of Pearland (1997, SD Tex) 177 FRD 395, 40 FR Serv 3d 804.

Where defendant university prevailed, for most part, on its motion to compel in False Claims Act action, its request for attorney's fees was granted. United States ex rel. O'Connell v Chapman Univ. (2007, CD Cal) 245 FRD 646, 68 FR Serv 3d 735.

Unpublished Opinions

Unpublished: In reviewing imposition of discovery sanctions, including dismissal, appellate court uses abuse of discretion standard, but factual findings are reviewed for clear error. Oliva

v Trans Union, LLC (2005, CA7 Ill) 123 Fed Appx 725, reh den (2005, CA7 Ill) 2005 US App LEXIS 3992.

Unpublished: There was no abuse of discretion by court awarding $ 8,860 in attorney fees for employer's discovery misconduct, specifically, not providing summary score sheets for all of candidates up for agent's position until after court ruled on summary judgment motion. Conner v State Farm Mut. Auto. Ins. Co. (2008, CA6 Ky) 2008 FED App 192N.

**50. --Particular cases**

When defendant's pleadings are stricken, appellate court's review should be particularly scrupulous lest District Court too lightly resort to this extreme sanction, amounting to judgment against defendant without opportunity to be heard on merits; nevertheless when defendant demonstrates flagrant bad faith and callous disregard of its responsibilities, District Court's choice of extreme sanction is not abuse of discretion; it is not responsibility of reviewing court to say whether it would have chosen more moderate sanction rather it is reviewing court's responsibility solely to decide whether District Court could, in its discretion, have determined defendant's conduct to be so flagrant as to justify striking its pleadings. Emerick v Fenick Industries, Inc. (1976, CA5 Fla) 539 F2d 1379, 22 FR Serv 2d 510.

District court did not abuse its discretion in refusing to award sanctions against employer in worker's retaliatory discharge suit where record reflected that both parties' counsel were combative, obstinate, and wholly uncooperative in exchanging information pertinent to litigation. Sweat v Peabody Coal Co. (1996, CA7 Ill) 94 F3d 301, 35 FR Serv 3d 1146.

There was no abuse of discretion in district court judge's resolution of sanctions request where record did not contain formal motion seeking monetary sanctions based on plaintiff's deceit at trial when plaintiff had been fired from his job right before trial, yet trial counsel used his job and upstanding citizenship in its arguments. Newsome v McCabe (2003, CA7 Ill) 319 F3d 301, 60 Fed Rules Evid Serv 740, cert den *(2003) 539 US 943, 156 L Ed 2d 630, 123 S Ct 2621.*

District court did not abuse its discretion when it denied employer's motion for sanctions because discrepancies between employee's testimony and events as depicted on surveillance videotapes were not so egregious as justify dismissing claims. Allen v Tobacco Superstore, Inc. (2007, CA8 Ark) 475 F3d 931, 99 BNA FEP Cas 1127.

In attorney negligence action, district court properly concluded that client's disclosure of expert's written report after close of discovery ran afoul of *Fed. R. Civ. P. 26(a)(2)* and N.D. Ga. R. 26.2(C), as interpreted by court of appeals, but sanction imposed pursuant to *Fed. R. Civ. P. 37(c)(1)*, i.e., exclusion of expert's testimony, was abuse of discretion; facts in record revealed that client failed to produce expert report not through willful delay or stonewalling, but from good-faith attempt to accommodate law firm's attorneys in scheduling their depositions over several months and good-faith belief that more practical and productive way to structure discovery was to identify its legal expert, engage in all relevant fact discovery of law firm's attorneys, and then to produce expert's written report and to engage in expert discovery; consequently, client had substantial justification for its conduct as to its expert report, record did

not support district court's willful-delay determination as to report, and district court abused its discretion in excluding expert's testimony. OFS Fitel, LLC v Epstein (2008, CA11 Ga) 549 F3d 1344, 21 FLW Fed C 1270.

Order imposing sanctions against appellant law firm and its attorneys was affirmed because district court did not abuse its discretion in concluding that appellants' use of insurance company's confidential files to solicit clients violated protective order and was abuse of discovery. Kaufman v Am. Family Mut. Ins. Co. (2010, CA10 Colo) 601 F3d 1088.

District court was well within its discretion in imposing sanctions upon defendant for its failure to comply with discovery obligations, based upon district court's finding that defendant's principal was non-responsive to questions of plaintiff's counsel during his deposition, and was obstructionist and hostile to counsel's most benign questions. Lamex Foods, Inc. v Audeliz Lebron Corp. (2011, CA1 Puerto Rico) 646 F3d 100.

District court struck affidavits because it found police officers unjustifiably failed to comply with *Fed. R. Civ. P. 26(e)(1)(A)*; district court determined lesser sanctions would not have adequately penalized officers, or deter future litigants from refusing to comply with discovery requests; given additional consideration of lesser sanctions by district court, there was no abuse of discretion in striking affidavits. Carmody v Kan. City Bd. of Police Comm'r (2013, CA8 Mo) 713 F3d 401, 20 BNA WH Cas 2d 933.

In patent infringement case, district court did not abuse its discretion in concluding that appellant violated *Fed. R. Civ. P. 26(e)* with delayed disclosure of drawings to supplement its contention interrogatory response, and imposed appropriate sanction of striking drawings under *Fed. R. Civ. P. 37* because patentee could not cure harm at late stage of disclosure and supplementation was inadequate; fact that drawings were disclosed within notice provision provided under 35 USCS § 282 did not impact fact that *Fed. R. Civ. P. 26(e)* was violated. Woodrow Woods & Marine Exhaust Sys., Inc. v Deangelo Marine Exhaust, Inc. (2012, CA FC) 692 F3d 1272, 104 USPQ2d 1169.

Airline's motion for new trial on ground that court's ruling that barred airline from making any reference to sensitive source information prevented it from effectively presenting its defense was denied, where court properly treated passenger's motion in limine as conceptually analogous to motion for failure to disclose discoverable material under *Fed. R. Civ. P. 37*, and imposed appropriate sanction of denying use of such undisclosed information at trial; thus, exclusion of any reference to sensitive source information was properly ordered by court. Cerqueira v Am. Airlines, Inc. (2007, DC Mass) 484 F Supp 2d 232.

Unpublished Opinions

Unpublished: District court did not abuse its discretion when, as sanction under *Fed. R. Civ. P. 37(b)(2)*, it ordered former wife to pay her former husband's costs and attorney's fees related to his motions to compel and for sanctions, but otherwise denied remainder of husband's sanction requests and dismissed, as moot, his motions to compel; district court's decision was well within range of discretion accorded to it. McAbee v McAbee (2008, CA3 Pa) 2008 US App LEXIS 9731.

Unpublished: District court's *Fed. R. Civ. P. 37* order striking portions of an answer in a seaman's personal injury action, thereby resulting in dismissal of the general contractor's and its purchaser's cross-claims against a subcontractor and city, was vacated where the district court had not explained why the delay and expense incurred could not have been cured by the proposed monetary sanctions, especially in light of the subcontractor's and city's inability to articulate any specific meaningful prejudice from the four month delay in disclosing a material witness or the delay in producing certain documents, there was no evidence that the general contractor and purchaser, who had already replaced the lawyers responsible for the discovery abuse, would not have participated in the discovery process in good faith, and there was no basis for the conclusory assertion that lesser sanctions were not sufficient to ensure that the general contractor and purchaser did not benefit from their obstruction of discovery. Ocello v White Marine, Inc. (2009, CA2 NY) 2009 US App LEXIS 21300.

Unpublished: Given district court's factual findings, none of which were clearly erroneous, district court did not abuse its discretion in determining that plaintiff acted willfully and in bad faith in his noncompliance with discovery order and in choosing to impose sanction of dismissal and award of default judgment. Shcherbakovskiy v Seitz (2011, CA2 NY) 2011 US App LEXIS 24854.

Unpublished: District court's dismissal of plaintiff's civil rights action based on discovery violations and failure to prosecute was not abuse of discretion; defendants had been parties to litigation for five years and plaintiff's actions had continuously frustrated completion of discovery and defendants' ability to prepare defense, and plaintiff's history of unresponsiveness suggested alternative sanctions would not have been effective. Muhammad v Court of Common Pleas (2013, CA3 Pa) 2013 US App LEXIS 17062.

Unpublished: District court did not abuse its discretion by finding that judgment debtor and his counsel had not fully complied with discovery, or in compelling them to do so, and by imposing sanctions of $ 1,500 upon both because they had three opportunities to comply properly with discovery, but by standing on specious contentions, they failed to do so. Porter Bridge Loan Co. v Northrop (2014, CA10 Okla) 2014 US App LEXIS 8956.

Unpublished: In overtime suit, district court did not abuse its discretion in denying fire chiefs' motion for discovery sanctions, because their rights were not prejudiced since information sought, assuming it was not already provided by city, was worthless without ruling that they were non-exempt employees. Bass v City of Jackson (2013, CA5 Miss) 21 BNA WH Cas 2d 335, 163 CCH LC P 36163.

### 51. Miscellaneous

In considering District Court dismissal of action under Rule 37, allowing such dismissal if party fails to obey court order to provide or permit discovery, federal reviewing court should not consider whether it would, as original matter, have dismissed action, but rather whether District Court abused its discretion in dismissing action. National Hockey League v Metropolitan Hockey Club (1976) 427 US 639, 96 S Ct 2778, 49 L Ed 2d 747, 1976-1 CCH Trade Cases P 60941, 21 FR Serv 2d 1027, reh den *(1976) 429 US 874, 97 S Ct 196, 97 S Ct 197, 50 L Ed 2d 158.*

Appellate review of final judgment of contempt involves power to review civil element as well as criminal element and to grant relief affecting both. *Hickman v Taylor (1945, CA3 Pa) 153 F2d 212,* affd (1947) 329 US 495, 91 L Ed 451, 67 S Ct 385, 34 Ohio Ops 395 (superseded by statute on other grounds as stated in Hawkins v District Court of Fourth Judicial Dist. (1982, Colo) 638 P2d 1372) and (superseded by statute on other grounds as stated in Graham v Gielchinsky (1991) 126 NJ 361, 599 A2d 149) and (superseded by statute on other grounds as stated in USW v Ivaco, Inc. (2003, ND Ga) 29 EBC 2897).

In cases invoking sanction power of Rule 37, District Court must clearly state its reasons so that meaningful review may be had on appeal; appellate court cannot realistically review monetary sanction unless there is offered on record both justification for sanction and accounting by court, and by adverse party, of reasonable expenses, including attorneys' fees, caused by noncompliance. Carlucci v Piper Aircraft Corp. (1985, CA11 Fla) 775 F2d 1440, 3 FR Serv 3d 325.

Because Rule 37 entitles Court of Appeals to award party whatever interest he may be entitled to under law, fact that prevailing plaintiff had failed to file cross-appeal from trial court's refusal to award postjudgment interest did not prevent Court of Appeals from making such award, and plaintiff's request would be granted. Bell, Boyd, & Lloyd v Tapy (1990, CA7 Ill) 896 F2d 1101.

Couple argued that district court improperly denied several motions couple filed requesting that district court compel employer to cooperate in discovery; however, at best, couple's arguments merely urged different interpretation of facts; couple did not show that district court's interpretation of facts was untenable, or that denying motions somehow fell outside broad range of choice open to district court under circumstances. Holloman v Mail-Well Corp. (2006, CA11 Ga) 443 F3d 832, 37 EBC 1293, 19 FLW Fed C 388.

Lead plaintiffs' due process rights were not violated when lead plaintiffs contended that district court's failure to enforce U.S. Dist. Ct., C.D. Cal. R. 37-1 denied them meaningful opportunity to respond to appellees' motion in limine; no such pre-motion meeting was required and any local rule that required conference prior to court's imposition of sanctions under *Fed. R. Civ. P. 37* would have been inconsistent with Rule 37(c) and therefore unenforceable. Hoffman v Constr. Protective Servs. (2008, CA9 Cal) 541 F3d 1175, remanded, in part, costs/fees proceeding (2008, CA9 Cal) 156 CCH LC P 35480 and amd (2008, CA9 Cal) 2008 US App LEXIS 19623 and reprinted as amd (2008, CA9 Cal) 2008 US App LEXIS 19681.

Magistrate judge's order allowing owners' motion for sanctions was reversed where magistrate judge's award of sanctions was contrary to law because defendants did not flaunt court discovery order or fail to disclose information in violation of *Fed. R. Civ. P. 37*, so they were not liable for Rule 37 sanctions. Tyson v Equity Title & Escrow Co. of Memphis, LLC (2003, WD Tenn) 282 F Supp 2d 825, 56 FR Serv 3d 1265.

Unpublished Opinions

Unpublished: In reviewing imposition of discovery sanctions, including dismissal, appellate court uses abuse of discretion standard, but factual findings are reviewed for clear error. Oliva

v Trans Union, LLC (2005, CA7 Ill) 123 Fed Appx 725, reh den (2005, CA7 Ill) 2005 US App LEXIS 3992.

Unpublished: Court of Appeals is not proper forum for employee to request transcript of grievance proceeding when employee did not proceed with any discovery in district court. McAdams v City of Huntsville (2005, CA5 Tex) 138 Fed Appx 613.

Unpublished: Appellate court could find no discernible error in district court's imposition of sanctions under *Fed. R. Civ. P. 37(b)* and (c)(1) for guarantor's use of fraudulent documents; therefore, district court's dismissal of guarantor's third party claim against law firm and lawyers was appropriate. REP MCR Realty, L.L.C. v Lynch (2006, CA7 Ill) 200 Fed Appx 592.

## II. MOTION FOR ORDER COMPELLING DISCLOSURE OR DISCOVERY [RULE 37(a)]

### A. In General

### 52. Generally

Purposes of Rule 37(a) of Federal Rules of Civil Procedure, dealing with orders compelling discovery, include (1) protection of courts and opposing parties from delaying or harassing tactics during discovery process, and (2) prevention of delay and costs to other litigants caused by filing of groundless motions. Cunningham v Hamilton County (1999) 527 US 198, 144 L Ed 2d 184, 119 S Ct 1915, 99 CDOS 4630, 99 Daily Journal DAR 5896, 1999 Colo J C A R 3444, 43 FR Serv 3d 739, 12 FLW Fed S 349, subsequent app (2001, CA6 Ohio) 7 Fed Appx 459.

Rule permits District Court to impose sanctions only "on motion" and plainly contemplates that allegedly refractory party will have opportunity to explain his conduct; failure to offer motion prevents court from exercising its power. Reinders Bros., Inc. v Rain Bird Eastern Sales Corp. (1980, CA7 Wis) 627 F2d 44, 30 FR Serv 2d 238.

Federal Rules of Civil Procedure provide necessary boundaries and requirements for formal discovery, and parties must comply with such requirements in order to resort to provisions of *FRCP 37* governing motions to compel. Suid v. CIGNA Corp. (2001, DC VI) 203 FRD 227.

### 53. Discretion of court

In exercise of court's discretion, availability of confidential information, being subject to abuse, may be disclosed under protective order so as to prevent its improper use. Scovill Mfg. Co. v Sunbeam Corp. (1973, DC Del) 61 FRD 598, 181 USPQ 53, 18 FR Serv 2d 1241.

Motion to compel discovery pursuant to *FRCP 37(a)* is addressed to sound discretion of trial court. EEOC v Klockner H & K Machs. (1996, ED Wis) 168 FRD 233, 71 BNA FEP Cas 833, 70 CCH EPD P 44714, 35 FR Serv 3d 1446.

In exercising its discretion on motion to compel discovery pursuant to *FRCP 37(a)*, court must be mindful that parties are permitted to obtain discovery regarding any matter, not privileged, which is relevant to subject matter involved in pending action. EEOC v Klockner H & K Machs. (1996, ED Wis) 168 FRD 233, 71 BNA FEP Cas 833, 70 CCH EPD P 44714, 35 FR Serv 3d 1446.

**54. No need for motion**

Where party has received adequate notice that certain discovery proceedings are to occur by specific date and that party fails to comply, court may impose sanctions to compel discovery without formal motion by opposing party. Tamari v Bache & Co. (Lebanon) S.A.L. (1984, CA7 Ill) 729 F2d 469, 38 FR Serv 2d 1044.

Court may proceed on its own motion to dismiss plaintiffs from action for noncompliance with order to respond to defendant's discovery where defendants had not filed motion for sanctions under Rule 37. Booker v Anderson (1979, ND Miss) 83 FRD 284.

While plaintiff's failure to seek protective order to avoid answering interrogatories under Fed. R. Civ. P. 33, which sought information that was duplicative of her deposition testimony, was not excused, there came point beyond which award under *Fed. R. Civ. P. 37(a)(4)(A)* was not to be used to compensate party for insisting upon its rights for no practical benefit, and thus, lesser sanction than that requested was awarded under circumstances of case. Drouin v Symetra Life Ins. Co. (2007, DC Mass) 242 FRD 167.

Equal rights center's allegations that property management company limited number of tenants with government assistance vouchers and had discriminated against prospective tenant because she had voucher, in violation of District of Columbia Human Rights Act, were sufficient to warrant discovery under *Fed. R. Civ. P. 56(f)* on issue of whether company engaged in discrimination after center's corporate charter was reinstated, and thus, center's motion to compel company to respond to requests for discovery was unnecessary. Bourbeau v Jonathan Woodner Co. (2009, DC Dist Col) 600 F Supp 2d 1.

Plaintiff's discovery request was insufficiently broad to include correspondence with third parties and suspicion was insufficient to grant motion to compel. Averill v Gleaner Life Ins. Soc'y (2009, ND Ohio) 626 F Supp 2d 756.

Unpublished Opinions

Unpublished: Sanctions under *Fed. R. Civ. P. 37* were properly denied because district court did not order counsel for employer to stipulate to employee's documents and exhibits for her discrimination claims and there was no other basis for sanctions or finding of contempt; further, district court did not violate Fed. R. Civ. P. 16(d) by failing to enter order after pretrial conference. Enwonwu v Fulton-Dekalb Hosp. Auth. (2008, CA11 Ga) 2008 US App LEXIS 10372.

**55. Form of motion**

Fact that order to produce documents is oral rather than written and was not entered pursuant to formal written Rule 37(a) motion does not deprive it of any of its binding force and affect. Penthouse International, Ltd. v Playboy Enterprises, Inc. (1981, CA2 NY) 663 F2d 371, 32 FR Serv 2d 1071.

District Court properly declines to rule upon motion for order compelling production of documents where motion does not comply with provision of local rule that such motion state that counsel

are unable to reach accord after personal meeting and consultation and sincere attempts to resolve differences and that it recite date, time, and place of such personal conference and names of all individuals attending. Sullivan v Savin Business Machines Corp. (1984, ND Ind) 38 FR Serv 2d 1051.

Plaintiff made out colorable claim of personal jurisdiction against defendants, and discovery was limited to defendants' contacts with Illinois, where plaintiff brought suit; if there were still disputes, parties were advised that strict compliance with *Fed. R. Civ. P. 37(a)(1)* and N.D. Ill. Loc. R. 37.2 would be required before discovery motions would be entertained. Hach Co. v Hakudo Co., Ltd. (2011, ND Ill) 784 F Supp 2d 977.

**56. Time for motion**

There is no specific time limit for a motion to compel further answers to interrogatories, and ten day time limit for objections to interrogatories provided in Rule 33 cannot be read into Rule 37(a). Riley v United Air Lines, Inc. (1962, SD NY) 32 FRD 230, 7 FR Serv 2d 622.

Rather than limit discovery to issues involved in particular case, discovery is permitted as to acts and events transpiring subsequent to those giving rise to cause of action where there is possibility that information sought may be relevant to subject matter of pending action. Goldinger v Boron Oil Co. (1973, WD Pa) 60 FRD 562, 1974-1 CCH Trade Cases P 74975.

Since Federal Rules of Civil Procedure do not specify time limit for filing motion to compel, court is called upon to establish reasonable time for party to bring motion to compel. Gault v Nabisco Biscuit Co. (1999, DC Nev) 184 FRD 620, 44 FR Serv 3d 1152.

If conduct of respondent to discovery necessitates motion to compel, requester of discovery must protect himself by timely proceeding with motion to compel; if he fails to do so, he acts at his own peril. Wells v Sears Roebuck & Co. (2001, SD Miss) 203 FRD 240.

Unpublished Opinions

Unpublished: *Fed. R. Civ. P. 37(a)* order compelling appellant to attend oral deposition was properly issued prior to appellant's actual failure to appear for deposition where appellant had already objected not only to time, place, and manner of noticed deposition, but also indicated he would only agree to be deposed upon written questions. Albert v Starbucks Coffee Co. (2007, App DC) 2007 US App LEXIS 196.

**57. --Premature motions**

Motion to compel discovery is premature if it is filed before any request for discovery. Bermudez v Duenas (1991, CA9 Guam) 936 F2d 1064, 91 CDOS 4621, 91 Daily Journal DAR 7190, 19 FR Serv 3d 1443.

In lawsuit filed under *5 USCS § 552(a)(4)(B)* and 42 C.F.R. § 2.12 (2000), plaintiff's motion to compel production of documents was premature; because documents he sought where very ones that U.S. Bureau of Land Management had refused to give him in response to his FOIA

requests, granting plaintiff's motion to compel would convert his discovery motion into dispositive motion. Robbins v United States BLM (2004, DC Wyo) 219 FRD 685, 58 FR Serv 3d 219.

Under *Fed. R. Civ. P. 37(a)*, plaintiff properly filed motion to compel discovery after futilely attempting to informally contact opposing counsel on four occasions--twice by phone and twice by e-mail--to obtain expanded answers to interrogatories and requests for production of documents; even though defense counsel was on medical leave during part of that period, plaintiff's having filed his motion to compel five business days after his counsel made his first telephone call did not render motion premature. Pederson v Preston (2008, DC Dist Col) 250 FRD 61, 70 FR Serv 3d 1271.

In contractor's defamation and intentional infliction of emotional distress suit against two home owners, contractor's *Fed. R. Civ. P. 37* motion to compel was premature because it was filed just one day after contractor's first renewed request for production following court's lifting of stay of discovery was submitted; under Fed. R. Civ. P. 34(b)(2)(A), owners had 30 days in which to respond. Metzler Contr. Co. LLC v Stephens (2009, DC Hawaii) 642 F Supp 2d 1192.

Because plaintiffs discovery request was premature and did not comply with *Fed. R. Civ. P. 26(d)(1)*, *37(a)(1)*, or D. Md. Loc. R. 104.4, 104.7, and as neither counsel complied with their obligation to cooperate with respect to planning and executing discovery or resolving discovery disputes, no discovery was to take place until after ruling on defendant's motion to dismiss. Madison v Harford County (2010, DC Md) 268 FRD 563.

In maritime breach of oral contract case that used Maryland state law, plaintiff's attempt to depose defendant was premature and in violation of D. Md. R. 104 because no scheduling order had been entered in case; however, defendant's refusal to answer deposition subpoena was improper because defendant, after first attempting in good faith to resolve dispute without court action pursuant to D. Md. R. 104, should have filed motion for protective order pursuant to *Fed. R. Civ. P. 26(c)*, moved to quash subpoena pursuant to Fed. R. Civ. P. 45(c)(3), or moved to terminate or limit deposition pursuant to Fed. R. Civ. P. 30(d)(3). *Balt. Line Handling Co. v Brophy (2011, DC Md) 771 F Supp 2d 531, 2011 AMC 975.*

Pro se plaintiff in employment discrimination case could not seek order directing defendant to produce discovery because plaintiff had never directed any formal discovery requests to defendant. Ward v Am. Pizza Co. (2012, SD Ohio) 279 FRD 451.

**58. --Other particular cases**

Fact plaintiff is seeking discovery of facts which occurred after suit was filed is not determinative of plaintiff's motion to compel answers to interrogatories. Cleo Wrap Corp. v Elsner Engineering Works, Inc. (1972, MD Pa) 59 FRD 386, 176 USPQ 266, 17 FR Serv 2d 1392.

Although *FRCP 37* does not specify any time limit within which motion to compel has to be brought, where plaintiff corporation waited 18 months to move to compel production of documents, i.e., three weeks before trial and six months after discovery cutoff, any discovery violations were waived through unreasonable delay; motion was untimely and was denied. Cont'l Indus. v Integrated Logistics Solutions LLC (2002, ND Okla) 211 FRD 442.

District court, pursuant to *Fed. R. Civ. P. 37*, would not consider information that was brought to court's attention for first time after court ruled on discovery dispute. Mitchell v AMTRAK (2003, DC Dist Col) 217 FRD 53.

Court decided defendant's motion to compel production of documents despite fact that it was filed after discovery cutoff date where: 1) defendant's evidence demonstrated that plaintiff responded to document requests with statements that it had produced or would have produced documents, that plaintiff's counsel stated in writing that she planned to make supplemental production of documents, that defendant's counsel repeatedly and diligently requested plaintiff to produce requested documents and things, and that plaintiff never clearly stated that it would not produce requested and promised documents until it was too late to file timely discovery motion within terms of non-expert discovery cutoff date; 2) court would not rigidly enforce discovery cutoff by barring discovery motion in circumstances in which defendant and its counsel reasonably relied to its detriment upon representations of plaintiff and its counsel that plaintiff would produce documents at issue; and 3) under circumstances, interest of court in efficient management of its caseload by enforcement of discovery cutoff yielded to court's overriding interest in fairness and equity. M2 Software, Inc. v M2 Communs., L.L.C. (2003, CD Cal) 217 FRD 499, summary judgment den, summary judgment gr, request den (2003, CD Cal) 281 F Supp 2d 1166.

Employee's motion to order employer to produce two witnesses for depositions and to allow employee additional time to complete such depositions was denied where court found that employee's filing of her motion eight days before discovery closed did not even come close to allowing everything that had to be done to be concluded before discovery closed. Bethea v Comcast (2003, DC Dist Col) 218 FRD 328, 57 FR Serv 3d 428.

Government's motion to compel tobacco companies to produce documents stored in their lawyers' firms was denied because government never adequately explained why it delayed in filing its motion when it should have known two years earlier of companies' position and because granting motion would have jeopardized trial date. United States v Philip Morris USA, Inc. (2004, DC Dist Col) 219 FRD 203.

In securities class action against chemical corporations, class' motions to compel one corporation's compliance with outstanding discovery requests under *Fed. R. Civ. P. 37* were denied as untimely where motions to compel were filed on day discovery closed, and class could not claim any prejudice because class was on notice that corporation was objecting to any remaining discovery requests by class, class had option to file motion to compel for months before close of discovery, stay of discovery was never entered, materials sought by class were irrelevant to question of timeliness of motion to compel, class never filed any motion to enforce its document subpoena, and corporation would still be required to comply with outstanding discovery requests if it was not dismissed from action. In re Sulfuric Acid Antitrust Litig. (2005, ND Ill) 231 FRD 331, 2005-2 CCH Trade Cases P 74960, 62 FR Serv 3d 946.

Motion to compel was untimely, where scheduling order established date for completion of discovery, and date was extended by subsequent orders; in order to timely obtain discovery which third-party plaintiff sought in his motion to compel, motion had to be filed sufficiently in

advance of discovery deadline (not motions deadline); motion was filed two weeks after extended deadline expired and did not meet this requirement. Days Inn Worldwide, Inc. v Sonia Invs. (2006, ND Tex) 237 FRD 395.

Unpublished Opinions

Unpublished: Denial of insured's motion to compel discovery and motion for sanctions based on insurer's alleged failure to provide correspondence between insurer and its outside counsel in timely manner was not abuse of discretion because requests to produce were untimely, as discovery had closed four months prior to discovery requests, and because information contained in correspondence was largely redundant of other evidence. Boral Indus. v Cont'l Cas. Co. (2005, CA11 Ga) 144 Fed Appx 36.

**59. Compliance with required procedures**

Upon remand, trial court was required to tailor discovery order allowing discovery by insurers of certain communications between insured and underlying defense counsel, should parties not be able to reach substantial agreement on their own under *Fed. R. Civ. P. 37(a)(1)*. Vicor Corp. v Vigilant Ins. Co. (2012, CA1 Mass) 674 F3d 1.

Plaintiffs satisfied their obligation to confer in good faith with defendant prior to filing motion to compel with bankruptcy court where plaintiffs' counsel conferred with defendant's counsel, requesting complete responses to discovery requests by certain date, and defendant's counsel did not agree to request. Wellness Int'l Network, Ltd. v Sharif (2013, CA7 Ill) 727 F3d 751, 58 BCD 116.

District Court properly declines to rule upon motion for order compelling production of documents where motion does not comply with provision of local rule that such motion state that counsel are unable to reach accord after personal meeting and consultation and sincere attempts to resolve differences and that it recite date, time, and place of such personal conference and names of all individuals attending. Sullivan v Savin Business Machines Corp. (1984, ND Ind) 38 FR Serv 2d 1051.

Failure to follow procedures specified in former *FRCP 37(a)(2)(B)* is grounds for court to deny motion to compel. Kidwiler v Progressive Paloverde Ins. Co. (2000, ND W Va) 192 FRD 193.

Federal Rules of Civil Procedure provide necessary boundaries and requirements for formal discovery, and parties must comply with such requirements in order to resort to provisions of *FRCP 37* governing motions to compel. Suid v. CIGNA Corp. (2001, DC VI) 203 FRD 227.

Defendants' experts did not meet exceptions to written expert report requirements of *Fed. R. Civ. P. 26(a)(2)* because it was not shown that they did not regularly give expert testimony as part of their employment and they were not treating physicians; exclusion of their testimony was too harsh remedy under *Fed. R. Civ. P. 37*, and proper remedy was to require disclosure of reports and to extend discovery deadline. Lee v Valdez (2008, ND Tex) 2008 US Dist LEXIS 70979 (criticized in Greenhaw v City of Cedar Rapids (2009, ND Iowa) 255 FRD 484).

After counsel had telephonic discussion respecting period of time which should be covered by authorization for release of plaintiff employee's National Guard records, defendants' motion to

compel discovery of records should have contained certification regarding conference, as required under *Fed. R. Civ. P. 37(a)(1)*. Mills v East Gulf Coal Preparation Co., LLC (2009, SD W Va) 259 FRD 118.

Because employee failed to make good faith effort to reach agreement with employer over discovery dispute, employee's motions to compel were denied for failure to comply with D. P.R. R. 26(b) and *Fed. R. Civ. P. 37(a)(1)*. Velazquez-Perez v Developers Diversified Realty Corp. (2011, DC Puerto Rico) 272 FRD 310.

Where there was no certification by debtor's counsel, as required by *Fed. R. Civ. P. 37(a)*, Fed. R. Bankr. P. 7037, before entry of any discovery sanctions, debtor's counsel demonstrated, by appending copies of his communications with plaintiff's counsel, his thorough effort to obtain such cooperation. Court was satisfied that proper effort had been made by debtor's counsel to obtain discovery cooperation and compliance by plaintiff but such cooperation had not been forthcoming. Media House Prods. v Amari (In re Amari) (2014, BC ND Ill) 505 BR 830.

Unpublished Opinions

Unpublished: In suit by government against business operator, operator waived argument that government failed to comply with meet-and-confer requirement of *Fed. R. Civ. P. 37* before filing motion to compel, as operator failed to raise argument in district court; in any event, operator's conduct clearly demonstrated that further efforts to secure discovery without court intervention would have been fruitless. United States v Hempfling (2010, CA9 Cal) 2010 US App LEXIS 13519.

Unpublished: Because plaintiff employee's counsel contravened *Fed. R. Civ. P. 37* by filing motion to compel discovery without first having attempted to confer in good faith with defendant employer's counsel regarding pending discovery requests, and district court noted that requests were, among other things, either duplicative of information that had already been disclosed or were patently overbroad, it was not abuse of discretion to have denied motion. Bialko v Quaker Oats Co. (2011, CA3 Pa) 2011 US App LEXIS 13225.

Unpublished: In case in which borrower appealed district court's entry of summary judgment in favor of bank, district court did not err in denying his motion to compel discovery from bank; motion was premature since borrower had not complied with consultation requirement in *Fed. R. Civ. P. 37(a)(1)*. Haynes v JPMorgan Chase Bank, N.A. (2012, CA11 Ga) 2012 US App LEXIS 2487.

Unpublished: In case in which borrower appealed district court's entry of summary judgment in favor of bank, district court did not err in denying his motion to compel discovery from bank; motion was premature since borrower had not complied with consultation requirement in *Fed. R. Civ. P. 37(a)(1)*. Haynes v JPMorgan Chase Bank, N.A. (2012, CA11 Ga) 2012 US App LEXIS 2487.

**60. --Certification included with motion**

District court did not abuse its discretion in denying products liability plaintiff's motion to compel discovery where plaintiff delayed raising issue until after close of discovery, after motion for

summary judgment had been filed, after briefing schedule had been set, and after her time for response had come and gone, nor did her motion include required certification that she had in good faith conferred or attempted to confer with opposing party to make discovery without court action. Kalis v Colgate-Palmolive Co. (2000, CA7 Ill) 231 F3d 1049, 48 FR Serv 3d 453.

Court may excuse former *FRCP 37(a)(2)(A)* good faith certification requirement where temporal exigencies require speedy action or where efforts at informal compromise would have been futile. Land Ocean Logistics, Inc. v Aqua Gulf Corp. (1998, WD NY) 181 FRD 229.

Under former *FRCP 37(a)(2)(A)*, attachment of good faith certificate, in proper form, is mandatory prerequisite to court's consideration of motion to compel; if certificate is not attached to motion, motion will be denied without prejudice. Ross v Citifinancial, Inc. (2001, SD Miss) 203 FRD 239.

Despite plaintiff's displeasure with defendants' refusal to settle, magistrate judge's denial of plaintiff's motion for sanctions was supported by record and did not present clear error of law; plaintiff's arguments were clearly and sufficiently addressed by judge and plaintiff failed to show that magistrate's determination--that requirement to certify good faith efforts towards settlement was satisfied--was clearly erroneous. Berman v Cong. Towers Ltd. P'ship (2004, DC Md) 325 F Supp 2d 590.

Plaintiff included in his motion to compel certification that he, in good faith, conferred and attempted to confer with defendants in effort to secure discovery and disclosure that was requested, however, neither certification nor motion to compel contained any facts to describe or identify steps that were taken by parties to resolve discovery dispute; plaintiff's certification made only conclusory statement that plaintiff conferred and attempted to confer with defendants, but defendants did not dispute this certification; while plaintiff could have described process with more specificity, motion was not overruled for his failure to do so and certification requirement was met. Cory v Aztec Steel Bldg., Inc. (2005, DC Kan) 225 FRD 667, dismd, in part (2005, DC Kan) 2005 US Dist LEXIS 15298, affd (2006, CA10 Kan) 468 F3d 1226, cert den (2007, US) *127 S Ct 2134, 167 L Ed 2d 864.*

Trademark holder's motion to compel accused infringers to produce responsive documents was denied because trademark holder failed to provide certification of its good faith efforts to confer prior to filing motion under former *Fed. R. Civ. P. 37(a)(2)(B)* and D. Kan. R. 37.2 and failed to undertake such good faith efforts to confer. Payless Shoesource Worldwide v Target Corp. (2006, DC Kan) 237 FRD 666, motion gr, in part, motion den, in part, motion to strike den (2006, DC Kan) 2006 US Dist LEXIS 84072.

Employer failed to satisfy requirements of *Fed. R. Civ. P. 37(a)(2)(B)* because nowhere in motion to compel did defense counsel certify that parties adequately conferred in attempt to resolve dispute without court intervention; indeed, there were no facts which gave court any indication that parties took significant steps to resolve dispute where defense counsel's only evidence of conferral was letter he sent to employee's counsel day before any Fed. R. Civ. P. 35 exam was to be completed that stated that if employee did not agree to examination, employer would file appropriate motion with court; therefore, court could not conclude that parties

conferred in good faith attempt to resolve dispute. Kankam v Univ. of Kan. Hosp. Auth. (2008, DC Kan) 104 BNA FEP Cas 1361.

Employees' motion to compel employer to respond to request for production of documents was denied because employees did not meet employees' duty to confer, under D. P.R. R. 26(b) and *Fed. R. Civ. P. 37(a)(1)*, as (1) employees did not specify if any attempt was made to discuss discovery dispute either personally or through telephone conference, and (2) emails sent by employees to employer, instead of showing good faith effort to reach agreement, only showed employees' point of view over objections made. Aponte-Navedo v Nalco Chem. Co. (2010, DC Puerto Rico) 268 FRD 31.

Creditors' motion to compel discovery was denied because, inter alia, it did not certify, as required by former *Fed. R. Civ. P. 37(a)(2)(B)*, that parties had unsuccessfully met and conferred in attempt to resolve discovery impasse without judicial intervention; certification requirement was not satisfied by including with motion copies of correspondence that discussed discovery at issue. Leimbach v Lane (In re Lane) (2003, BC DC Idaho) 302 BR 75.

Defendant in adversary proceeding was not entitled to relief under *Fed. R. Civ. P. 37* (applicable by reason of Fed. R. Bankr. P. 7037) in form of order compelling production from Chapter 7 trustee because defendant did not provide adequate certification that her efforts to resolve discovery disputes met standards of Rule 37, which included duty to confer or attempt to confer in good faith. Rhiel v Hook (In re Johnson) (2009, BC SD Ohio) 408 BR 115.

Unpublished Opinions

Unpublished: District court was not required to grant borrower's motion to compel bank to comply with discovery requests, as borrower did not certify that he had conferred in good faith with bank's counsel. Samadi v Bank of Am., N.A. (2012, CA11 Ga) 2012 US App LEXIS 6732.

Unpublished: Court adopted standards set forth in Shuffle Master v. Progressive Games, 170 F.R.D. 166 (D. Nev. 1996), and as applied in this case, found that neither bank's Motion to Compel nor debtors' Motion to Compel satisfied *Fed. R. Civ. P. 37(a)(1)*; in short, bank's Motion lacked necessary Rule 37(a)(1) certification that it, as moving party, in good faith conferred or attempted to confer with debtors in effort to obtain requested discovery without court action; likewise, from declarations of debtors' counsel, court was simply unable to determine that moving parties in good faith engaged in meaningful negotiations in genuine effort to resolve discovery dispute. Sanchez v Wash. Mutual Bank (In re Sanchez) (2008, BC ED Cal) 2008 Bankr LEXIS 4239.

### 61. Failure to move and effect thereof

Where defendant, defending action brought by Secretary of Labor to enjoin violations of Fair Labor Standards Act [29 USCS § 215], refuses to comply with court order directing him to either answer interrogatories or afford Secretary opportunity to examine payroll records to obtain information sought by interrogatories, and where defendant files own interrogatories seeking same information from Secretary, court's order is not nullified by absence of formal motion by Secretary; elevating technical omission to level of jurisdictional defect would be unreasonable.

Hodgson v Mahoney (1972, CA1 Mass) 460 F2d 326, 16 FR Serv 2d 306, cert den *(1972) 409 US 1039, 34 L Ed 2d 488, 93 S Ct 519.*

Where party fails to move for order compelling adversary to comply with request for production of documents, court does not have authority to sanction adversary under *FRCP 37*. United States v Kattar (1999, DC NH) 191 FRD 33, 84 AFTR 2d 6063 (criticized in Cambridge Elecs. Corp. v MGA Elecs., Inc. (2004, CD Cal) 227 FRD 313).

Because injured ship worker failed to file motion to compel and obtain order compelling discovery under *Fed. R. Civ. P. 37*, his motion for sanctions against ship rebuilder was denied. Saudi v Northrop Grumman Corp. (2004, ED Va) 221 FRD 452, 2004 AMC 992, affd (2005, CA4 Va) *427 F3d 271, CCH Prod Liab Rep P 17304, 2005 AMC 2831, 63 FR Serv 3d 483,* cert den (2006, US) *127 S Ct 115, 166 L Ed 2d 34.*

If defendant had filed motion to compel, it could have obtained sanctions against plaintiff and its attorneys under *Fed. R. Civ. P. 37(a)* & (b); because defendant did not file motion to compel, it may only seek Rule 37 sanctions against plaintiff. *Fed. R. Civ. P. 37(c)*. Qualcomm Inc. v Broadcom Corp. (2008, SD Cal) 2008 US Dist LEXIS 911, vacated, in part, remanded (2008, SD Cal) 88 USPQ2d 1169, dismd, in part, motion gr (2008, CA FC) *274 Fed Appx 875* and app dismd, motion gr, motion gr, in part (2008, CA FC) 2008 US App LEXIS 18934.

Unpublished Opinions

Unpublished: Where an African-American high school student filed suit against the school district and its administrators for racial discrimination, he asserted that defendants violated discovery rules and acted in bad faith for purposes of *Fed. R. Civ. P. 26*, *37* by refusing to produce email correspondence among school administrators regarding the student, the district administrator's daily journal, and a letter that sent to the principal, district court did not err by granting defendants' motion for summary judgment without disclosure of the materials, because plaintiff never sought a motion to compel as required by *Fed. R. Civ. P. 37(b)(2)*. Bryant v Bd. of Educ. (2009, CA7 Ill) 2009 US App LEXIS 22392.

**62. Burden of proof**

On motion to compel answer to interrogatory, movants had burden of proving answer to interrogatory was incomplete. Daiflon, Inc. v Allied Chemical Corp. (1976, CA10 Okla) 534 F2d 221, 1976-1 CCH Trade Cases P 60829, 21 FR Serv 2d 785, cert den *(1976) 429 US 886, 97 S Ct 239, 50 L Ed 2d 168.*

Plaintiff's motion to compel answers to interrogatories and production of documents will be granted where defendant does not show that such production and answers will be annoying, burdensome or completely irrelevant to thrust of instant litigation, and where plaintiff adequately contends that answers to interrogatories and production of relevant documents will significantly enhance plaintiff's ability to present properly its cause of action. Roto--Finish Co. v Ultramatic Equipment Co. (1973, ND Ill) 60 FRD 571, 181 USPQ 86, 17 FR Serv 2d 1396.

Motion by plaintiffs for production of witnesses' statements will be denied where plaintiffs fail to carry burden of establishing inability to obtain substantial equivalent of data sought by

alternative means without undue hardship. Howard v Seaboard C. R. Co. (1973, ND Ga) 60 FRD 638, 18 FR Serv 2d 575.

Party who asserts attorney-client privilege bears burden of establishing all essential elements of privilege; meeting that burden requires submission of affidavits or other competent evidence to establish sufficient facts to prove applicability of privilege, and conclusory assertions are not enough. Saxholm AS v Dynal, Inc. (1996, ED NY) 164 FRD 331, magistrate's recommendation (1996, ED NY) *938 F Supp 120* and affd (1996, ED NY) 1996 US Dist LEXIS 16958.

Burden is on objecting party to show why particular discovery request is improper. EEOC v Klockner H & K Machs. (1996, ED Wis) 168 FRD 233, 71 BNA FEP Cas 833, 70 CCH EPD P 44714, 35 FR Serv 3d 1446.

Where pro se incarcerated petitioner failed to show attempt to confer with defendants regarding petitioner's discovery requests as required by former *Fed. R. Civ. P. 37(a)(2)*, petitioner's motion to compel discovery and for sanctions was denied. Avent v Solfaro (2002, SD NY) 210 FRD 91.

Court partially granted motion to compel, which was filed by defendants who were sued by disabled customer under Americans With Disabilities Act (ADA); although customer had made prima facie showing of standing under ADA, and defendants' request for copies of complaints that customer had filed in similar actions in prior year was only remotely relevant to standing issue, defendants made sufficient showing of relevance to compel customer to respond in limited fashion to their discovery request. Molski v Franklin (2004, SD Cal) 222 FRD 433.

Plaintiff's *Fed. R. Civ. P. 37* motion to compel was granted where defendants failed to sustain their burden that requested documents (including rail freight shipping services data and schedules) did not exist, were not relevant, and would be unduly burdensome to produce in dispute concerning timeliness of defendants' delivery of goods. *Am. Rock Salt Co., LLC v Norfolk S. Corp. (2004, WD NY) 228 FRD 426.*

Department of Justice was entitled to motion to compel under *Fed. R. Civ. P. 37(a)(1)* proper discovery on plaintiff's Privacy Act claims because plaintiff's general objections failed to satisfy his burden under *Fed. R. Civ. P. 26*, 34(b)(2)(B), and 33(b)(4) and his responses were evasive, nonresponsive, and generally inadequate. Convertino v United States DOJ (2008, DC Dist Col) 565 F Supp 2d 10.

Plaintiff's motion to compel discovery was denied where there was no proof that discovery sought was both relevant and proper. Amedisys, Inc. v JP Morgan Chase Manhattan Bank (In re Nat'l Century Fin. Enters.) (2003, BC SD Ohio) 298 BR 140, summary judgment gr, judgment entered (2004, BC SD Ohio) 310 BR 580, motion to strike gr (2005, BC SD Ohio) 334 BR 907, 63 FR Serv 3d 891.

**63. Objections**

When parties raise objections and choose not to pursue them against motion to compel, court may deem them abandoned. Pulsecard, Inc. v Discover Card Servs. (1996, DC Kan) 168 FRD 295.

In employment discrimination case, because they failed to assert their qualified immunity defense in dispositive motion, court overruled defendants' qualified immunity objections. Sonnino v Univ. of Kan. Hosp. Auth. (2004, DC Kan) 220 FRD 633, motions ruled upon (2004, DC Kan) 2004 US Dist LEXIS 5988.

Where defendants did not address in motion to compel various objections asserted by plaintiff in its responses to defendants' interrogatories and request for production, plaintiff was under no obligation to reassert them in its response to motion to compel so that plaintiff's objections to discovery requests stood, and defendants' motion to compel was denied. DIRECTV, Inc. v Puccinelli (2004, DC Kan) 224 FRD 677 (criticized in Diaz-Padilla v Bristol Myers Squibb Holding Ltd. Liab. Co. (2005, DC Puerto Rico) 2005 US Dist LEXIS 5879) and motion den, motion to strike den (2006, DC Kan) 2006 US Dist LEXIS 94648 and (criticized in Ice Corp. v Hamilton Sundstrand Corp. (2007, DC Kan) 2007 US Dist LEXIS 34578).

Defendants' motion to compel as to certain interrogatories and request for production was granted because, although defendants' discovery requests at issue were unrelated to issues of case, plaintiff had not asserted any timely opposition to defendants' interrogatories and request for production and, accordingly, had waived any objection. Essex Ins. Co. v Neely (2006, ND W Va) 236 FRD 287.

Prisoner moved to compel discovery under *Fed. R. Civ. P. 37* in his civil rights action against health care providers and prison officials; providers' and officials' previous objections to motion to compel may have been appropriate when they first responded to prisoner's discovery requests, but no longer applied once court screened prisoner's amended complaint and denied motion for partial summary judgment brought by providers and officials'; in such situation, objections originally provided were no longer valid and providers and officials had to supplement or correct their disclosure under *Fed. R. Civ. P. 26(e)*. Goodvine v Gorske (2009, ED Wis) 72 FR Serv 3d 790.

In case in which (1) insurance company argued that production request exceeded scope of discovery in that it was vague, ambiguous, overly broad, unduly burdensome, and oppressive on its face; (2) individuals in their motion to compel, argued that objection was improper general objection; and (3) insurance company listed three specific grounds for objecting to request, court was able to evaluate merits of insurance company's objections and determine whether request was proper; accordingly, though objection, without more, might be in contradiction to Fed. R. Civ. P. 34, that part of objection did not render objection as whole noncompliant and improper. Hager v Graham (2010, ND W Va) 267 FRD 486.

In case in which insurance company filed objections to motion to compel production for complete files, it unsuccessfully argued that W. Va. Code § 33-11-4(10) only required record of complaint be maintained, not complete file and that W. Va. Code § 33-2-9 demonstrated that provisions were mechanism under which West Virginia Insurance Commissioner could examine affairs of any insurer that transacted business in state and that it was not subject to West Virginia Insurance Commissioner; it was required to maintain records requested, and it was judicially estopped from arguing that it was not subject to West Virginia Insurance Commissioner. Hager v Graham (2010, ND W Va) 267 FRD 486.

In case in which insurance company argued request for production did not satisfy Fed. R. Civ. P. 34 because it did not describe with reasonable particularity each item or category of items to be inspected and individuals had filed motion to compel, individuals' request for complete investigative files and claims files of insurance company in connection with underlying claims by individuals arising from accident in question did not fail for specificity; without knowing what exactly was in file, individuals were unable to request with exact specificity documents that could assist in their claim. Hager v Graham (2010, ND W Va) 267 FRD 486.

In case in which several individuals filed motion to compel production and insurance company argued that request exceeded scope of discovery permitted under *Fed. R. Civ. P. 26(b)* and 34 in that it was vague, ambiguous, and overly broad, insurance company's objection was general objection inconsistent with law of United States District for Northern District of West Virginia; additionally, Rule 26 permitted discovery of nonprivileged information that was relevant to any party's claim or defense, and request sought files of complaints kept pursuant to W. Va. Code § 33-11-4(10) for time period required by W. Va. Code § 33-2-9. Hager v Graham (2010, ND W Va) 267 FRD 486.

**64. Contents of order**

Order should not cast burden and expense of making copies and photostats of records upon producing party. Niagara Duplicator Co. v Shackleford (1947, App DC) 82 US App DC 45, 160 F2d 25.

In view of serious sanctions for failure to comply with court order for production of documents contained in Rule 37, it is obvious that order should be explicit. United States v American Optical Co. (1942, DC NY) 2 FRD 534 (superseded by statute on other grounds as stated in Gulf & Western Industries, Inc. (1977, ASBCA) 78-1 BCA P 12988).

In view of fact that obtaining of copies may involve some expense, order for production of such copies should include provision that expense of such copies shall be advanced or borne by party seeking such production. Reeves v Pennsylvania R. Co. (1948, DC Del) 80 F Supp 107.

**65. Modification of order**

Court is authorized to disapprove, modify, alter, or amend proposed or existing order; court is not bound by provision in stipulation between parties that party must consent to any disclosure. TIF Instruments, Inc. v Colette (1983, CA6 Mich) 713 F2d 197, 37 FR Serv 2d 18.

Court order can only be altered, amended, or suspended by stay or superseding court order; parties cannot by their actions alter or amend explicit requirement that defendant supply list of persons with information about case provided for in previous court order. In re Fulghum Constr. Corp. (1982, BC MD Tenn) 20 BR 925.

**66. Reconsideration**

Individual's motion for reconsideration of court's decision that denied individual's motion to compel discovery of any complaints and cease and desist letters and disposition of those

claims against singer for copyright infringement was denied where (1) evidence of defendant's willful behavior in copyright infringement case went towards damages and not liability, (2) it was clear from language of bifurcation order that, whatever trial strategy individual had, discovery was being conducted on issue of liability, and discovery relating to damages would have been conducted subsequent to liability trial, and (3) to extent that individual intended to ask jury during liability phase of trial about willfulness, individual had not indicated how such question was relevant in determining liability. Loussier v Universal Music Group, Inc. (2003, SD NY) 258 F Supp 2d 308.

Motion to reconsider court's ruling denying second emergency motion to compel regarding imaging of computer server was denied where scope of proposed imaging was substantially overbroad because imaging would have included not only files at issue, but also anything else that happened to be on server containing one of those files. Positive Software Solutions, Inc. v New Century Mortg. Corp. (2003, ND Tex) 259 F Supp 2d 561.

**67. Particular motions**

District court did not abuse its discretion in denying party's requests to compel discovery where party never forwarded interrogatories or request for production of documents to party from whom it sought discovery, thus failed to fulfill prerequisite for compelling discovery. Petrucelli v Bohringer & Ratzinger (1995, CA3 Pa) 46 F3d 1298, CCH Prod Liab Rep P 14148, 30 FR Serv 3d 823, reh, en banc, den (1995, CA3 Pa) 1995 US App LEXIS 4100.

In securities litigation, plaintiffs' motion to compel discovery that had been stayed pursuant to Private Securities Litigation Reform Act, 15 USCS § 77z-1(b)(3), while defendants' motions to dismiss were under consideration was denied because mere delay and complexity of action were insufficient to demonstrate undue prejudice. In re Initial Pub. Offering Sec. Litig. (2002, SD NY) 236 F Supp 2d 286.

Employee's motion for order compelling her employer and others to allow her to enter upon their premises, inspect their computer systems and related programs, and copy any information relevant to her employment discrimination claims was denied where court found that employee failed to demonstrate what relevance any information still contained on employer's hard drives may have to pending lawsuit; rather, employee was speculating, and such conjecture did not warrant compelled inspection of computer system that contained voluminous information relating to many topics other than employee's employment discrimination claim, and, in addition, employee had made no showing that documents she sought actually existed or that employer had unlawfully failed to produce them. Bethea v Comcast (2003, DC Dist Col) 218 FRD 328, 57 FR Serv 3d 428.

Since railroad did not have information to continue train conductor's deposition, its Fed. R. Civ. P. 30 and *37* motion to compel conductor's deposition was denied without prejudice. Union Pac. R.R. Co. v Larkin (2005, DC NM) 228 FRD 692.

Even assuming that corporation served formal Fed. R. Civ. P. 34 request for inspection of helicopter's engine parts, time, place, and manner of inspection proposed by corporation were not reasonable under circumstances because corporation could have served plaintiffs with its

Rule 34 request at any time after May 8, 2006, when helicopter company informed all parties that it was turning care, custody, and control of engine parts to plaintiffs instead of waiting until mid-June to ask plaintiffs to ship parts to corporation's experts for inspection; because plaintiffs allowed corporation reasonable alternative of inspecting parts at facilities of plaintiff's expert and had indicated that parts would continue to be available at those facilities until discovery deadline, corporation had reasonable opportunity to inspect and analyze engine parts and there was no need to compel inspection under *Fed. R. Civ. P. 37*. Holliday v Extex (2006, DC Hawaii) 237 FRD 425.

Order was warranted under *Fed. R. Civ. P. 37(a)(3)(B)(i)* compelling deposition to be conducted under magistrate's supervision; deponent continually failed to answer questions during deposition, and answers that were given were evasive and non-responsive. GMAC Bank v HTFC Corp. (2008, ED Pa) 248 FRD 182.

As employee's inquiries were neither unduly burdensome nor overly broad, they were relevant, or at least reasonably calculated to lead to discovery of admissible evidence, and there was no request of mental impressions of attorney or other representative under *Fed. R. Civ. P. 26(b)*, motion to compel was granted. Ferguson v TD Bank, N.A. (2010, DC Conn) 268 FRD 153.

**68. --Compel answer**

District Court did not abuse discretion in denying pro se plaintiff's motion to compel answers to interrogatories under Rule 37 where interrogatories were filed long after court's deadline for end of discovery, plaintiff never requested extension of time to file, and interrogatories did not comply with local rules. Draper v Coombs (1986, CA9 Or) 792 F2d 915.

Judgment creditor's motion to compel sole stockholder of debtor-corporation to answer questions at taking of his deposition will be granted; in such circumstances, judgment-creditor is entitled to broad discovery to uncover any hidden assets. Caisson Corp. v County West Bldg. Corp. (1974, ED Pa) 62 FRD 331, 18 FR Serv 2d 1289.

While corporation could not respond to interrogatory if it lacked sufficient information to do so, unrebutted evidence before court suggested that record companies provided certificates of registration with Copyright Office concerning recordings at issue, which was sufficient information for corporation to formulate answer to interrogatories about whether corporation contended that parties listed in exhibit were exclusive owners of recordings; therefore, record companies' motion to compel under *Fed. R. Civ. P. 37* was granted, and corporation was ordered to provide responses without objections to interrogatories. Sanyo Laser Prods. v Arista Records, Inc. (2003, SD Ind) 214 FRD 496.

Pursuant to former *Fed. R. Civ. P. 37(a)(2)(B)*, manufacturers of polyether polyol products did not have standing to move to compel answers to interrogatories which had been propounded by defendants who had settled with plaintiffs and were not party to motion to compel; those defendants were "discovering party" within meaning of former *Fed. R. Civ. P. 37(a)(2)(B)*. In re Urethane Antitrust Litig. (2006, DC Kan) 237 FRD 454, 2006-2 CCH Trade Cases P 75421.

Court granted in part and denied in part defendants' *Fed. R. Civ. P. 37(a)* motion to compel plaintiff to respond to interrogatories; although claiming that defendants already had information

sought, plaintiff did not explain how defendants would have this information and did not show that interrogatories would put undue burden on them. PCS Phosphate Co., Inc. v Norfolk S. Corp. (2006, ED NC) 238 FRD 555.

In action in which plaintiffs alleging violations by defendant of W.Va. Unfair Trade Practices Act, defendant's *Fed. R. Civ. P. 37(a)(2)(B)* motion to compel responses to interrogatories was granted; plaintiffs did not identify documents with specificity as required by Fed. R. Civ. P. 33(d) and plaintiffs did not set forth factual information that was within their special subjective knowledge. Ayers v Cont'l Cas. Co. (2007, ND W Va) 240 FRD 216.

In employee's race discrimination and retaliation case under *42 USCS § 1981*, employer was required under *Fed. R. Civ. P. 37(a)* to provide discovery information requested in interrogatories and requests for productions related to any complaint of racial discrimination in specific district in which employee worked and as to any discrimination complaints in that district within time employee worked there. Chatman v AMTRAK (2007, MD Fla) 246 FRD 695.

Employer's counsel did not comply with *Fed. R. Civ. P. 37(a)(1)* or D. Md. R. 104.7, as record showed that counsel did not confer with employee's counsel about employee's incomplete and evasive deposition responses; as result of this noncompliance, employer's motion to compel answer was not considered. Mezu v Morgan State Univ. (2010, DC Md) 269 FRD 565.

Plaintiff could not be compelled under *Fed. R. Civ. P. 37(a)(3)(B)* to answer interrogatories inquiring as to number of commercial loans secured by mortgages it had made and how many of such loans were in default where pertinent issue in plaintiff's dispute with defendants was whether valid enforceable contract existed between parties and whether contract had been breached. Carolina First Bank v Stambaugh (2011, WD NC) 275 FRD 463.

Grant of plaintiff's motion for leave to amend to join additional party at late stage in proceedings risked unfair prejudice to current defendants and/or separate third party; that decision did not render moot Interrogatory No. 5 since determining scope of separate third party defendants' business efforts provided insight into whether they were continually violating tax codes; information sought by interrogatory was therefore relevant, and because one of defendants was manager of and exercised practical control over separate third party, plaintiff's motion to compel was granted. United States v Elsass (2012, SD Ohio) 109 AFTR 2d 2075.

In light of plaintiff's counsel's limitation of scope of question to one year period, court did not find that interrogatories were overbroad, and defendant's responses were incomplete and evasive, which was tantamount to failure to answer, under *Fed. R. Civ. P. 37(a)(4)*; party answering interrogatories had to provide to requesting party all information that was available to it and that could be given without undue labor and expense; therefore, to extent that defendant knew which employees made calls, as well as who created prerecorded voice message delivered to plaintiff, which employees served as live collectors, and which employees authorized making of calls, or was able to obtain such information without undue labor and expense, defendant had to provide that information to plaintiff. Lynn v Monarch Recovery Mgmt. (2012, DC Md) 285 FRD 350.

When sureties' interrogatories in bonded company's action to recover performance and payment bond funds that were misappropriated by third party exceeded scope of S.D.N.Y.R.

33.3(a) and company provided permissible answers, sureties' were not entitled to order directing company to provide supplemental answers, pursuant to *Fed. R. Civ. P. 37*, except where company's identification of relevant documents did not adequately identify documents requested in one interrogatory. Clean Earth Remediation & Constr. Servs. v Am. Int'l Group, Inc. (2007, SD NY) 245 FRD 137.

Unpublished Opinions

Unpublished: Defendants' *Fed. R. Civ. P. 37* motion for order compelling plaintiff to answer questions that he refused to answer at his deposition, and to direct that deposition be reconvened at plaintiff's expense was granted to extent that plaintiff relied exclusively upon relevance objection, Fed. R. Civ. P. 30(c)(2), or upon no specific objection when he refused to answer question at deposition, and to extent that plaintiff relied on work product privilege; however, court found that sanction was not appropriate in light of plaintiff's pro se status. Bourne v Arruda (2012, DC NH) 2012 US Dist LEXIS 97987, motion to strike den, costs/fees proceeding, motion gr, request den (2012, DC NH) 2012 US Dist LEXIS 110089.

**69. --Compel disclosure**

Defendant's motion will be granted to compel plaintiff to disclose which of defendant's products are claimed to be infringing where defendant does not seek to learn, in addition, in what respect infringing is occurring. Technitrol, Inc. v Digital Equipment Corp. (1973, ND Ill) 62 FRD 91, 181 USPQ 87, 18 FR Serv 2d 1394.

Defendants, who were sued in toxic tort suit, were entitled to order compelling disclosure of medical records and information pertaining to siblings of suing individuals' siblings, to extent that siblings' records might possibly have been viewed, reviewed, or considered by individuals' medical experts in forming their expert opinions; because suit claimed injury arising out of inhalation of lead dust, medical information pertaining to siblings, who had also originally been parties to suit, was relevant and might lead to admissible evidence regarding cause of cognitive disabilities suffered by suing individuals; defendants were not entitled to compel disclosure of records and information pertaining to other former plaintiffs, who had dismissed their claims and were not related to any of suing individuals who remained in suit. JB v Asarco, Inc. (2004, ND Okla) 225 FRD 258, 60 FR Serv 3d 755.

Plaintiffs in *42 USCS § 1983* action for death of inmate were granted motion to compel disclosure under *Fed. R. Civ. P. 26*, *37* of morbidity and mortality report generated by jail medical official and related correspondence and documents because court refused under *Fed. R. Evid. 501* to recognize medical peer review privilege of O.C.G.A. §§ 31-7-133, 31-7-143 in that need for probative evidence in civil rights action outweighed need for privilege. Jenkins v Dekalb County (2007, ND Ga) 242 FRD 652.

Parents of teenager who committed suicide while taking anti-depressant were entitled to compel, under *Fed. R. Civ. P. 37*, discovery responses and documents from maker of anti-depressant regarding sales, revenue, and profits from sale of anti-depressant, as well as number of pediatric prescriptions, because information was relevant to case under *Fed. R. Civ.*

*P. 26* and necessary to develop claim for punitive damages; advertising, promotional, and educational materials drug maker disseminated to medical community during certain period were also considered relevant to complaint's allegations of fraud as well as punitive damages claim. Cunningham v SmithKline Beecham (2009, ND Ind) 255 FRD 474, 72 FR Serv 3d 972.

Plaintiff's motion for sanctions was denied because magistrate was not clearly erroneous in stating that plaintiff did not appear to request his medical file and because medical file was missing, it was not in "possession, custody, or control" of defendants within meaning of *Fed. R. Civ. P. 26(a)(1)(A)(ii)* at time initial disclosures were made. *Nance v Wayne County (2009, MD Tenn) 264 FRD 331.*

Plaintiff's motion to compel was denied in part; court denied plaintiff's request to force defendants through discovery to determine which political subdivisions were properly joined and had interest in action because it was plaintiff's burden to make this determination, and such burdens could not be delegated through discovery. Gingerich v City of Elkhart Prob. Dep't (2011, ND Ind) 273 FRD 532.

Under *Fed. R. Civ. P. 37(a)(2)*-(3), district court required production of summary report relating to four treating physicians identified in plaintiff's expert disclosures because *Fed. R. Civ. P. 26(a)(2)(C)* mandated summary disclosures in place of complete expert reports of opinions to be offered by expert witnesses who were not retained or specially employed to give expert testimony. Coleman v Am. Family Mut. Ins. Co. (2011, ND Ind) 274 FRD 641.

**70. --Compel production**

If party fails to disclose expert witness report required by *FRCP 26(a)(2)(B)*, proper method to obtain production of such report is by motion under former *FRCP 37(a)(2)*, rather than by motion under FRCP 34. Smith v Transducer Tech., Inc. (2000, DC VI) 197 FRD 260, 48 FR Serv 3d 393 (criticized in Weil v Long Island Sav. Bank FSB (2001, ED NY) 206 FRD 38) and (criticized in Venn v McCrae (In re McCrae) (2003, BC ND Fla) 295 BR 676, 41 BCD 172, 16 FLW Fed B 166) and (criticized in Reg'l Airport Auth. v LFG, LLC (2006, CA6 Ky) 460 F3d 697, 62 Envt Rep Cas 2121, 36 ELR 20166, 2006 FED App 302P).

In discrimination action, court denied plaintiff's motion to compel responses to discovery requests contained in letter, which consisted of five-page, single-spaced list of documents and discovery materials sought unaccompanied by legal argument, because plaintiff did not identify specifically what items from letter he sought and he did not articulate basis on which to grant motion to compel as required by U.S. Dist. Ct., D. Conn., Civ. R. 9(d)(3). Croom v W. Conn. State Univ. (2002, DC Conn) 218 FRD 15.

In creditors committee's fraud suit against debtor's officers, directors, and professional employees, court granted committee's *Fed. R. Civ. P. 37* motion to compel production of auditor's audit manual; any failure to follow auditor's internal policies could be probative of scienter and, thus, was discoverable pursuant to *Fed. R. Civ. P. 26*. Official Unsecured Creditors Comm. of Media Vision Tech., Inc. v Jain (2003, ND Cal) 215 FRD 587.

Defendant's motion to compel production of documents was granted where: 1) defendant's evidence demonstrated that plaintiff responded to document requests with statements that it

had produced or would have produced documents, that plaintiff's counsel stated in writing that she planned to make supplemental production of documents, that defendant's counsel repeatedly and diligently requested plaintiff to produce requested documents and things, and that plaintiff never clearly stated that it would not produce requested and promised documents until it was too late to file timely discovery motion within terms of non-expert discovery cutoff date; 2) plaintiff's general objections were not sufficient to raise any substantial, meaningful, or enforceable objections to any particular discovery request; 3) portion of plaintiff's document production responses referring to Fed. R. Civ. P. 33(d) was unintelligible and meaningless because R. 33(d) allowed party to respond to interrogatory by producing business records, situation that did not exist; 4) verified response of plaintiff to each request to produce amounted to response under penalty of perjury that it would produce all documents responsive to request; 5) plaintiff waived relevancy objections by responding to each request that it would produce requested documents; and 6) because plaintiff made no claim that documents and things were not within scope of documents and things in requests, plaintiff impliedly conceded issue. M2 Software, Inc. v M2 Communs., L.L.C. (2003, CD Cal) 217 FRD 499, summary judgment den, summary judgment gr, request den (2003, CD Cal) 281 F Supp 2d 1166.

Since it was not apparent that witness had to be characterized as testifying expert, thereby subjecting him and his reports to disclosure requirements of *Fed. R. Civ. P. 26(b)*, court denied defendant's *Fed. R. Civ. P. 37* motion to compel production of witness' draft report. Sec. Ins. Co. v Trustmark Ins. Co. (2003, DC Conn) 218 FRD 29.

Court cannot compel party to produce documents that do not exist or that are not in that party's possession, custody, or control. Sonnino v Univ. of Kan. Hosp. Auth. (2004, DC Kan) 220 FRD 633, motions ruled upon (2004, DC Kan) 2004 US Dist LEXIS 5988.

In action claiming violations of state Unfair Trade Practices Act, W. Va. Code §§ 33-11-1 et seq., insureds' motion to compel was denied in part because their requests for true and accurate copies of any document not otherwise produced upon which insurer might have relied at trial was overly broad and inappropriate because insurer was not required to produce documents that it planned on relying on at trial until it was required to prepare trial exhibit list. Miller v Pruneda (2004, ND W Va) 236 FRD 277.

In employment discrimination suit under Title VII of Civil Rights Act of 1964, 42 USCS §§ 2000e et seq., plaintiff's motion to compel production of document, through which plaintiff sought to discover names of other applicants in attempt to expose discriminatory hiring pattern, which would show that plaintiff too was discriminated against because of Puerto Rican descent and residence, was denied because plaintiff could not use document to show disparate treatment discrimination through numerical disparities where plaintiff's claim was for individual disparate treatment. Diaz v Ashcroft (2004, DC Puerto Rico) 301 F Supp 2d 112.

*Fed. R. Civ. P. 37(a)* motion to compel filed by United States was granted where (1) United States was seeking to obtain discovery from claimants, who asserted ownership interest in funds that were subject of forfeiture action brought by United States; (2) given that claimants contended that they had already served their interrogatory answers, it would be simple matter for them to furnish substitute responses to those interrogatories to United States, which

professed not to have received them; (3) claimants' tax returns should be produced because Tax Return Privacy Act, 26 USCS § 6103, did not render returns privileged from disclosure by claimants, who were taxpayers who had filed returns, and returns were discoverable under *Fed. R. Civ. P. 26(b)* because, although they might not be directly relevant to United States' claim that money at issue was related to drug activity, information in tax returns might lead to discovery of other relevant information, namely whether or not claimants had legitimate explanation for money; and (4) claimants had waived their right to challenge relevance of tax returns by failing to timely raise relevance objection in response to United States' production request. United States v Six Hundred Forty-Four Thousand Eight Hundred Sixty & 00/100 Dollars in United States Currency (2007, CD Ill) 99 AFTR 2d 2386.

In plaintiff former public agency employee's wrongful termination/whistleblower suit, former employee's request for sanctions, attorney fees, and costs was inappropriate under *Fed. R. Civ. P. 37(a)(5)(A)* because defendant fellow employees' opposition to former employee's motion to compel production of documents was substantially justified, based on fellow employees' lack of personal possession of government documents sought. Lowe v District of Columbia (2008, DC Dist Col) 250 FRD 36.

Court granted employee's requests that employer be compelled to produce certain documents, primarily e-mails and e-mail attachments, in their native format, which were previously produced by employer in paper form because court found that employer failed to produce emails and attachments in either form in which they were ordinarily maintained, or in reasonably usable form, as required by Fed. R. Civ. P. 34(b)(2)(E)(ii), since employer's option to produce in reasonably usable form did not mean that they were free to convert electronically stored information from form in which it was ordinarily maintained to different form that makes it more difficult or burdensome for employee to use information efficiently in litigation. White v Graceland College Ctr. for Prof'l Dev. & Lifelong Learning, Inc. (2008, DC Kan) 586 F Supp 2d 1250.

Employer's motion to compel limited discovery under *Fed. R. Civ. P. 37(a)* or, in alternative, to extend fact discovery period under Fed. R. Civ. P. 6(b), was granted in part and denied in part because (1) employee's failure to label two doctors as individuals with discoverable or relevant information in timely supplemental disclosure was harmless as employee identified doctors during discovery period, and employer received copies of their files and had opportunity to question employee about their treatment of him and to depose them before discovery deadline; (2) court extended discovery deadline for employer to subpoena third doctor's files and depose him as employee failed to identify third doctor as individual with discoverable or relevant information until last day of six-month discovery period, which prevented employer from timely obtaining his files or deposing him; (3) treating physician could testify as fact witness at trial, pursuant to Fed. R. Evid. 701, so long as his testimony was not based on scientific, technical, or other specialized knowledge within scope of *Fed. R. Evid. 702*, and because three treating physicians would not testify as experts and would not offer expert opinion, employee was not precluded by requirements of *Fed. R. Civ. P. 26(a)(2)(A)* and (b)(4)(A). Hadley v Pfizer, Inc. (2009, ED Pa) 73 FR Serv 3d 1046.

In case in which (1) federal employee had filed motion to compel production of documents; (2) employee and her federal employer conferred and were unable to reach agreement prior to

deadline for response; (3) document request complied with basic requirements of Fed. R. Civ. P. 34; and (4) employer had ability to object on grounds of overbreadth, irrelevance, or undue burden to any request it believed was not within limits set forth in Federal Rules of Civil Procedure, employee was at least entitled to response to her initial request. Lurensky v Wellinghoff (2009, DC Dist Col) 258 FRD 27.

In breach of contract suit, owner was entitled to order compelling contractor to produce certain requested documents because record established that documents were relevant to lawsuit and that contractor had failed to produce all documents contained in request. Global Ampersand, LLC v Crown Eng'g & Constr. (2009, ED Cal) 261 FRD 495.

Court denied officer and his wife's motion to compel United States Attorney's Office for District of Columbia to produce certain documents officer and his wife had requested in subpoena of documents because it was settled beyond all question that prosecutor had absolute immunity from liability for acts performed by prosecutor in his or her official capacity as advocate for state in course of judicial proceedings; moreover, immunity that prosecutor enjoyed from deposition shielded with same force contents of prosecutor's file insofar as that file pertained to, related, or evidenced acts performed by prosecutor in his or her official capacity as advocate for state in course of judicial proceedings. Amobi v D.C. Dep't of Corr. (2009, DC Dist Col) 262 FRD 45.

Insured was entitled to second order to compel discovery under *Fed. R. Civ. P. 37* in action against insurer related to alleged bad faith denial of claim under long term care policy because documents sought were not overly burdensome and were relevant to insured's claims. Beyer v Medico Ins. Group (2009, DC SD) 266 FRD 333.

Government and federal government officials had obligation to produce information about circumstances in which detainee's statements were made, including interrogation logs, for all statements on which government relied; accordingly, government and federal government officials had to produce circumstances in which detainee's statements were made or adopted, including any interrogation logs or plans, which were not already provided. Al Darbi v Obama (2009, DC Dist Col) 680 F Supp 2d 7.

Court repeatedly held that evidence showing that petitioner was subject to abuse, torture, coercion, or duress prior to or contemporaneous with time that petitioner made statements included in factual return was exculpatory and had to be produced under case management order (CMO); therefore, because detainee identified additional documents that showed he was subject to abuse or torture prior to or contemporaneous with any statements made by detainee that were relied upon in factual return, pursuant to CMO, such documents, from which court would also be able to determine credibility and reliability of detainee's statements, were exculpatory and had to be produced to extent they were reasonably available; however, because any information related to death of other detainees was not exculpatory, detainee's request for that specific information was denied. Al Darbi v Obama (2009, DC Dist Col) 680 F Supp 2d 7.

Corporation's motion to compel inspection of electronic media devices of its former employees and their competing business was granted in corporation's suit alleging trade secret violations,

fraud, and unfair business practices, because corporation established that former employees transmitted proprietary information and one former employee admitted that he spoliated evidence by destroying his personal computer, which was allegedly used to transmit proprietary information; corporation also showed that it was entitled to attorney's fees and costs associated with its motion to compel, particularly since voluminous and detailed nature of client information at issue rendered former employees' contentions that they recalled it by memory or discovered it through internet searches incredulous and corporation established that former employees' refusals to produce were unreasonable, dubious, and intentional. Genworth Fin. Wealth Mgmt. v McMullan (2010, DC Conn) 267 FRD 443, injunction gr (2010, DC Conn) 2010 US Dist LEXIS 57870.

In this patent infringement action, defendants' motion to compel was granted in part where (1) plaintiffs' response to instant motion offered no argument or supporting documentation for any of objections as to which they claimed their document production remained "subject" (i.e., overbreadth, burdensomeness, and relevance); and (2) by failing to present valid objections to several discovery requests, plaintiffs waived any legitimate objection they may have had. Kinetic Concepts, Inc. v ConvaTec Inc. (2010, MD NC) 268 FRD 226.

Subcontractor's motion to compel general contractor to produce requested documents was granted because (1) general contractor waived general contractor's objections by not timely objecting, as required by Fed. R. Civ. P. 34(b)(2), and (2) general contractor's objections were insufficient, as general contractor did not provide specific reasons for objections and gave no excuse for general contractor's failure to produce requested documents within any deadline. Brenford Envtl. Sys., L.P. v Pipeliners of P.R., Inc. (2010, DC Puerto Rico) 269 FRD 143.

In employees' suit alleging, among other things, age discrimination and violations of ERISA, employees were entitled to order compelling employer to produce certain requested documents regarding disputed release, which concerned core of employees' claim, because employees demonstrated relevance of requests and employer failed to meet its opposing burden of establishing why discovery should not be permitted as to these particular requests. Romero v Allstate Ins. Co. (2010, ED Pa) 271 FRD 96.

In case in which employer moved to compel documents it had requested, employee had complied with her document production obligations by allowing employer party to inspect and copy requested documents at her counsel's office; plain language of Fed. R. Civ. P. 34(a)(1) allows party to fulfill its production obligations by permitting requesting party to copy any designated documents. Simms v Ctr. for Corr. Health & Policy Studies (2011, DC Dist Col) 272 FRD 36, 78 FR Serv 3d 733.

Claims file was not due to be produced because at present point, plaintiff had only alleged breach of contract action, not bad faith claims handling case, and discovery into insurer's claims handling practices, policies, and protocols was impermissible in breach of contract claim; however, to extent that any of documents responsive to request for production were not included in claims file, they were due to be produced; moreover, any documents listed on privilege log that were included within claims file were not due to be produced. Gavin's Ace Hardware, Inc. v Federated Mut. Ins. Co. (2011, MD Fla) 23 FLW Fed D 75.

Plaintiff's single letter unilaterally identifying flaws in defendant's discovery responses and setting arbitrary response deadline for defendant was inadequate under *Fed. R. Civ. P. 37* where it did not equate to good faith conferral or attempt to confer; additionally, plaintiff's assertion that its letter constituted its good faith attempt to confer did not rectify its failure to satisfy Rule 37 because it simply quoted statutory language. Compass Bank v Shamgochian (2012, SD Tex) 287 FRD 397.

Because court dismissed debtor's breach of implied covenant of good faith and fair dealing claim against its insurer, and documents sought by debtor's motion to compel production of documents under *Fed. R. Civ. P. 26*, *37*, were irrelevant absent claim for consequential damages, court denied debtor's motion to compel. Eurospark Indus. v Mass. Bay Ins. Co. (In re Eurospark Indus.) (2003, BC ED NY) 288 BR 177, 40 BCD 227.

One possible remedy for evasive and incomplete response from party that has been asked for discovery in either form of interrogatories or as request for production under Fed. R. Civ. P. 34 is motion to compel response under *Fed. R. Civ. P. 37(a)(3)(B)*. Herzog v Zyen, LLC (In re Xyience Inc.) (2011, BC DC Nev) 55 BCD 184, 66 CBC2d 1104, judgment entered, sanctions allowed (2011, BC DC Nev) 2011 Bankr LEXIS 4250.

Where plaintiff disabled individuals and equal rights center filed disability lawsuit against defendant transit authority (TA), and plaintiffs moved to compel re-creation and production of e-mails which had been automatically deleted from TA's system after certain amount of time, e-mails had to be recreated under (newly adopted) *Fed. R. Civ. P.* 37(e) (former Rule 37(f)) as they were not available from any other source and TA failed to impose litigation hold. Disability Rights Council of Greater Wash. v Wash. Metro. Transit Auth. (2007, DC Dist Col) 242 FRD 139.

Unpublished Opinions

Unpublished: Employer's insurer was properly entitled to protective order and employee was not entitled to motion to compel under *Fed. R. Civ. P. 26* and *37* in employment tortious interference case as to claims file for coverage case filed by employee's relatives because of prospect of undue advantage and fact that relevant, non-privileged, employment-related materials were still accessible. Crosswhite v Lexington Ins. Co. (2009, CA5 Tex) 2009 US App LEXIS 6781.

Unpublished: Where plaintiff failed to respond to Fed. R. Civ. P. 34 request for production of documents in action arising from defendants' efforts to enforce judgment awarded to them in related action, it was appropriate under *Fed. R. Civ. P. 37(a)* to compel plaintiff to produce documents that were relevant under *Fed. R. Civ. P. 26(b)*; however, defendants did not show need for plaintiff's tax records. Zamani v Carnes (2008, ND Cal) 2008 US Dist LEXIS 119922.

**71. Other particular cases**

District Court's order given over telephone to one of defense counsel to effect that depositions of plaintiffs' experts should proceed as scheduled, is not valid order, where neither defense counsel's telephonic statement to plaintiff's counsel that he might contact judge about matter

nor plaintiffs' telephone conversation with judge's law clerk after order had been entered constituted reasonable notice of application for order compelling discovery for purposes of Rule 37(a) and Due Process Clause, and where neither of plaintiffs' experts had been served with subpoenas. Holcomb v Allis-Chalmers Corp. (1985, CA10 Wyo) 774 F2d 398, 3 FR Serv 3d 875.

Plaintiff's counsel's opposition to motion to compel discovery cannot be justified on ground that more information will be available after further discovery from defendant; plaintiff is required to fully and specifically answer interrogatories based upon his present knowledge, information, or belief. Watkinson v Great Atlantic & Pacific Tea Co. (1984, ED Pa) 38 FR Serv 2d 1310.

In disability discrimination case based on employee's mental condition, where defendants moved to compel employee to submit to independent mental examination, employee's requested conditions were denied in part because, inter alia, complaint placed employee's mental condition in controversy and splitting interview up into two or more sessions would cast doubt on validity of results; employee's request for presence of third party or recording device was rejected. Letcher v Rapid City Reg'l Hosp., Inc. (2010, DC SD) 23 AD Cas 225, 14, 14 CCH Accommodating Disabilities Decisions P 14-95.

In arrestees' lawsuit alleging physical and mental injuries from state troopers' alleged use of excessive force, troopers were not entitled to order compelling arrestees to execute medical releases compliant with Health Insurance Portability and Accountability Act, 42 USCS § 300gg et seq., because *Fed. R. Civ. P. 37* did not create distinct discovery mechanism, but rather it was enforcement mechanism for other discovery rules. Fields v Lemmon (2010, SD W Va) 264 FRD 260.

Merger partner's *Fed. R. Civ. P. 37* motion to compel shareholder to produce documents was denied as moot where shareholder represented at hearing that six documents he currently possessed constituted entire universe of documents that were responsive to three requests for production, and merger partner had stated that it was satisfied with shareholder's response based on representations made to court. Lane v Page (2011, DC NM) 2011 US Dist LEXIS 21198, motion gr, motion den, motion to strike den (2011, DC NM) 273 FRD 665.

Bankruptcy court declined to set aside its order to compel pursuant to *Fed. R. Civ. P. 37(a)* where defendant's objections to discovery requests were unsustainable on their face; defendant's argument that his failure to attend hearing deprived him of his right to have his objections heard was without merit because rules did not entitle him to hearing in first place, but bankruptcy court did in fact hold hearing, and defendant's absence was due to his counsel's failure to attend. Lowe v Veliz (In re Tex. Bumper Exchange, Inc.) (2005, BC WD Tex) 333 BR 135.

Unpublished Opinions

Unpublished: District court abused its discretion when it struck property owner's motion to compel without acting on it, and cited M.D. Pa. Civ. R. 5.4(b) for support because R. 5.4(b) applied to filing of requests for and responses to discovery, not motions to compel discovery as provided for by *Fed. R. Civ. P. 37(a)*. Miller v Hassinger (2006, CA3 Pa) 173 Fed Appx 948.

### 72. Miscellaneous

Order of bankruptcy court staying all actions against debtor does not forbid motion to compel production of documents as part of pretrial discovery pursuant to former Rule 37(a)(2). Teledyne Industries, Inc. v Eon Corp. (1974, SD NY) 373 F Supp 191, 20 CCF P 82918.

Fed. R. Civ. P. 34(b) by itself did not provide for sanctions in event of discord, but instead referred aggrieved party to *Fed. R. Civ. P. 37(a)*, which instructed said party to move for appropriate order thereunder, and which, in turn, was concerned with motions to compel, and sanctions that may flow therefrom. Clay v Sotheby's Chi., Inc. (2003, SD Ohio) 257 F Supp 2d 973.

In minor's excessive force suit against officers and city, minor's request for documents involving "use of force" investigations, reports, and complaints was denied because request previously had been decided by implication in prior order. Garcia v City of Imperial (2010, SD Cal) 270 FRD 566.

Former Fed. R. Civ. P. 37(a)(4) requires filing of motion to compel before sanction of dismissal can be invoked. BRAC Group, Inc. v Jaeban (U.K.) Ltd. (In re BRAC Group, Inc.) (2004, BC DC Del) 43 BCD 17, subsequent app, remanded on other grounds (2005, DC Del) 2005 US Dist LEXIS 38911.

Unpublished Opinions

Unpublished: Plaintiff failed to state claim against attorney and others under 42 USCS § 12203(a) and (b) because filing motion to compel in course of discovery dispute was appropriate step towards resolving dispute pursuant to Cal. Code Civ. Proc. § 2025.480 and *Fed. R. Civ. P. 37* and was not act of retaliation, coercion, or intimidation. Louie v Carichoff (2008, CA9 Cal) 2008 US App LEXIS 10951.

Unpublished: It was not error for district court to deny motion to compel prison officials to turn over plaintiff's treatment records and grievance while plaintiff was civilly committed in facility for sexually violent persons because plaintiff did not specifically authorize release of confidential medical information. Hung Nam Tran v Kriz (2010, CA7 Wis) 2010 US App LEXIS 9318.

### B. Factors Considered

### 1. In General

### 73. Annoyance

Plaintiff's motion to compel answers to interrogatories and production of documents will be granted where defendant does not show that such production and answers will be annoying, burdensome or completely irrelevant to thrust of instant litigation, and where plaintiff adequately contends that answers to interrogatories and production of relevant documents will significantly enhance plaintiff's ability to present properly its cause of action. Roto--Finish Co. v Ultramatic Equipment Co. (1973, ND Ill) 60 FRD 571, 181 USPQ 86, 17 FR Serv 2d 1396.

Where plaintiffs fail to demonstrate that production of requested documents would be annoying, burdensome or completely irrelevant to thrust of litigation, stockbroker and dealer-defendants are entitled to discovery of plaintiffs' documents reflecting plaintiffs' financial status to test accuracy, veracity and extent of financial information furnished defendants as requested during time of financial dealings. Lavin v A. G. Becker & Co. (1973, ND Ill) 60 FRD 684, CCH Fed Secur L Rep P 94446.

**74. Burdensomeness**

Plaintiff's motion to compel answers to interrogatories and production of documents will be granted where defendant does not show that such production and answers will be annoying, burdensome or completely irrelevant to thrust of instant litigation, and where plaintiff adequately contends that answers to interrogatories and production of relevant documents will significantly enhance plaintiff's ability to present properly its cause of action. Roto--Finish Co. v Ultramatic Equipment Co. (1973, ND Ill) 60 FRD 571, 181 USPQ 86, 17 FR Serv 2d 1396.

Where plaintiffs fail to demonstrate that production of requested documents would be annoying, burdensome or completely irrelevant to thrust of litigation, stockbroker and dealer-defendants are entitled to discovery of plaintiffs' documents reflecting plaintiffs' financial status to test accuracy, veracity and extent of financial information furnished defendants as requested during time of financial dealings. Lavin v A. G. Becker & Co. (1973, ND Ill) 60 FRD 684, CCH Fed Secur L Rep P 94446.

Motion to compel will be granted where information requested is primarily background information, and where answers to interrogatories will not be unnecessarily burdensome. Natcontainer Corp. v Continental Can Co. (1973, SD NY) 362 F Supp 1094, 180 USPQ 127, 1973-2 CCH Trade Cases P 74621, 17 FR Serv 2d 1501.

**75. --Particular cases**

Fact that entities affiliated with corporation may or may not have conspired to or engaged in copyright infringement was solid basis for discovery in copyright infringement case since it related to record companies' claims and defenses, and although corporation alleged that it had voluntarily produced over 14,800 documents in discovery, information requested was not unreasonably cumulative or duplicative, and in light of important issues raised by record companies in obtaining that information, was not burdensome under *Fed. R. Civ. P. 26*(b(2); therefore, record companies' motion to compel discovery under *Fed. R. Civ. P. 37* was granted. Sanyo Laser Prods. v Arista Records, Inc. (2003, SD Ind) 214 FRD 496.

Where dishwasher repairer argued that production of service records would be unduly burdensome because cost would be $ 10,400, court rejected repairer's argument taking judicial notice of fact that for year repairer had net income of $ 735 million; therefore, court granted plaintiffs' motion to compel production of those records in consolidated product liability case. McCoy v Whirlpool Corp. (2003, DC Kan) 214 FRD 642, motions ruled upon (2003, DC Kan) 214 FRD 646, 55 FR Serv 3d 740, motions ruled upon (2003, DC Kan) 2003 US Dist LEXIS 6909.

In product liability action involving defective child seat, parents' motion to compel parent company to produce documents under Fed. R. Civ. P. 34 was granted because (1) company did not support its argument that producing documents was unduly burdensome; (2) fact that it did not produce child seat did not relieve it of obligation to produce documents; (3) inclusion of omnibus term "pertaining to" modified design of particular side protection system and side impact testing of certain group of child restraint devices, and did not modify large number or general category of things or events; and (4) documents relating to child seats made by European subsidiary were relevant under *Fed. R. Civ. P. 26(b)(1)* to whether European seat provided lateral impact protection that was safer, feasible design. Cardenas v Dorel Juvenile Group, Inc. (2005, DC Kan) 232 FRD 377, CCH Prod Liab Rep P 17282, 63 FR Serv 3d 722.

In suit by debtors alleging that federal government agency and its officers violated federal equal credit opportunity law with respect to certain loan application, government was granted *Fed. R. Civ. P. 37(a)* motion to compel because debtors' answers to interrogatories and requests for production of documents (1) provided little or no substantive information, (2) their objections that requests were overly broad were frivolous, and (3) claims of burdensomeness were not accompanied by required explanatory affidavits. Williams v Johanns (2006, DC Dist Col) 235 FRD 116.

In considering motion under former *Fed. R. Civ. P. 37(a)(2)(B)* to compel response to document request and interrogatory regarding plaintiffs' sales volume and customers, request and interrogatory was found to be not unduly burdensome pursuant to *Fed. R. Civ. P. 26(b)(2)(iii)*; plaintiffs made only conclusory allegation of burdensomeness, and provided no detailed explanation, affidavit, or other evidence which demonstrated that providing information would be burdensome, time-consuming, or expensive. In re Urethane Antitrust Litig. (2006, DC Kan) 237 FRD 454, 2006-2 CCH Trade Cases P 75421.

In purported class action for violations of California Labor Code, conversion and theft of labor, and unfair business practices under Cal. Bus. & Prof. Code § 17200 et seq., plaintiff was entitled under *Fed. R. Civ. P. 37* to compel production of documents requested under Fed. R. Civ. P. 34, which pertained to putative class members' hours, wages, business-related expenses, repayment of wages, termination wages, and meal breaks, because documents were relevant and were not overbroad as to time; however, limited protective order was appropriate to protect third-party privacy rights under Cal. Const. art. I, § 1; further, defendant employer was entitled to provide "sample" discovery because it showed that it would be unduly burdensome under *Fed. R. Civ. P. 26(b)* to fully respond to document requests. Hill v Eddie Bauer (2007, CD Cal) 242 FRD 556.

In case in which former employee sued her former employer, owner, and another company alleging various tort claims and wage and hour claims and former employee filed motion to compel production of defendants' credit card and telephone statements for period 1998 to present, defendants argued unsuccessfully that production would be overly burdensome and not likely to lead to discovery of admissible evidence; not only were documents relevant and reasonably calculated to lead to discovery of admissible evidence, but defendants' conclusory statement that production would be overly burdensome, without benefit of affidavits or evidence, was insufficient to demonstrate that production would be overly burdensome. Thong v Andre Chreky Salon (2008, DC Dist Col) 247 FRD 193.

In case in which employer moved to compel documents it had requested, employee had complied with her discovery obligations by shifting cost of production to employer; while presumption was that employee, as responding party, had to pay for production, district court had discretion to shift all or part of costs of production to employer, as requesting party; employee had rebutted presumption by showing that cost would be undue burden on her. Simms v Ctr. for Corr. Health & Policy Studies (2011, DC Dist Col) 272 FRD 36, 78 FR Serv 3d 733.

In product liability case where there was motion to compel discovery filed, manufacturer's mechanical repetition of same objections request-by-request was not proper; moreover, because manufacturer did not substantiate its claim that requests were unduly burdensome, this objection could have been deemed waived. In re Heparin Prods. Liab. Litig. (2011, ND Ohio) 273 FRD 399.

**76. Cooperation of parties**

With respect to motion to compel, court requires that parties operate in spirit of co-operation. James N. Pappas & Sons, Inc. v McDonald's Corp. (1976, DC Dist Col) 21 FR Serv 2d 773.

Plaintiff would be ordered to appear at his deposition and answer questions put to him be defense counsel related to factual basis of his claims against defendants, and to refrain from questioning defense counsel or otherwise interfering with taking of his deposition, as he did first time. Minniecheske v Gudmanson (1993, ED Wis) 151 FRD 107, 26 FR Serv 3d 1095.

Motion to compel plaintiff's identification of each specific satellite piracy device that plaintiff claimed defendants possessed was granted where plaintiff had not exercised its option under Fed. R. Civ. P. 33(d) to provide defendants with business records from which this information could be obtained, nor did it appear that plaintiff had attached any documents to its interrogatory answer that were identified as being responsive to this particular interrogatory. DIRECTV, Inc. v Puccinelli (2004, DC Kan) 224 FRD 677 (criticized in Diaz-Padilla v Bristol Myers Squibb Holding Ltd. Liab. Co. (2005, DC Puerto Rico) 2005 US Dist LEXIS 5879) and motion den, motion to strike den (2006, DC Kan) 2006 US Dist LEXIS 94648 and (criticized in Ice Corp. v Hamilton Sundstrand Corp. (2007, DC Kan) 2007 US Dist LEXIS 34578).

**77. --Conferring or attempting to confer in good faith**

Defendants in civil rights action complied with former *Fed. R. Civ. P. 37(a)(2)(B)*, where attorneys met in person following hearing, and next day, defense counsel sent written clarification of discovery he was requesting, and plaintiffs failed to respond. LaFleur v Teen Help (2003, CA10 Utah) 342 F3d 1145, 56 FR Serv 3d 497.

District court did not abuse its discretion in denying employee's motion to compel discovery because employee could not show that parties attempted to confer in good faith to resolve discovery request. Robinson v Potter (2006, CA8 SD) 453 F3d 990, 18 AD Cas 198, reh den (2006, CA8 SD) 2006 US App LEXIS 24093.

Motion to compel is improper where parties to motion have made no effort to confer prior to requesting relief from court. James N. Pappas & Sons, Inc. v McDonald's Corp. (1976, DC Dist Col) 21 FR Serv 2d 773.

Where there are instances of neglect and miscommunication among counsel regarding various discovery disputes, conference requirement of Local Rule 5.1(a) should be utilized more in order to resolve discovery issues or at least narrow their focus before judicial resolution is sought. Dondi Properties Corp. v Commerce Sav. & Loan Asso. (1988, ND Tex) 121 FRD 284.

Motion to compel would be denied where defendant's assertion that plaintiff's counsel failed to make reasonable effort to first confer was uncontested. Haselhorst v Wal-Mart Stores (1995, DC Kan) 163 FRD 10.

Plaintiff's *Fed. R. Civ. P. 37* motion to compel was denied in part as to plaintiff's request for records covering "similar routes" as such issue was not subject of good faith pre-motion resolution requirement of former Rule 37(a)(2)(A), to confer with defendants prior to filing motion to compel. *Am. Rock Salt Co., LLC v Norfolk S. Corp. (2004, WD NY) 228 FRD 426.*

In action claiming violations of state Unfair Trade Practices Act, W. Va. Code § 33-11-1 et seq., insureds' motion to compel was addressed on merits because they made good faith effort to confer with insurer under former *Fed. R. Civ. P. 37(a)(2)(B)* since they were not required to contact insurer's new counsel as long as its former counsel was counsel of record, and seven days was reasonable amount of time to wait for response to attempt to confer. Miller v Pruneda (2004, ND W Va) 236 FRD 277.

In qui tam action, physicians moved to compel relator to answer interrogatories and respond to requests for production of documents, but physicians failed to first confer with opposing counsel in attempt to resolve dispute as required by former *Fed. R. Civ. P. 37(a)(2)(B)* and D. D.C. Civ. R. 7(m) before filing non-dispositive motion; because of physicians' failure to comply with requirement to confer with opposing counsel in good faith effort to resolve or narrow dispute prior to filing motion to compel, court denied motion. United States ex rel. Pogue v Diabetes Treatment Ctrs. of Am., Inc. (2006, DC Dist Col) 235 FRD 521, amd on other grounds, on reh, motions ruled upon, claim dismissed on other grounds (2007, DC Dist Col) 474 F Supp 2d 75.

In case in which armament company made good faith attempt to comply with *Fed. R. Civ. P. 37(a)(1)* to resolve discovery issues with optical company before filing motion to compel and motion was ripe for resolution, magistrate judge's decision to consider motion on its merits, despite its non-compliance with M.D. Fla. Gen. R. 3.01(g) was not clearly erroneous; good faith conferral requirement in Local Rules of United States District Court for Middle District of Florida was stricter than *Fed. R. Civ. P. 37*'s good faith conferral requirement; thus, while attempt to confer did not satisfy M.D. Fla. Gen. R. 3.01(g), attempt to confer might satisfy Rule 37(a)(1) if it was made in good faith. Knights Armament Co. v Optical Sys. Tech., Inc. (2008, MD Fla) 254 FRD 470.

Court denied buyers' motion to compel seller to answer Interrogatories 6 and 7, pursuant to *Fed. R. Civ. P. 37(a)* because buyers had not satisfied their duty to confer, as required by R. 37(a) and D. Kan. R. 37.2; while buyers sent seller golden rule letter asking it to withdraw its objection and answer to Interrogatories 6 and 7, buyers never responded to seller's response, but instead filed motion to compel, and thus, conferring efforts fell short of requirement that

counsel in good faith converse, confer, compare views, consult and deliberate, or in good faith attempt to do so. Hayne v Green Ford Sales, Inc. (2009, DC Kan) 263 FRD 647.

Fed. R. Civ. P. 45(d) required that parties issuing subpoena duces tecum for electronically stored information (ESI) from non-parties must attempt to meet and confer with non-party and discuss same issues with regard to requests for ESI as set out in N.D. Miss. R. 26; however, rule did not require that party serving subpoena meet and confer before issuing subpoena, N.D. Miss. R. 37(a) required that counsel confer in good faith to determine to what extent issue in question could be resolved without court intervention; because parties should have worked together to reach amicable resolution of issues before seeking court intervention, as contemplated by N.D. Miss. R. 37(a), motion to quash was denied. Noatex Corp. v King Constr. of Houston, LLC (2012, ND Miss) 864 F Supp 2d 478, remanded (2012, CA5 Miss) 2012 US App LEXIS 18975.

Unpublished Opinions

Unpublished: It was not error to deny plaintiff's motion to compel discovery, as, inter alia, plaintiff's motion did not include certification that plaintiff had, in good faith, conferred or attempted to confer with defendants about their responses to requests for admission of facts before seeking court action as required by *Fed. R. Civ. P. 37(a)(1)*, and motion did not identify particular problems with responses. Jacox v DOD (2008, CA11 Ga) 2008 US App LEXIS 19068.

**78. Defenses**

Information regarding sound recordings corporation contended it had authority to license, adapt, reproduce, replicate, distribute, and/or sell were central to record companies' defenses in corporation's underlying claim for declaratory judgment ruling that it did not engage in copyright infringement and damages; therefore, record companies' motion to compel under *Fed. R. Civ. P. 37* was granted, and corporation was ordered to provide complete responses to interrogatories. Sanyo Laser Prods. v Arista Records, Inc. (2003, SD Ind) 214 FRD 496.

Bank's motion to compel production of documents that company shared with its financial advisors was granted because company failed to show that financial advisors met standard of integration into company's corporate structure, and bank's application to compel production of documents related to company's payment of $ 90 million to restructuring agency was denied because company's equitable defense was fruitless, and bank's disadvantage was therefore illusory. Export-Import Bank of the United States v Asia Pulp & Paper Co., Ltd. (2005, SD NY) 232 FRD 103 (criticized in Stafford Trading, Inc. v Lovely (2007, ND Ill) 2007 US Dist LEXIS 13062).

Where injured party filed suit that was dismissed due to failure to exhaust administrative remedies, where U.S. Attorney assigned to that case represented that government would honor complaint and that injured party would not need to refile, where injured party instituted her suit again after exhausting her administrative remedies, and where new U.S. Attorney assigned to case moved to dismiss under 28 USCS § 2401(b) and alleged that state of limitations had expired, injured party was entitled to order compelling deposition of former U.S. Attorney

regarding her representations in order to establish equitable tolling of statute of limitations because injured party raised significant issues concerning conduct of government's counsel, processing of case, reasonable expectations of injured party's counsel, and reliance upon government's conduct. Waltz v United States Dep't of Agric. (2008, ED Cal) 251 FRD 491.

**79. Independent availability of information**

Where all of information relevant to issues raised in case necessary to proper preparation of same is made available to counsel for plaintiff, defendant will not, in light of former depositions, interrogatories, and admissions, be compelled to produce again witnesses either for general depositions or for purpose of compelling answers to specific questions; directing defendants to do so would constitute harassment and undue burden. Hampton v Pennsylvania R. Co. (1962, ED Pa) 30 FRD 70, 5 FR Serv 2d 442.

Employee was entitled to discover information relating to other employees who were discharged in five-year period preceding case, including identification information, which was relevant to employee's race discrimination case as telephone books were unreliable source of information. Tomanovich v Glen (2002, SD Ind) 89 BNA FEP Cas 1157.

In creditors committee's fraud suit against debtor's officers, directors, and professional employees, court denied committee's *Fed. R. Civ. P. 37* motion to compel production (Fed. R. Civ. P. 34) of personnel files of individual auditors; Cal. Const. art. I, § 1 protected those files from disclosure, and because committee could depose auditors, committee did not have substantial need for files. Official Unsecured Creditors Comm. of Media Vision Tech., Inc. v Jain (2003, ND Cal) 215 FRD 587.

Compelling discovery from another, pursuant to *Fed. R. Civ. P. 37*, is unnecessary when documents sought under Fed. R. Civ. P. 34, are equally accessible to all; furthermore, although parties are generally responsible for their own costs, and their adversaries are not obligated to finance their litigation, court retains discretion to equitably alter cost burden and order production under appropriate circumstances. Baum v Village of Chittenango (2003, ND NY) 218 FRD 36, 57 FR Serv 3d 403.

Court denied plaintiff's *Fed. R. Civ. P. 37* motion to compel defendant to produce, under Fed. R. Civ. P. 34, transcript where plaintiff refused to share costs of preparing transcript and document was equally available to both parties; defendant was not obligated to subsidize plaintiff's litigation, and although plaintiff suggested that she was financially strapped, she offered no details to substantiate that suggestion. Baum v Village of Chittenango (2003, ND NY) 218 FRD 36, 57 FR Serv 3d 403.

Company's request for order to reopen bank's employee's deposition at bank's expense was denied under Fed. R. Civ. P. 30(a)(2)(B) and *Fed. R. Civ. P. 26(b)(2)* since company had its opportunity to obtain from bank's employee non-privileged information to which it was entitled; benefit that might have been obtained from asking bank's employee about communications with bank's lawyers that neither concerned information she learned while she was bank employee nor was work product was outweighed by burden new deposition would have

imposed on bank. Export-Import Bank of the United States v Asia Pulp & Paper Co., Ltd. (2005, SD NY) 232 FRD 103 (criticized in Stafford Trading, Inc. v Lovely (2007, ND Ill) 2007 US Dist LEXIS 13062).

In case in which marketing company filed motion to compel discovery, and communications company had responded to marketing company's interrogatories by stating that interrogatories requested, in whole or in part, information that it was ascertainable from records in possession of marketing company, that approach was not sanctioned by Federal Rules of Civil Procedure. Covad Communs. Co. v Revonet, Inc. (2009, DC Dist Col) 258 FRD 17.

**80. Information that would lead to discovery of admissible evidence**

Trial court errs in not requiring plaintiff to answer question during pretrial deposition calculated to lead to discovery of admissible evidence. Mellon v Cooper-Jarrett, Inc. (1970, CA6 Ohio) 424 F2d 499, 14 FR Serv 2d 107.

In insured's bad faith and breach of contract suit against insurer, insured's motion to compel was granted in part because, under *Fed. R. Civ. P. 26(b)(1)*, insured was entitled to learn identities of individuals who made later decision to pay, as such information could lead to discovery of admissible evidence regarding reasons insurer changed its mind and decided to pay policy limits. Moses v Halstead (2006, DC Kan) 236 FRD 667, summary judgment den, motion to strike den (2007, DC Kan) 477 F Supp 2d 1119.

In case in which former employee sued her former employer, owner, and another company alleging various tort claims and wage and hour claims and former employee filed motion to compel production of all documents evidencing number of hours actually worked by employees, including, but not limited to time cards, work schedules, and notes or reports kept by supervisors or managers from 1998 to present, defendants argued unsuccessfully that three-year limitations period set by Fair Labor Standards Act (FLSA) rendered request per se overly broad in scope of time; request was reasonably calculated to lead to admissible evidence related to matters other than alleged FLSA violations, including former employee's claim that owner reduced her work schedule as form of punishment for resisting his alleged sexual advances. Thong v Andre Chreky Salon (2008, DC Dist Col) 247 FRD 193.

In stock analyst's suit against corporation, its officers, and consultant (defendants), alleging defamation related to alleged campaign to discredit him, analyst was not entitled to motion to compel under *Fed. R. Civ. P. 37* with respect to certain electronically stored information, except that defendants were required to restore and search specified backup tapes from certain e-mail and file servers, because analyst failed to show that remaining requests would produce relevant documents, which had not already been produced. Treppel v Biovail Corp. (2008, SD NY) 249 FRD 111.

In inmate's civil rights suit alleging excessive force against him by corrections officer, district court ordered corrections officer, in response to inmate's motion to compel discovery, to produce inmate's complete medical file and log book for time and date alleged assault took place as such information could lead to admissible evidence; inmate had been unable to obtain

his own medical records from prison personnel and records may show admissible evidence as to medical treatment he received as result of alleged assault; further, logbook page may lead to admissible evidence or additional witnesses. Harcum v LeBlanc (2010, ED Pa) 268 FRD 207, summary judgment gr, judgment entered (2010, ED Pa) 2010 US Dist LEXIS 112754.

**81. Relevancy and irrelevancy**

On motion by plaintiffs to compel answers to interrogatories and for production of documents, irrelevancy will not preclude granting of motion where defendant does not assert that plaintiffs' claim is baseless. Humphreys Exterminating Co. v Poulter (1974, DC Md) 62 FRD 392, 18 FR Serv 2d 809.

Motion to compel witness to answer questions put to him at deposition should be granted if questions are relevant and proper and denied if questions call for privileged information or if answer is otherwise unnecessary. Oliver v Committee for Re-Election of President (1975, DC Dist Col) 66 FRD 553, 19 FR Serv 2d 1517.

Question of relevancy of evidence to be discovered under Rule 37(a) must be decided in favor of relevancy; what is relevant in discovery is different from what is relevant at trial; concept at discovery stage is much broader. Flora v Hamilton (1978, MD NC) 81 FRD 576, 3 Fed Rules Evid Serv 1425, 26 FR Serv 2d 783.

In exercising its discretion on motion to compel discovery pursuant to *FRCP 37(a)*, court must be mindful that parties are permitted to obtain discovery regarding any matter, not privileged, which is relevant to subject matter involved in pending action. EEOC v Klockner H & K Machs. (1996, ED Wis) 168 FRD 233, 71 BNA FEP Cas 833, 70 CCH EPD P 44714, 35 FR Serv 3d 1446.

Cross-plaintiff's motion to compel production of documents from defendant was granted, as documents requested were relevant to cross-plaintiff and he did not bear any responsibility for prejudice; if documents were not produced they would substantially prejudice cross-plaintiff since he would not be able to adequately defend himself from plaintiff or move forward with his claims against defendant. *Colon v Blades (2010, DC Puerto Rico) 268 FRD 129.*

In case alleging retaliation in violation of Title VII of Civil Rights Act of 1964, 42 USCS §§ 2000e et seq., in which former employee filed motion to compel discovery of memoranda written by attorney and her associate regarding interviews of city employees that were conducted in course of investigation of employee's sexual harassment complaint, employer would not be permitted to withhold documents on relevance grounds; interview memorandum fell within broad scope of discoverable material under *Fed. R. Civ. P. 26(b)*. Reitz v City of Mt. Juliet (2010, MD Tenn) 680 F Supp 2d 888.

**82. --Particular cases**

District court's denial of organization's motion to compel professor to produce communications with other non-parties regarding textbook review process was affirmed because organization had not shown that district court abused its discretion in denying motion to compel based on

lack of relevance of disputed communications since speculative and attenuated connection organization suggested between alleged discrimination in imposing or not imposing restrictions on advisers and final textbook revisions did not provide basis to compel discovery organization sought; court properly exercised its discretion to limit scope of subpoena to matters that had been disclosed to defendants, and burden of professor, nonparty to underlying action, to disclose his private communications with other nonparties outweighed any slight relevance disputed communications might have had. In re Subpoena to Witzel (2008, CA1 Mass) 531 F3d 113.

Plaintiff's motion to compel answers to interrogatories and production of documents will be granted where defendant does not show that such production and answers will be annoying, burdensome or completely irrelevant to thrust of instant litigation, and where plaintiff adequately contends that answers to interrogatories and production of relevant documents will significantly enhance plaintiff's ability to present properly its cause of action. Roto--Finish Co. v Ultramatic Equipment Co. (1973, ND Ill) 60 FRD 571, 181 USPQ 86, 17 FR Serv 2d 1396.

Where plaintiffs fail to demonstrate that production of requested documents would be annoying, burdensome or completely irrelevant to thrust of litigation, stockbroker and dealer-defendants are entitled to discovery of plaintiffs' documents reflecting plaintiffs' financial status to test accuracy, veracity and extent of financial information furnished defendants as requested during time of financial dealings. Lavin v A. G. Becker & Co. (1973, ND Ill) 60 FRD 684, CCH Fed Secur L Rep P 94446.

Where employee moved to compel employer to comply with written discovery requests regarding comparative information and information relating to conduct of certain decisionmakers relating only to employee's claims under Title VII of Civil Rights Act of 1964, 42 USCS §§ 2000e et seq., in ruling on discovery requests, court determined that: (1) information relating to certain supervisor and employees under that supervisor was irrelevant because that particular supervisor was not involved in failure to promote employee or in employee's termination; (2) employee's request for information going back to January 1, 1997 was overbroad, and January 1, 2001 was more reasonable date; (3) employee's request for information relating to employer's manager training program should have been limited to employees who worked in district in which employee worked; (4) request for information as to "each and every employee" found to have violated employer's asset protection or security policies was overbroad because employee and non-management employees were decidedly not similarly situated, and request should have been limited to employees who had same position and duties as employee and who worked in district in which employee worked; (4) request for information as to "each and every employee" terminated for insubordination was overbroad because request included employees who were not similarly situated, and request should have been limited to same misconduct in which employee allegedly engaged; (5) request for personnel files of two employees was unwarranted because neither was decision maker nor similarly situated; and (6) request for counseling reports should have been limited to similarly situated employees. Banks v CBOCS, West, Inc. (2003, ND Ill) 91 BNA FEP Cas 1019.

In deciding plaintiffs' motion to compel, court found that field returns and associated documentation for all base model dishwashers that either included some sort of allegation that

fire started in door area of dishwasher or that fire's origin was unknown were both relevant on their face, and since court rejected manufacturer's argument that requested discovery was not relevant and court found burden of production did not outweigh presumption in favor of broad disclosure, court granted plaintiffs' motion to compel. McCoy v Whirlpool Corp. (2003, DC Kan) 214 FRD 642, motions ruled upon (2003, DC Kan) 214 FRD 646, 55 FR Serv 3d 740, motions ruled upon (2003, DC Kan) 2003 US Dist LEXIS 6909.

In inmate's *42 USCS § 1983* action against, inter alia, prison employees, alleging violation of *28 USCS § 1915(b)*, retaliation under *U.S. Const. amend. I*, and violation of his right of access to courts, prison employees' motion to compel answers to interrogatories was granted where prison employees' interrogatories requesting identity of persons and seeking witnesses having information regarding inmate's claim, requesting oral conversations inmate had with prison employees regarding his complaint, requesting inmate to detail his damages, seeking all correspondence allegedly not mailed in violation of inmate's rights, seeking information as to inmate's efforts to re-mail disputed correspondence, and seeking identification of inmate's legal proceedings were subject to mandatory disclosure under *Fed. R. Civ. P. 26(a)(1)(A)*, were relevant under *Fed. R. Civ. P. 26(b)(1)*, were related to inmate's *42 USCS § 1983* claims, and were not privileged. Davidson v Goord (2003, WD NY) 215 FRD 73, app den (2003, WD NY) 259 F Supp 2d 238, magistrate's recommendation (2004, WD NY) 2004 US Dist LEXIS 30177, accepted, objection denied, summary judgment gr, in part, summary judgment den, in part,, motion gr (2006, ED Va) 2006 US Dist LEXIS 44048.

In action by former employee against her former employer alleging gender discrimination, failure to promote, and retaliation under Title VII of Civil Rights Act of 1964, 42 USCS §§ 2000e et seq., *N.Y. Exec. Law § 296*, and New York City law, following employer's production of sample of e-mails from restored computer backup tapes, employee's motion to compel production of all remaining backup e-mails was granted and one quarter of cost of any further production concerning computer backup tapes requested under Fed. R. Civ. P. 34(a) was shifted to employee pursuant to *Fed. R. Civ. P. 26(b)(2)* and (c) because employee demonstrated that marginal utility of backup tapes was potentially high, cost of restoration was not significantly disproportionate to projected value of case, employee probably had financial wherewithal to cover at least some of cost of restoration, and, although employee did not show that there was indispensable evidence on backup tapes, there was plainly relevant evidence that was only available on backup tapes. Zubulake v UBS Warburg LLC (2003, SD NY) 216 FRD 280, 92 BNA FEP Cas 684, 56 FR Serv 3d 326.

In patent infringement action involving technology used to improve image enhancement for consumer electronic products, court granted patent holders' motion to compel production of documents to extent that motion sought to require corporation to produce chassis and end product model number of all models using certain chips because such information was relevant to determining whether additional products infringed on patents at issue and to infringement allegations. IP Innovation L.L.C. v Sharp Corp. (2003, ND Ill) 219 FRD 427.

In action claiming violations of state Unfair Trade Practices Act (UTPA), W. Va. Code 33-11-4(9), insureds' motion to compel was granted in part because, since they were attempting to prove their allegations that insurer had general business practice of acting in bad faith by presenting

evidence that insurer previously acted in bad faith in state, and proof of multiple past breaches by insurance company was required to prove that company had general business practice of acting in bad faith, previous bad faith/UTPA cases involving insurer in state were relevant. Miller v Pruneda (2004, ND W Va) 236 FRD 277.

Although defendants argued that disclosure of information plaintiff sought, specifically Office of Professional Standards (OPS) files, was clearly prohibited by Del. Code Ann. tit. 11, § 9200(c)(12) and (d), OPS files that plaintiff sought had to be produced because they were relevant to prove whether 37 other officers charged and/or convicted of dishonesty and/or inaccurate reporting were similarly situated to plaintiff; defendants were also to produce responsive information regarding camera room assignments and training opportunities because that information was relevant to plaintiff's ability to establish his prima facie burden with respect to his retaliation claim; plaintiff's motion to compel was granted. Jones v City of Wilmington (2004, DC Del) 299 F Supp 2d 380.

Defendants' motion to compel was granted except as to request for production of parties' correspondence, copies of which defendants presumably possessed; motion was otherwise granted because plaintiffs had improperly responded to five interrogatories by generally referring to voluminous documents, and documents pertaining to terminated insurance agent's business activities with insurer's competitors were relevant and likely to lead to discovery of admissible evidence in suit. Morin v Nationwide Fed. Credit Union (2005, DC Conn) 229 FRD 364.

U.S. magistrate judge found that District of Columbia complied with former *Fed. R. Civ. P. 37(a)(2)(B)* before it filed motion to compel minor, who sued District, pursuant to *42 USCS § 1983*, to provide additional documents pertaining to his medical condition, and it ordered minor to provide those documents because they were relevant to minor's claim that he was abused while he lived in home operated by contractor hired by District; however, magistrate denied supplement District filed to its motion because District failed to show exceptional circumstances necessary to justify its request for permission to depose nontestifying, consulting expert. Doe v District of Columbia (2005, DC Dist Col) 231 FRD 27, 63 FR Serv 3d 159.

Motion by school administrative assistant and her husband to compel discovery about alleged anger management, psychological, and psychiatric conditions of school principal was denied because any treatment that principal allegedly received for her anger management, psychological, or psychiatric conditions was not relevant to any of sexual harassment, negligent hiring, and negligent supervision claims of assistant or her husband against diocese that hired principal, and was not relevant to any defense of diocese to claims of assistant and her husband; accordingly, protective order was issued to diocese. Favale v Roman Catholic Diocese of Bridgeport (2005, DC Conn) 233 FRD 243.

Where insurer produced documents clearly stating that it would not insure nightclub if nightclub's liquor sales exceeded 25 percent of its total sales, insurer was not required to produce its underwriting guidelines and its policies issued to other nightclubs since documents were irrelevant as to whether nightclub's alleged misrepresentation of its liquor sales was material to insurer's decision to insure nightclub. Burlington Ins. Co. v Okie Dokie, Inc. (2005, DC Dist Col) 368 F Supp 2d 83.

Patent holder was entitled to discovery of documents regarding manufacturer's foreign sales of allegedly infringing products; failure by manufacturer's counsel to respond to statement in letter that relevancy-based objections would be withdrawn constituted admission, information was relevant to holder's claim for inducement of infringement under *35 USCS § 271(b)*, and holder was not judicially estopped from arguing that foreign sales information was relevant. Murata Mfg. Co. v Bel Fuse, Inc. (2006, ND Ill) 234 FRD 175.

In purported class action for violations of California Labor Code, conversion and theft of labor, and unfair business practices under Cal. Bus. & Prof. Code § 17200 et seq., plaintiff was entitled under *Fed. R. Civ. P. 37* to compel production of documents requested under Fed. R. Civ. P. 34; request for documents pertaining to putative class members' hours, wages, business-related expenses, repayment of wages, termination wages, and meal breaks was not premature because documents were relevant under *Fed. R. Civ. P. 26* to showing of numerosity and commonality for purposes of *Fed. R. Civ. P. 23(a)*. Hill v Eddie Bauer (2007, CD Cal) 242 FRD 556.

In employment discrimination case, employee's *Fed. R. Civ. P. 37* motion to compel was granted as to interrogatory and two requests for production, except, pursuant to Fed. R. Civ. P. 34, where employer did not have materials sought in its possession, custody, or control, because information was relevant as was required pursuant to *Fed. R. Civ. P. 26(b)(1)*; specifically, information regarding vacant positions and documents demonstrating that employer had accommodated specific employees with disabilities was relevant to employee's discrimination claims; in addition, five-year time period was not overly broad in temporal scope, nor was request overly broad in organizational scope given that it sought discovery for all employees in plant, regardless of whether they were salaried or hourly, and without regard to their position, department, supervisor, or medical history; plant medical officer made decision regarding whether employee could be accommodated, and all employees working in plant were subject to decisions made by that officer. Manning v GM (2007, DC Kan) 247 FRD 646.

In case in which assignee moved to compel production of insurance company's underwriting file from its inception to present time, that motion was denied because that file was not relevant to assignee's breach of contract claim. Milinazzo v State Farm Ins. Co. (2007, SD Fla) 247 FRD 691.

In case in which assignee moved to compel production of insurance company's standard operating procedures, motion was denied because they were irrelevant to assignee's breach of contract claim; while insurance company's failure to comply with internal guidelines, though potentially relevant to bad faith action, was irrelevant to determination of coverage, i.e., whether insurance company had breached insurance contract. Milinazzo v State Farm Ins. Co. (2007, SD Fla) 247 FRD 691.

In *42 USCS § 1983* suit against city and two police officers (defendants), alleging false arrest, malicious prosecution, and excessive force in violation of his constitutional rights, arrestee was not entitled under *Fed. R. Civ. P. 37(a)* to compel defendants to disclose information permitting him to depose surviving witness of murder and attempted murder because this deposition was not necessary since defendants sufficiently established probable cause for arrest and

prosecution based on fact that surviving witness was victim, and he identified arrestee in photo array and lineup. Drummond v Castro (2007, SD NY) 522 F Supp 2d 667.

In case in which former employee sued her former employer, owner, and another company alleging various tort claims and wage and hour claims and former employee filed motion to compel production of testimony or deposition of owner from another case, alleging that owner had provided false testimony in other case, request was relevant to weigh credibility of owner's testimony in present case. Thong v Andre Chreky Salon (2008, DC Dist Col) 247 FRD 193.

In review of decisions of Trademark Trial and Appeal Board, defendant's motion to compel discovery was granted in part under *Fed. R. Civ. P. 37* and *26* because under Fed. R. Civ. P. 33 plaintiff was required to provide in response to interrogatories unambiguous statement identifying all of those having rights to plaintiff's mark and to confirm that there were no nonprivileged documents comparing parties' products, relevant issue. Tequila Centinela, S.A. de C.V. v Bacardi & Co. (2008, DC Dist Col) 247 FRD 198.

Employer who was sued for retaliatory termination by former employee was entitled to sanction of dismissal of suit under *Fed. R. Civ. P. 37(a)(4)* because employee lied under oath in his discovery responses in attempt to conceal his prior mental health treatment, which was relevant to key issue of emotional distress damages. Gonzalez v Business Representation Int'l, Inc. (2008, SD Fla) 248 FRD 644, 21 FLW Fed D 174.

In vicarious liability suit against company arising from motor vehicle accident, passenger in truck whose driver was allegedly employed by company was entitled to compel discovery under *Fed. R. Civ. P. 37(a)(3)(B)* of various documents requested under Fed. R. Civ. P. 34(a); documents including driver's license and driving record, drug testing of driver, company's criteria for hiring drivers, and repair records for truck were relevant to establish negligence on part of driver, so documents were discoverable under *Fed. R. Civ. P. 26(b)(1)*. Huggins v Fed. Express Corp. (2008, ED Mo) 250 FRD 404.

In limited discovery preceding actual discovery under *Fed. R. Civ. P. 26(f)*, employee asserting that employer failed to give proper overtime pay to class of employees was not entitled to compel discovery, under *Fed. R. Civ. P. 37(a)*, of putative class members' names as such discovery was not necessary to determination of whether employer's arbitration agreement with employees was enforceable. O'Donnell v TD Ameritrade, Inc. (2008, SD Cal) 250 FRD 502, motion gr, in part, motion den, in part, judgment entered (2008, SD Cal) 2008 US Dist LEXIS 49829.

Plaintiffs in negligence suit against chemical manufacturers were not entitled under *Fed. R. Civ. P. 37* to compel production of documents that related to chemicals other than wood treatment chemical that allegedly harmed plaintiffs; documents were not shown to have been relevant under *Fed. R. Civ. P. 26(b)(1)*, as plaintiffs had not demonstrated any connection between wood treatment chemical and chemicals that were subject of requested documents. Bredemus v Int'l Paper Co. (2008, DC Minn) 252 FRD 529.

In suit alleging that employer discriminated against employee due to her pregnancy and her panic disorder, thus violating District of Columbia Family and Medical Leave Act and District of

Columbia Human Rights Act, employee was compelled under *Fed. R. Civ. P. 37* to produce medical records and to answer non-privileged deposition questions, as information pertaining to employee's panic syndrome and treatment thereof, information relating to financial and property losses claimed by employee as resulting from alleged violations, and information regarding employee's work history after she separated from employer, was relevant under *Fed. R. Civ. P. 26(b)* both with regard to support for employee's claims and in assisting employer in asserting defenses. Jackson v CCA of Tenn., Inc. (2008, DC Dist Col) 254 FRD 135, 71 FR Serv 3d 1614.

Employee's motion to compel employer to produce three personnel files for members of management team who were involved in or who provided input on, decision to terminate employee's employment was granted as to one member of management team because there was factual issue as to whether member of management team consulted, was involved in, or provided input into decision to terminate employee's employment; motion to compel was denied as to other two members of management team since there was no evidence that refuted employer's contention that they were not involved in termination decision. White v Graceland College Ctr. for Prof'l Dev. & Lifelong Learning, Inc. (2008, DC Kan) 586 F Supp 2d 1250.

In wrongful death action involving truck-automobile collision, where plaintiff was entitled to order compelling production of defendant's investigation files regarding prior accident, plaintiff could depose employee or employees of defendants who participated in investigation involving prior accident because prior accident was relevant to issues in instant litigation, and it did not appear that information related to prior accident was privileged. Gruenbaum v Werner Enters. (2010, SD Ohio) 270 FRD 298.

In wrongful death action involving truck-automobile collision, plaintiff was not entitled to order compelling production of defendant's investigation files regarding three prior accidents because accidents were not sufficiently similar to accident at issue to justify further discovery. Gruenbaum v Werner Enters. (2010, SD Ohio) 270 FRD 298.

In wrongful death action involving truck-automobile collision, plaintiff was entitled to order compelling production of defendant's investigation files regarding prior accident because accident was sufficiently similar to accident at issue to warrant further discovery. Gruenbaum v Werner Enters. (2010, SD Ohio) 270 FRD 298.

In minor's excessive force suit against officers and city, documents that specifically related to use of Taser when confronting person with suspected "mixed martial arts training" were discoverable because litigation involved allegation of excessive force by deployment of Taser. Garcia v City of Imperial (2010, SD Cal) 270 FRD 566.

In bad faith case under Montana's Unfair Trade Practices Act, Mont. Code Ann. § 33-18-201 et seq., arising from self-insured company's handling of personal injury claim, claimant was entitled to compel discovery under *Fed. R. Civ. P. 37(a)* of similar claims, which were relevant under *Fed. R. Civ. P. 26(b)(1)* to consideration of punitive damages as set forth in Mont. Code Ann. § 27-1-221(7)(b). Moe v Sys. Transp., Inc. (2010, DC Mont) 270 FRD 613.

In employees' suit alleging, among other things, age discrimination and violations of ERISA, employees were entitled to order compelling employer to produce requested documents

regarding interpretation of certain non-compete provisions and documents relating to employer's representations regarding its treatment of former employees who attempted to contact certain clients because documents were relevant to employees' claims regarding certain releases they were required to sign, and absence of time limitation for such documents did not bar their production because changes in these matters over time was relevant to employees' theory of case regarding allegedly discriminatory releases. Romero v Allstate Ins. Co. (2010, ED Pa) 271 FRD 96.

In employees' suit alleging, among other things, age discrimination and violations of ERISA, employees were entitled to order compelling employer to produce requested documents regarding certain alleged misrepresentations regarding required execution of releases for retaining employment because discovery about this matter was explicitly part of appellate court's mandate and documents were relevant to employees' pleaded causes of action; however, such production was temporally limited to two year period. Romero v Allstate Ins. Co. (2010, ED Pa) 271 FRD 96.

Just because signatory to contract was one with most knowledge on contract decision issue did not necessarily mean that others lacked knowledge relevant to that issue; each defendant's decision to engage marketing company could have involved other people with significant knowledge of decision; because plaintiff's request to identify all persons with personal knowledge of why defendants first contracted with company was relevant and not overly broad or unduly burdensome, under *Fed. R. Civ. P. 37* and *26(b)*, defendants were compelled to answer plaintiff's interrogatory. Abraham v Alpha Chi Omega (2010, ND Tex) 271 FRD 556.

Because plaintiff's subpoena duces tecum was overbroad and was served on defendant's counsel, who was not part of pending sanctions dispute, pursuant to *Fed. R. Civ. P. 26(c)*, *37(a)(5)*, defendant was entitled to protective order as well as part of fees incurred in moving to quash subpoena. Rodriquez v Parsons Infrastructure & Tech. Group, Inc. (2010, SD Ind) 271 FRD 620.

In United States' action for injunctive and declaratory relief under 26 USCS §§ 7402, 7407 and 7408, court denied defendants' motion to compel discovery under *Fed. R. Civ. P. 26(b)(1)*, *37* because manner in which IRS interpreted and applied laws and regulations governing deduction was immaterial to whether or not defendants acted with reasonable cause or in good faith as those terms were used in 26 USCS § 6694(a)(3), and similarly, any alleged internal inconsistency in IRS's application of deduction had no bearing on these defenses; even assuming that actions or positions taken by IRS employees were relevant to defenses of reasonable cause and willfulness, it was only those actions or those positions of which defendants had actual knowledge that would be relevant, and evidence of actions or positions of which defendants had actual knowledge were likely to be within defendants' own knowledge, possession and control. United States v Elsass (2011, SD Ohio) 108 AFTR 2d 6105.

In product liability case, motion to compel discovery under *Fed. R. Civ. P. 37* was partially granted because plaintiffs were entitled to discovery on manufacturer's financial condition since it was relevant; however, requests were overly broad and should have been limited to most recent two year period to allow for development of punitive damages claim. In re Heparin Prods. Liab. Litig. (2011, ND Ohio) 273 FRD 399.

Company's motion to compel production of documents detailing corporation's actual damages was granted as follows: (1) because cost of producing underlying white mail was significant, especially considering that it appeared that only small number of customers cancelled by mail rather than through other means, if company desired to review white mail, either all of it or some sample to confirm spreadsheet's accuracy, it had to bear cost of its retrieval; (2) because business documents detailing corporation's projected earnings from its various contracts with company were relevant to its claim for actual damages to extent that corporation had not realized those profits due to breach alleged, corporation had to respond in full to document request by July 22, 2011, or it would be precluded from using any such documents to argue that it suffered lost profits as result of company's alleged breach, under *Fed. R. Civ. P. 37(b)(2)(A)(ii)*. Trilegiant Corp. v Sitel Corp. (2011, SD NY) 275 FRD 428.

In action alleging that defendant trust wrongfully denied plaintiff health care benefits in violation of Employee Retirement Income Security Act, plaintiff's motion to compel under *Fed. R. Civ. P. 37(a)(3)(B)* was granted because trust had not met its burden of establishing that decision to deny benefits was entitled to deferential review, so de novo standard of review was appropriate, and plaintiff could seek discovery of all materials reasonably calculated to lead to discovery of admissible evidence under *Fed. R. Civ. P. 26(b)(1)*. Durham v IDA Group Benefit Trust (2011, ND Ind) 276 FRD 259.

In action in which plaintiffs alleged that defendant airline's negligent and reckless acts caused crash of aircraft that was operated by regional carrier, plaintiffs' requests for information concerning airline's control of its regional carriers and airline's policies relating to training, safety, and flight operations were relevant under *Fed. R. Civ. P. 26(b)(1)* because requests were calculated to lead to evidence regarding whether airline failed to address problems with regional carrier's safety standards and whether airline's actions contributed to crash; thus, pursuant to *Fed. R. Civ. P. 37(a)*, airline was directed to produce requested information. In re Air Crash near Clarence Ctr. (2011, WD NY) 277 FRD 251, motion gr, in part, motion den, in part, request den (2011, WD NY) 2011 US Dist LEXIS 146551.

Having not submitted any evidence regarding harm to its goodwill, consumer confusion, or diversion of sales, corporation relied only on companies' domestic activity to bring their allegedly infringing foreign activity within scope of *15 USCS § 1125*; companies' domestic conduct by itself was insufficient to make Lanham Act applicable extraterritorially, and based on corporation's evidentiary submissions, court was not convinced that reopening of fact discovery to order production of information pursuant to *Fed. R. Civ. P. 37* related to companies' sales to foreign purchasers would be reasonably calculated to lead to discovery of admissible evidence under *Fed. R. Civ. P. 26(b)(1)*. Gucci Am. v Guess?, Inc. (2011, SD NY) 790 F Supp 2d 136, 79 FR Serv 3d 995.

Under *Fed. R. Civ. P. 26(b)(1)* and *Fed. R. Civ. P. 37*, employee who asserted race discrimination claim was required to respond to interrogatories seeking information regarding alleged emotional suffering, loss of income, identity of any person who was contacted by employee concerning his allegations, any admissions made by employer, identity of any individual known to have personal knowledge regarding employee's allegations, and nature and amount of all damages employee was seeking; such requests were relevant or could lead to discovery of admissible evidence. Grant v Target Corp. (2012, SD Ohio) 281 FRD 299.

Where creditors' representative in bankruptcy case alleged that bankruptcy debtor's forgiveness of loan to terminated officer was fraudulent transfer, and officer declined to produce personal income tax returns, officer was not compelled to produce returns since officer's tax treatment of loan and forgiveness was irrelevant to value of transfer and whether debtor received reasonably equivalent value. Savage & Assocs., P.C. v Mandl (In re Teligent, Inc.) (2006, BC SD NY) 358 BR 63, 47 BCD 104.

Unpublished Opinions

Unpublished: In this Title VII of Civil Rights Act of 1964 action, district court's denial of motion to compel was justified by employee's failure to comply with *Fed. R. Civ. P. 37(a)(2)(B)*; district court found that employee's questions about Chief Executive Officer's sexual relationships were overbroad because they contained no time limitations and could have elicited information about his sex life stretching back 38 years or more. Bilal v Rotec Indus. (2009, CA7 Ill) 2009 US App LEXIS 12649.

Unpublished: In action for breach of non-competition agreement, teleconferencing service provider was entitled to compel corporation and related individual to produce individual's financial records under *Fed. R. Civ. P. 37* because information was relevant to claims and defenses; although Utah Code Ann. § 78B-8-201(2)(a) was not specifically applicable to discovery motion, logic and policy behind statute counseled in favor of protective order restricting access and use of individual's financial information to counsel of record. Free Conf. Call Holdings, Inc. v Powerhouse Communs., LLC (2009, DC Utah) 2009 US Dist LEXIS 81408.

Unpublished: In action in which former employers alleged that former employees stole trade secrets and shared them with competitor so that competitor could manufacture and sell employers' products as its own, employers were compelled under *Fed. R. Civ. P. 26(b)(1)* and *Fed. R. Civ. P. 37(a)(1)* to produce all records responsive to discovery requests for names of customers who were permitted to resell employers' products because employees were correct to ask for names of resellers who were not known to them. Paper Thermometer Co. v Murray (2011, DC NH) 2011 US Dist LEXIS 121775.

**83. Miscellaneous**

In corporation's suit alleging that borrower breached two promissory notes requiring repayment of sums advanced by corporation and its principal owner, borrower's *Fed. R. Civ. P. 37* motion for imposition of sanctions, which was premised on corporation's reliance on evidence that it failed to produce during discovery, was properly denied because borrower himself engaged in litany of discovery abuses. Conseil Alain Aboudaram, S.A. v De Groote (2006, App DC) 373 US App DC 110, 460 F3d 46, motion to strike den (2006, App DC) 2006 US App LEXIS 21502.

Counsel's reasons for instructing his witnesses not to answer deposition may not be considered in opposition to subsequently filed motion to compel since such consideration would condone procedure of giving such instructions when, as matter of law, instructing witnesses not to answer except in very limited areas of privileged matter and trade secrets is improper. American Hangar, Inc. v Basic Line, Inc. (1985, DC Mass) 105 FRD 173, 1 FR Serv 3d 1086.

Motion for order compelling production would be denied since there was parallel criminal proceeding in progress which would be prejudiced by disclosure and disclosure would only be deferred until disposition of criminal proceeding and be recommenced no later than 60 days before civil trial. In re Ivan F. Boesky Sec. Litig. (1989, SD NY) 128 FRD 47.

*FRCP 37(a)* does not provide authority for court to act where motion to compel was never heard and is then subsequently mooted, but where offending party admits delinquency, yet never actually provides any discovery. *In re Fisherman's Wharf Fillet, Inc. (1999, ED Va) 83 F Supp 2d 651, 2000 AMC 1331.*

Defendants' motion to compel further responses to interrogatory was granted because corporation had failed to address specific damages claimed for each cause of action; corporation had several different claims against defendants, and defendants were entitled to know their exposure on each claim. DIRECTV, Inc. v Trone (2002, DC Cal) 209 FRD 455.

In Lanham Act case, where plaintiff explained why further discovery was necessary before it could answer questions related to damages it suffered from defendant's alleged wrongful conduct, court denied defendant's motion to compel discovery but reminded plaintiff of its continuing obligation under *Fed. R. Civ. P. 26(e)* to supplement its responses when information requested became available. Inseco, Inc. v Flood Co. (2003, MD Fla) 70 USPQ2d 1159.

In action by automobile buyers against automobile sellers alleging federal and state consumer protection violations and unjust enrichment, buyers' motion to compel discovery was denied because buyers failed to submit copies of their requests for documents or requests for sellers' responses. Violette v P. A. Days, Inc. (2003, SD Ohio) 214 FRD 207, subsequent app, remanded on other grounds (2005, CA6 Ohio) 427 F3d 1015, 2005 FED App 436P.

In class action by plaintiff health care consumers for violation of federal Medicaid Act, magistrate granted motions to compel production of documents having private information regarding class members; under Mass. Gen. Laws ch. 66A, § 2(k), part of Massachusetts Fair Information Practices Act, Mass. Gen. Laws ch. 66A, §§ 1 et seq., balance of interests tipped in favor of disclosure to class counsel, particularly given fact that consumers' counsel were deemed capable of representing class of individuals whose personal information was at issue. Rosie D. v Romney (2003, DC Mass) 256 F Supp 2d 115, 55 FR Serv 3d 883, findings of fact/conclusions of law (2006, DC Mass) 410 F Supp 2d 18.

In *42 USCS § 1983* action, magistrate's decision to compel discovery from inmate was not clearly erroneous where inmate demonstrated ability to participate in litigation when necessary, and thus inmate's medical condition and use of medication did not impede inmate's ability to participate in discovery. Davidson v Goord (2003, WD NY) 259 F Supp 2d 238, magistrate's recommendation (2004, WD NY) 2004 US Dist LEXIS 30177, accepted, objection denied, summary judgment gr, in part, summary judgment den, in part,, motion gr (2006, ED Va) 2006 US Dist LEXIS 44048.

Defendants' motion to compel as to their request for production was denied because there was no evidence that broker's file at issue was within plaintiff's possession. Essex Ins. Co. v Neely (2006, ND W Va) 236 FRD 287.

In insured's bad faith and breach of contract suit against insurer, insured's motion to compel was denied in part because interrogatory which sought identities of all persons with knowledge concerning any of issues raised by pleadings, was overbroad since term "concerning" modified enormous amount of information, i.e., all issues raised in pleadings. Moses v Halstead (2006, DC Kan) 236 FRD 667, summary judgment den, motion to strike den (2007, DC Kan) 477 F Supp 2d 1119.

All factors enumerated in Restatement (Third) of Foreign Relations Law of U.S. § 442(1)(c), Aerospatiale, and Minpeco weighed in favor of plaintiffs; mutual interests of U.S. and United Kingdom in thwarting terrorist financing outweighed British interest in preserving bank customer secrecy--especially where Britain has not expressed interest in bank secrecy and has acted upon its own interest in international cooperation to detect, monitor, and report customer links to terrorist organizations, and freeze funds used for terrorist financing; requested discovery originated outside of U.S., was crucial to case, and was specifically tailored to issues and plaintiffs did not have viable alternative means of securing discovery. Weiss v Nat'l Westminster Bank, PLC (2007, ED NY) 242 FRD 33.

In former employee's suit against managing partner (MP), where former employee sought emails from former employee's tenure, it was appropriate to require MP to participate in process designed to ascertain cost of forensic testing of computers at issue because, inter alia, (1) results of search that was conducted were incomprehensible, and (2) MP waived any objection to document request at this late date on grounds that request should have issued separately to company. Peskoff v Faber (2007, DC Dist Col) 244 FRD 54.

In breach of contract case in which marketing company requested that communications company identify people who may have information about lawsuit, and communications company responded with list of names and argued that it should not have to provide present or last known home and business address, present position, business affiliation, and job description or last known, if current information was unavailable because marketing company had not done so in response to similar request, communications company was not justified in providing insufficient answers just because marketing company had done so. Covad Communs. Co. v Revonet, Inc. (2009, DC Dist Col) 258 FRD 17.

In contract case in which marketing company filed motion to compel discovery and Interrogatory No. 7 sought information about communications company's allegation that marketing company continued to use communications company's information illicitly, communications company's answer that marketing company still had sales leads that had not been returned did not answer question of what information communications company had that would tend to show that marketing company was still using leads; accordingly, communications company had to supplement that interrogatory by indicating specifically what information it had, if any, that marketing company was still using leads. Covad Communs. Co. v Revonet, Inc. (2009, DC Dist Col) 258 FRD 17.

In contract case in which marketing company filed motion to compel discovery and Interrogatory Nos. 1-10 sought information about communications company's basis for claiming that marketing company breached 2004, 2005, and 2006 contracts, respectively, communications

company had to state dates on which breaches occurred, if it knew them, specific manner in which breaches occurred, and why it believed breach occurred on those dates; as to 2005 contract, which contained provision that was not found in other two contracts, communications company must also supplement its answer to indicate whether alleged actions took place while contract was in effect, and indicate basis for its contention. Covad Communs. Co. v Revonet, Inc. (2009, DC Dist Col) 258 FRD 17.

In employees' suit alleging, among other things, age discrimination and violations of ERISA, employees were entitled to order compelling employer to produce certain requested documents regarding whether disputed release was void under part and parcel theory of recovery because such discovery was clearly ordered as part of appellate court's mandate in this case. Romero v Allstate Ins. Co. (2010, ED Pa) 271 FRD 96.

In employees' suit alleging, among other things, age discrimination and violations of ERISA based in part, on required execution of certain release in order to maintain employment, employees were entitled to order compelling employer to produce requested documents in native format together with all associated meta-data because information was relevant to employees' claims and they demonstrated particularized need in that information would be crucial to establish their case and permit them to conduct more meaningful search of employer's extensive documentation. Romero v Allstate Ins. Co. (2010, ED Pa) 271 FRD 96.

In adversary proceeding, bankruptcy trustee's motion to compel and for sanctions was granted because defendant had failed to produce documents and respond to interrogatories for numerous months without reasonable excuse for delay; discovery requests were reasonably related to issues raised in adversary proceeding, and fact that similar requests had been produced in related proceeding did not excuse defendant's failure to respond. E.J. Sciaba Contr. Co. v Sciaba, (In re E.J. Sciaba Contr. Co.) (2006, BC DC Mass) 45 BCD 249.

Where creditors' representative in bankruptcy case alleged that bankruptcy debtor's forgiveness of loan to terminated officer was fraudulent transfer, and officer declined to produce application documents from officer's current employer, officer was compelled to produce documents since officer was high-ranking officer and director of current employer with legal right, or at least practical ability, to produce personnel documents, and thus officer had custody, possession, or control of documents. Savage & Assocs., P.C. v Mandl (In re Teligent, Inc.) (2006, BC SD NY) 358 BR 63, 47 BCD 104.

Where creditors' representative in bankruptcy case alleged that bankruptcy debtor's forgiveness of loan to terminated officer was fraudulent transfer, and bankruptcy court compelled production of documents from officer's current employer but refused to compel production of personal tax returns, sanctions against officer under *Fed. R. Civ. P. 37(a)(4)* were not warranted despite order to compel employment documents since representative's motion to compel production of tax returns was not substantially justified; representative's request for documents could not be read to cover returns, motion to compel was not timely, and returns were irrelevant. Savage & Assocs., P.C. v Mandl (In re Teligent, Inc.) (2006, BC SD NY) 358 BR 63, 47 BCD 104.

In deciding motion for sanctions filed pursuant to *Fed. R. Civ. P. 37*, court can consider if discovery violations prejudiced opposing party's preparation for trial. Sprouse v Rebel Log Homes (In re Sprouse) (2008, BC ND Miss) 391 BR 367.

Unpublished Opinions

Unpublished: In Title VII of Civil Rights Act of 1964 case in which district court dismissed action with prejudice pursuant to *Fed. R. Civ. P. 37(b)(2)(A)(v)* and 41(b), district court did not abuse its discretion in granting employer's motion to compel and for sanctions; pro se employee committed various violations of discovery requests and orders including repeated refusals to fully answer interrogatories and deposition questions pertaining to discoverable information. Crystal Commodore Pippen v Georgia-Pacific Gypsum, LLC (2011, CA11 Ga) 2011 US App LEXIS 840.

**2. Privileged and Confidential Matters**

**84. Generally**

When claim of privilege is well-taken, party's remedy for claimant's failure to take procedural step of seeking protective orders pursuant to Rules 26 and 30 lies in fees and sanctions provision of Rule 37. In re Sealed Case (1988, App DC) 272 US App DC 314, 856 F2d 268, CCH Fed Secur L Rep P 94009.

Concern for protecting confidentiality does not equate to privilege, and information and documents are not shielded from discovery on sole basis that they are confidential. Sonnino v Univ. of Kan. Hosp. Auth. (2004, DC Kan) 220 FRD 633, motions ruled upon (2004, DC Kan) 2004 US Dist LEXIS 5988.

Upfront request to ignore court orders of confidentiality is not appropriate procedure; if witness whose deposition testimony is sought refuses to testify out of concerns for confidentiality obligations, deposing party may move to compel cooperation pursuant to former *Fed. R. Civ. P. 37(a)(2)(B)*, and opposing party may oppose such motion or move for protective order pursuant to *Fed. R. Civ. P. 26(c)*. Stephens v County of Albemarle (2006, WD Va) 422 F Supp 2d 640.

In discrimination case, employees' *Fed. R. Civ. P. 37* motion to compel, wherein they sought to have declared employer's assertions of privilege where legal counsel was not involved invalid, was partially denied with respect to those documents where employer showed that communications contained therein were made in confidence for primary purpose of obtaining legal advice; further, it denied motion where documents were protected by work-product doctrine, as embodied in *Fed. R. Civ. P. 26(b)(3)*, which only applied to those prepared in anticipation of litigation; however, district court rejected position that document that was "sent from" or "sent to" lawyer for employer was automatically protected from disclosure; moreover, that document was initially placed on privilege log and then removed from it before log was produced was, in and of itself, insufficient to establish relevancy. Williams v Sprint/United Mgmt. Co. (2007, DC Kan) 245 FRD 660.

**85. Attorney-client privilege**

In patent infringement action by patent holder against alleged infringer, infringer's motion to compel further document production and testimony of patent holder's Fed. R. Civ. P. 30(b)(6) witness was denied in part where patent holder was entitled to assert attorney-client joint

defense privilege with regard to withholding testimony and documents involving discussions between it and third parties concerning its patent because there was strong possibility of litigation on horizon, and patent holder demonstrated cooperation among parties in formulating common legal strategy, and crime-fraud exception did not apply because alleged infringer did not establish prima facie likelihood that Sherman Act conspiracy existed. Sony Elecs., Inc. v Soundview Techs., Inc. (2002, DC Conn) 217 FRD 104.

Magistrate judge properly denied plaintiff's motion to compel production of documents related to studies of validity of patent that had been performed by defendant's patent attorney; patent attorney's opinions were protected by attorney-client privilege and defendant had not impliedly waived privilege. Marusiak v Adjustable Clamp Co. (2003, ND Ill) 67 USPQ2d 1798.

In taxpayers' suit to recover taxes and interest allegedly assessed and collected erroneously, court declined to compel government to produce notes of communications between Internal Revenue Service (IRS) attorney and IRS employees and memorandum that discussed IRS's rejection of taxpayer's offer-in-compromise; while attorney-client privilege did not protect notes, as government failed to show that communications were intended to be confidential, notes were "predecisional" and "deliberative" so deliberative process privilege protected them from disclosure and taxpayers did not show that their need for notes outweighed confidentiality concerns underlying privilege. Begner v United States (2003, ND Ga) 92 AFTR 2d 5389.

Motion to compel was granted in part; some documents were discoverable because they related to corporate affairs and were not segregable from personal affairs of defendant, and/or were generated after attorney-client relationship between defendant personally and law firm was terminated. Grassmueck v Ogden Murphy Wallace (2003, WD Wash) 213 FRD 567.

Claims adjuster's interviews of participants, specifically two police officers in underlying matter which was subject of excessive force claim, were not protected by attorney-client privilege where, even if interviewing claims adjuster were attorney (there had been no evidence offered that interviewing claims adjuster was in fact attorney), attorney-client privilege would not have attached because officers were not seeking legal advice from claims adjuster; claims adjuster's capacity was principally to determine whether to pay arrestee's claim, not to offer legal advice to officers. Garcia v City of El Centro (2003, SD Cal) 214 FRD 587.

In breach of contract suit, attorney-client privilege did not apply to defense counsel's deposition questions to plaintiffs' principal regarding status of certain state proceedings against plaintiffs, plaintiffs' decision not to pay back rent, and agency agreement entered into by plaintiffs. Kan. Wastewater, Inc. v Alliant Techsystems, Inc. (2003, DC Kan) 217 FRD 525.

In light of affirmative duty imposed by Fed. R. Civ. P. 30(b)(6), corporate representative was obliged to gain some understanding of underlying facts, regardless of source identifying underlying facts, and to answer questions accordingly; therefore, court granted defendant's *Fed. R. Civ. P. 37* motion to compel and required company to identify documents relied on by its 30(b)(6) witness and produce such documents to extent it had not done so already, as attorney-client privilege did not provide valid basis on which to refuse to divulge facts underlying company's response to defendant's allegations. Sec. Ins. Co. v Trustmark Ins. Co. (2003, DC Conn) 218 FRD 29.

In action by tenant partners against landlord and its partners alleging, inter alia, breach of contract, fraud, and racketeering violations, tenant partners' motion to compel disclosure of unredacted investigatory report was denied where: 1) investigatory report was protected by attorney-client privilege under *Fed. R. Evid. 501* and work product doctrine under *Fed. R. Civ. P. 26(b)(3)* because it was prepared for criminal defense purposes; 2) crime or fraud exception did not apply because investigatory report was not used to defraud anyone; 3) tenant partners had entire investigatory report minus employee's name; and 4) landlord and its partners waived attorney-client privilege and work product doctrine only to extent of partner's statements to press, which did not include divulging employee's name. Lugosch v Congel (2003, ND NY) 218 FRD 41.

Defendants' motion to compel was granted; plaintiff's assertion of attorney-client privilege and work product immunity was unsupported because at no time had plaintiff provided any type of privilege log or made attempt to describe nature of any of alleged privileged or work product documents so as to enable defendants (or Court) to assess applicability of claimed privilege or protection. DIRECTV, Inc. v Puccinelli (2004, DC Kan) 224 FRD 677 (criticized in Diaz-Padilla v Bristol Myers Squibb Holding Ltd. Liab. Co. (2005, DC Puerto Rico) 2005 US Dist LEXIS 5879) and motion den, motion to strike den (2006, DC Kan) 2006 US Dist LEXIS 94648 and (criticized in Ice Corp. v Hamilton Sundstrand Corp. (2007, DC Kan) 2007 US Dist LEXIS 34578).

In suit by mutual insurance association against its members seeking declaration that it was not obligated to indemnify its members for certain occupational disease claims that were not reported prior to certain date, association was not entitled to compel production under *Fed. R. Civ. P. 37(a)* regarding attorney opinion letters issued by members' attorneys to members who served on association's board of directors because (1) information was subject to members' attorney-client privilege, (2) directors owed fiduciary duty to association, but members did not, (3) association sought documents from members and not from directors, and (4) association did not show good cause for piercing attorney-client privilege since complaint did not assert claim for breach of fiduciary duty. Am. S.S. Owners Mut. Prot. & Indem. Ass'n v Alcoa S.S. Co. (2005, SD NY) 232 FRD 191.

In case in which assignee sought to compel insurance company to produce documents related to investigation, processing, analysis and ultimate denial of assignee's claim, with exception of two documents protected by attorney-client privilege, insurance company had to turn over documents related to investigation, processing, analysis and ultimate denial of assignee's claim except for those documents dated after May 28, 2002, date that assignee's claim was denied; documents after that date were protected by attorney-client privilege. Milinazzo v State Farm Ins. Co. (2007, SD Fla) 247 FRD 691.

In beneficiary's lawsuit against employer and its plans (defendants), alleging breach of fiduciary duties under Employee Retirement Income Security Act, 29 USCS §§ 1001 et seq., from elimination of certain stock funds from plan, beneficiary was not entitled to *Fed. R. Civ. P. 37(a)* order compelling defendants to produce certain requested documents because they were protected under *Fed. R. Civ. P. 26(b)(3)* by attorney-client privilege since these documents

related to plan fiduciary communications with outside counsel seeking legal advice to protect to plan administrators from beneficiary's imminent lawsuit, where threat of litigation was not merely based on possibility of suit from filing of benefits claim, but was expressly stated by beneficiary during conversation with plan benefits compliance manager during conversation regarding his benefits and elimination of certain stock from plan. Tatum v R.J. Reynolds Tobacco Co. (2008, MD NC) 247 FRD 488.

Where art collector had sought discovery in aid of suits in Norway and France regarding breach of contract to sell certain sculpture, and where collector and art gallery and its owner had stipulated to certain discovery, pursuant to *Fed. R. Civ. P. 37(a)(1)*, collector was entitled, in part, to order compelling art gallery and its owner to disclose certain information that was within scope of stipulation because none of material was protected by attorney-client privilege since gallery owner did not function as exclusive agent for buyers of certain sculpture, and her role in transaction involving this sculpture was not necessary to furnishing of legal advice to buyers. In re 28 U.S.C. § 1782 (2008, SD NY) 249 FRD 96.

Information provided in employer's privilege log for three entries referencing employee's lawsuit history and divorce proceedings, challenged by employee, was inadequate to meet employer's burden of proof with regard to claim of protection based on attorney-client privilege; court thus found that those three documents were not protected from disclosure by attorney-client privilege and thus had to be produced within 30 days from date of order. White v Graceland College Ctr. for Prof'l Dev. & Lifelong Learning, Inc. (2008, DC Kan) 586 F Supp 2d 1250.

In declaratory judgment suit against insurer by assignee of insured, neither attorney-client privilege nor work-product doctrine applied to shield discovery materials in possession of law firm retained by insurer to defend insured in underlying personal injury suit; court declined to quash assignee's subpoena for records under Fed. R. Civ. P. 45(c)(3)(A)(iii) and compelled discovery of relevant materials possessed by law firm pursuant to *Fed. R. Civ. P. 37(a)(2)*-(3). McGrath v Everest Nat'l Ins. Co. (2009, ND Ind) 73 FR Serv 3d 831, motion to strike gr, claim dismissed (2009, ND Ind) 2009 US Dist LEXIS 71535, motion to strike den, motion to strike gr, partial summary judgment gr, in part, partial summary judgment den, in part (2009, ND Ind) *668 F Supp 2d 1085,* motion den, motion to strike den (2009, ND Ind) 2009 US Dist LEXIS 88180.

In case in which several individuals filed motion to compel production and insurance company argued that production request improperly sought documents protected by attorney-client privilege and work product doctrine and that request was contrary to West Virginia law under Gaughan decision, insurance company overlooked Madden decision; two cases came together to formulate discovery process in bad-faith actions, particularly for discovery of insurance company's claim files of underlying claim; insurance company failed to provide privilege log, in accordance with both Federal of Civil Procedure and United States District Court for Northern District of West Virginia Rules of Civil Procedure and discovery process announced in Madden decision and failed to sufficiently specify why material sought was protected. Hager v Graham (2010, ND W Va) 267 FRD 486.

In wrongful death action involving truck-automobile collision, plaintiff was not entitled to order compelling deposition of defendant's in-house counsel because plaintiff offered no persuasive

argument or evidence that testimony would not be privileged, and plaintiff had not established that testimony was crucial to her case. Gruenbaum v Werner Enters. (2010, SD Ohio) 270 FRD 298.

Under *Fed. R. Civ. P. 37*, defendants were ordered to identify those former and current employees "responsible for" their licensing programs because identifying all employees "involved in" licensing program was overbroad and identifying only those "responsible for" licensing program sufficiently responded to plaintiff's request; plaintiff informed defendants that it was only asking who current people could identify as having served in that capacity; defendant's responses to specific interrogatory concerning former employees did not mention attorney-client privilege; blanket assertion that information concerning former employees was likely covered by attorney-client privilege did not describe nature of items not produced or disclosed and was insufficient under *Fed. R. Civ. P. 26*; and, although defendants did disclose some former employees, it was unclear whether disclosures were complete or were limited in some way by privilege. Abraham v Alpha Chi Omega (2010, ND Tex) 271 FRD 556.

**86. --Exceptions**

Motion to compel was granted in part; claims of court appointed receiver and grand jury investigation provided ample grounds for law firm to invoke self defense exception to attorney-client privilege. Grassmueck v Ogden Murphy Wallace (2003, WD Wash) 213 FRD 567.

District court denied defendants' objections to magistrate judge's order and affirmed order compelling testimony by non-party attorney concerning communications attorney had with defendants' representative while performing legal services for defendants relating to patent application where (1) in granting plaintiff's motion on basis of crime-fraud exception to attorney-client privilege, magistrate judge properly applied probable cause standard; (2) in concluding that plaintiff had met its burden under probable cause standard, magistrate judge found sufficient evidence that defendants intended to commit fraud on Patent and Trademark Office (PTO) by not disclosing to PTO, on two separate occasions, same prior art known to defendants and their representatives; (3) magistrate judge found it persuasive that prior art in question and patent were attributable to same inventor who was affiliated with defendants, that specifications of two patents substantially overlapped, that both patent applications were prepared for defendants by same agent, and that with filing of reexamination application defendants' representative signed declaration attesting to full disclosure to PTO of information material to patentability, including information inconsistent with argument of patentability; (4) it was not unwarranted to infer that omission of reference to prior art was knowing and deliberate; (5) defendants offered no compelling or even plausible account for its double failure to disclose prior art to PTO; (6) magistrate judge's inference that had prior art been disclosed it appeared quite likely that patent would not have been granted or, at least, not in terms of original patent used to describe product, was not clearly erroneous or contrary to law; and (7) it was fair to infer that prior art, which encompassed some claims substantially overlapping with patent and was attributed to same inventor, would certainly have had material relevance to PTO in its reexamination of patent and could have had significant bearing on PTO's determination on defendants' application. Specialty Minerals, Inc. v Pluess-Staufer AG (2004, SD NY) 220 FRD 41, objection denied, motion to strike gr (2005, SD NY) 395 F Supp 2d 109.

Although recognizing fiduciary exception to *Fed. R. Civ. P. 26(b)(3)* attorney-client privilege where Employee Retirement Income Security Act (ERISA), 29 USCS §§ 1001 et seq., plan administrator asserted privilege to withhold from plan beneficiaries communications related to matters on which fiduciary duty was owed, in beneficiary's lawsuit against employer and its plans (defendants), alleging breach of ERISA fiduciary duties from elimination of certain stock funds from plan, beneficiary was not entitled to *Fed. R. Civ. P. 37(a)* order compelling defendants to produce certain requested documents because some of documents contained legal advice related to plan settlor functions, rather than to fiduciary function, and thus remained subject to attorney-client privilege. Tatum v R.J. Reynolds Tobacco Co. (2008, MD NC) 247 FRD 488.

Special Master's report and recommendation pursuant to Fed. R. Civ. P. 53 on insured's motion to compel production of 600 documents from insurer under *Fed. R. Civ. P. 26(b)(1)*, *37(a)(2)* was adopted as trial court had previously found that there was sufficient indicia of fraud to apply crime-fraud exception to privilege and law was properly applied. *Yoon Boon Lee v State Farm Mut. Auto. Ins. Co. (2008, DC Colo) 249 FRD 662.*

Because plaintiff in action seeking to recover emeralds and amethysts made out prima facie case for application of crime-fraud exception to attorney-client privilege by showing that attorney's services may have been obtained to further fraudulent conduct, court ordered in camera review of attorney's documents. JTR Enters., LLC v Unknown Quantity of Colombian Emeralds (2013, SD Fla) 297 FRD 522.

Based on transferees' continuing refusal to comply with discovery requests of Chapter 7 trustee in adversary proceeding seeking to set aside fraudulent transfers, court struck any answer that was served on trustee and entered default judgment pursuant to *Fed. R. Civ. P. 37* and Fed. R. Bankr. P. 7037; trustee's requests for interrogatories, depositions, and documents were legitimate requests in light of cause of action, and in at least one instance, transferees acknowledged possession or ability to obtain possession of their tax returns, but they failed to produce even those documents, demonstrating their willfulness and bad faith in their dealing with trustee and court. Geltzer v Giacchetto (In re Cassandra Group) (2006, BC SD NY) 46 BCD 72.

**87. --Waiver**

Defendant will be required to produce documents involving matters within realm of attorney-client privilege where such privilege has been waived by attorney's earlier, voluntary testimony before SEC on such matters. Re Penn Cent. In re Penn Cent. Commercial Paper Litigation (1973, SD NY) 61 FRD 453, CCH Fed Secur L Rep P 94311, 18 FR Serv 2d 1252.

Defendants would be ordered to disclose documents respecting attorney-client communications because corporation's broad disclosure of these communications is inconsistent with claimed confidentiality and constitutes waiver of attorney-client privilege. In re Consolidated Litigation Concerning International Harvester's Disposition of Wisconsin Steel (1987, ND Ill) 666 F Supp 1148, 8 EBC 2294, 24 Fed Rules Evid Serv 792, 10 FR Serv 3d 262.

Plaintiff's assertion in counterclaim of lack of understanding of agreement and fraudulent misrepresentation, in circumstances in which only people who would have explained agreement

to it were its attorneys, was implicit waiver of attorney-client privilege, entitling plaintiff/counterclaim defendants to motion to compel, counterclaim plaintiff to produce documents and respond to questions at depositions. Synalloy Corp. v Gray (1992, DC Del) 142 FRD 266, CCH Fed Secur L Rep P 97260 (criticized in State v Durant (2000, App) 2000 NMCA 66, 129 NM 345, 7 P3d 495) and (criticized in Banc of Am. Secs., LLC v Evergreen Int'l Aviation, Inc. (2006, Super Ct) 2006 NCBC 2, 2006 NCBC LEXIS 3).

In trademark dispute between restaurant and manufacturer that manufactured, marketed, and sold products originally developed in restaurant, letters by attorney to co-administrators of estate were not disclosed inadvertently, so attorney-client privilege had been waived; thus, court compelled disclosure of those documents and of other documents dealing with same subject matter and permitted further deposition of one of co-administrators, and court declined to issue protective order permitting co-administrators to withhold those documents and refuse to answer questions about them. Ken's Foods, Inc. v Ken's Steak House, Inc. (2002, DC Mass) 213 FRD 89.

Court found that defendant waived attorney-client privilege and work-product immunity on subject matter of defense of advice of counsel, and fairness required granting, in part, of plaintiff's motion to compel and for disclosure of all documents reviewed, considered, or authored by former trial counsel; work-product of patent attorney, later designated as expert witness, was also discoverable, but current counsel was not compelled to produce any documents. Aspex Eyewear, Inc. v E'Lite Optik, Inc. (2003, DC Nev) 276 F Supp 2d 1084.

Plaintiff in *35 USCS § 271* patent infringement action was not entitled to compel defendant's production of documents under *Fed. R. Civ. P. 37*; defendant did not waive its attorney-client privilege with respect to documents exchanged between defendant's engineers and its former litigation counsel by asserting advice-of-counsel defense to plaintiff's charge of willful infringement. Collaboration Props. v Polycom, Inc. (2004, ND Cal) 224 FRD 473 (criticized in Genentech, Inc. v Insmed Inc. (2006, ND Cal) 442 F Supp 2d 838).

Question posed by company's counsel to expert concerning what corporation's counsel communicated to him about deletion of certain sections of his reports regarding validity of patents-in-suit, as well as enforceability of patents-in-suit, was properly discoverable and was clearly related to subject matter of expert's report and, therefore, was relevant; moreover, special master correctly held that it was well established that voluntary disclosure of information to party outside privilege waived attorney-client privilege with respect to such information; therefore, special master correctly granted company's motion to compel testimony from expert concerning his communications with corporation about deletion of sections of his expert reports. In re Omeprazole Patent Litig. (2005, SD NY) 227 FRD 227.

In action by personal representatives of deceased individuals against airline and airplane manufacturer, manufacturer's motion to compel attorney to produce certain memoranda he authored, pursuant to *Fed. R. Civ. P. 37* and 45, was granted because (1) attorney failed to establish attorney-client relationship concerning memoranda he authored after he spoke with German reporter as there was no evidence that German reporter, who had contacted attorney seeking legal advice, was his client and there was no evidence that attorney served personal

representatives' executive committee as consultant, (2) work-product privilege had previously been held inapplicable to memoranda, (3) privileges would have been waived anyway due to attorney's failure to submit detailed privilege log, and (4) transfer of information by German reporter to attorney waived any alleged reporter's privilege. In re Air Crash at Belle Harbor (2007, SD NY) 241 FRD 202, app dismd (2007, CA2) 2007 US App LEXIS 10875.

Former pilots were not entitled to protection order under *Fed. R. Civ. P. 26(c)*, *37(a)(4)(B)*, and sued labor union could compel disclosure under *Fed. R. Civ. P. 37*, because although pilots had inadvertently disclosed 25 privileged documents as part of approximately 6,000 pages of document that they had produced, disclosure of those documents waived attorney-client privilege as disclosure resulted from gross negligence on part of pilots' original class counsel; pilots did not have to disclose additional, still-privileged documents pertaining to disclosed documents, however, because union did not show that pilots had attempted to gain advantage from their inadvertent disclosure of otherwise privileged documents. Bensel v Air Line Pilot Ass'n (2008, DC NJ) 248 FRD 177.

Employer's *Fed. R. Civ. P. 37* motion to compel its former employee's attorney to testify regarding his communications with employee regarding his settlement authority was granted because testimony was admissible pursuant to *Fed. R. Civ. P. 26(b)(1)* on two grounds; under *Ohio Rev. Code Ann. § 2317.02(A)*, because employee testified that he did not authorize attorney to accept settlement offer, he waived attorney-client privilege; further, granting settlement authority was not confidential communication. Rubel v Lowe's Home Ctrs., Inc. (2008, ND Ohio) 580 F Supp 2d 626.

Party that produced privilege log that essentially invoked blanket attorney-client or work product privilege to production of documents sought via request for production under Fed. R. Civ. P. 34 and failed to specify, on document-by-document basis, names of document's authors, names of all persons receiving copy thereof, general description of document by type, date of document, and general description of subject matter of document had willfully failed to comply with governing law and was properly sanctioned by order per *Fed. R. Civ. P. 37* denying all such privilege claims and requiring party to produce such documents in their entirety. Novelty, Inc. v Mt. View Mktg. (2009, SD Ind) 265 FRD 370, motion den, motion gr, in part, clarified, stay lifted (2010, SD Ind) 2010 US Dist LEXIS 35082.

In case alleging retaliation in violation of Title VII of Civil Rights Act of 1964, 42 USCS §§ 2000e et seq., in which former employee filed motion to compel discovery of memoranda written by attorney and her associate regarding interviews of city employees that were conducted in course of investigation of employee's sexual harassment complaint, employer argued unsuccessfully that report was protected by attorney-client privilege and work-product doctrine; since employer had used attorney's report to assert Faragher-Ellerth defense as to sexual harassment complaint and hostile work environment claim was dismissed, attorney-client privilege and work-production protection had been waived; however, only fact work product created by attorney and her associate was discoverable. Reitz v City of Mt. Juliet (2010, MD Tenn) 680 F Supp 2d 888.

**88. Business-related privileges and confidences**

Trade secrets and other confidential business information are not immune from discovery if relevant and necessary to presentation of case. Triangle Ink & Color Co. v Sherwin-Williams Co. (1974, ND Ill) 61 FRD 634, 181 USPQ 438.

Plaintiffs in antitrust class action are entitled to order compelling defendants to respond to interrogatories seeking information about communications between defendants and their competitors related to pricing and other business activities, where defendants claimed that they would supplement answers when their officers and employees could testify without fear of criminal prosecution, because awaiting completion of criminal investigation would create unnecessary delay in discovery and would interfere with court's ability to bring complex litigation to close. In re Residential Doors Antitrust Litig. (1995, ED Pa) 900 F Supp 749, 1995-2 CCH Trade Cases P 71136.

Defendants' motion to compel responses to their requests for production of corporation's proprietary information regarding design and manufacture of corporation's satellite television programming system and its anti-piracy efforts was denied; defendants failed to explain why they had to have access to information for their defense. DIRECTV, Inc. v Trone (2002, DC Cal) 209 FRD 455.

Motion to compel was granted in part; some documents were discoverable because they related to corporate affairs and were not segregable from personal affairs of defendant, and/or were generated after attorney-client relationship between defendant personally and law firm was terminated. Grassmueck v Ogden Murphy Wallace (2003, WD Wash) 213 FRD 567.

Motion to compel production of all data from logging database concerning each time video had been viewed on file sharing website or through embedding on third-party website was granted because data was necessary to compare attractiveness of allegedly infringing videos with that of non-infringing videos, which bore on plaintiffs' vicarious liability claim, and defendants' substantial non-infringing use defense. Viacom Int'l Inc. v YouTube Inc. (2008, SD NY) 253 FRD 256, 87 USPQ2d 1170.

Motion to compel production of all data fields which defendants had agreed to produce for works-in-suit, for all videos that had been posted to their file sharing website was denied because plaintiffs' request was unduly burdensome, and defendants had fully accommodated plaintiffs' need to identify potential infringements by giving plaintiffs access to use search program which allowed users to search for and watch any video currently available on website. Viacom Int'l Inc. v YouTube Inc. (2008, SD NY) 253 FRD 256, 87 USPQ2d 1170.

Motion for production of file sharing website's advertising schema was denied because, given that plaintiffs had already been promised only relevant data in database, they did not need its confidential schema, which provided detailed to roadmap to how website ran its advertising business. Viacom Int'l Inc. v YouTube Inc. (2008, SD NY) 253 FRD 256, 87 USPQ2d 1170.

Motion to compel production of website's video schema was granted because schema was relevant to extent defendants were aware of and could control copyright infringements on their sites. Viacom Int'l Inc. v YouTube Inc. (2008, SD NY) 253 FRD 256, 87 USPQ2d 1170.

Where plaintiffs sought production of computer search code (product of over thousand person-years of work, and of enormous commercial value) to support their claim that defendants had purposefully designed or modified tool to facilitate location of infringing content, but defendants maintained that no source code in existence could distinguish between infringing and non-infringing video clips, plausible showing that defendants' denials were false, and that search function could and had been used to discriminate in favor of infringing content, was required before disclosure of so valuable and vulnerable asset was compelled. Viacom Int'l Inc. v YouTube Inc. (2008, SD NY) 253 FRD 256, 87 USPQ2d 1170.

Motion to compel production of video identification code was denied because notion that examination of code might have suggested how to make better method of infringement detection was speculative, and considered against its value and secrecy, plaintiffs had not made sufficient showing of need for its disclosure. Viacom Int'l Inc. v YouTube Inc. (2008, SD NY) 253 FRD 256, 87 USPQ2d 1170.

Motion to compel production of copies of all videos removed from file sharing site was granted because burden of producing program for production of all of removed videos was roughly equivalent to, or at least not significantly greater than, that of producing program to create and copy list of specific videos selected by plaintiffs. Viacom Int'l Inc. v YouTube Inc. (2008, SD NY) 253 FRD 256, 87 USPQ2d 1170.

**89. Deliberative process privilege**

In taxpayers' suit to recover taxes and interest allegedly assessed and collected erroneously, court declined to compel government to produce Internal Revenue Service (IRS) memorandum that discussed IRS's rejection of taxpayer's offer-in-compromise; memorandum was "deliberative" and "predecisional," so it was protected by deliberative process privilege and taxpayers did not show that their need for document outweighed confidentiality concerns underlying privilege. Begner v United States (2003, ND Ga) 92 AFTR 2d 5389.

In action by beneficiaries against federal government concerning administration of certain trust, beneficiaries' motion to compel deposition testimony under *Fed. R. Civ. P. 37* was granted and parties were required to comply with procedures governing government's assertion of deliberative process privilege in conjunction with any deposition testimony. Cobell v Norton (2003, DC Dist Col) 213 FRD 1.

Where city sanitation department hired consulting firm to perform survey of waste carters licensed to operate within city in order to estimate quantity, origins, and disposal locations for waste generated within city, deliberative process privilege did not protect firm's documents relating to preparation of materials for agency. Allocco Recycling, Ltd. v Doherty (2004, SD NY) 220 FRD 407.

Taped interviews of witnesses before city board of inquiry to investigate fire department were relevant under former *Fed. R. Civ. P. 37(a)(2)(B)* to former fire employees' claim of wrongful termination due to union activities and disclosure of abuses so as to entitled employees to motion to compel; because tapes were factual, they were outside realm of deliberative process

privilege, and mere speculation of chilling effect of disclosure did not establish executive privilege so as to entitle city and official to be granted motion for protective order under *Fed. R. Civ. P. 26(c)*. Kluth v City of Converse (2005, WD Tex) 178 BNA LRRM 2250, 152 CCH LC P 60118.

Company failed balancing test that was applicable to deliberative process privilege because evidence it sought lacked relevance since principal subject of discovery in case was whether bank was estopped or otherwise equitably prevented from asserting its claims, and company's assertion of estoppel defense was futile where (1) doctrine of equitable estoppel was not available against government except in most serious of circumstances and conduct that company alleged, bank's representation that it would sign restructuring agreement and using its influence over entire restructuring process to demand and extract significant concessions from company, was hardly egregious, and (2) party could not assert estoppel as result of being induced to do what he was already legally required to do, and it was company's debts, not bank's entreaties, that obligated company to make payments it made to its creditors; thus, company's request for order compelling discovery of bank's privileged deliberative communications was denied. Export-Import Bank of the United States v Asia Pulp & Paper Co., Ltd. (2005, SD NY) 232 FRD 103 (criticized in Stafford Trading, Inc. v Lovely (2007, ND Ill) 2007 US Dist LEXIS 13062).

At minimum, 2009 report detailing District of Columbia's internal investigation of disorderly conduct arrests seemed to be discoverable because it related to arrestee's claim that she was falsely arrested for disorderly conduct, albeit even though she was arrested well before 2009 report was created; utilizing standard for invoking deliberative process privilege, and without seeing report, court could conclude only that parts of report may have been protected by deliberative process privilege whereas other parts may not, and it was equally clear that court could not make final, accurate determination without seeing report; therefore, court ordered District to submit 2009 report to chambers for in camera review, and depending on court's determination as to portions of report that were shielded by deliberative process, court would then confront issues of whether privilege should nevertheless have yielded as argued by arrestee in her motion to compel under *Fed. R. Civ. P. 37*. Huthnance v District of Columbia (2010, DC Dist Col) 268 FRD 120.

**90. Government-related privileges and confidences, generally**

Chemical company was entitled to motion to compel discovery from U.S. of any information regarding whether Army dumped hazardous substances at Love Canal landfill since proof of such dumping was relevant to company's counterclaim under CERCLA and, in light of allegations of such dumping contained in government memorandum and government's inadequate initial investigation into such allegations, failure to take adequate precautions against possible destruction of documents by Army or reveal to company in response to earlier discovery request such allegations, public has acute interest in issue being fought on public record. *United States v Hooker Chems. & Plastics Corp. (1991, WD NY) 136 FRD 559.*

In plaintiff's case against U.S. based on fraud by IRS employee, court conducted in camera review of Treasury Department's Office of Inspector General for Tax Administration file on

employee and determined that file was confidential under 26 USCS § 6103(a) and *5 USCS § 552a(b)*; thus, court denied plaintiff's motion to compel. Pritchett v United States (2003, ED Mich) 2003-1 USTC P 50351, 91 AFTR 2d 1446.

In action by plaintiffs challenging alleged targeted searches by federal government against Latinos, plaintiffs had shown that production of documents related to government operation, that government claimed were subject to law enforcement privilege, should be disclosed, pursuant to *Fed. R. Civ. P. 26*, because plaintiffs had shown relevancy to claims plaintiffs had standing to assert, and protectible interests of government could be protected through redactions, confidentiality orders, and stipulated agreements. Aguilar v Immigration & Customs Enforcement Div. of United States Dep't of Homeland Sec. (2009, SD NY) 259 FRD 51.

**91. Grand jury matters**

Defendants in civil antitrust action with price fixing for will be ordered to answer interrogatories requesting them to provide names of persons testifying before grand jury which returned related criminal indictment since notions of grand jury secrecy do not protect such information from disclosure in civil antitrust action. In re Shopping Carts Antitrust Litigation (1982, SD NY) 95 FRD 299, 1982-1 CCH Trade Cases P 64561, 34 FR Serv 2d 778.

In government grand jury investigation of target, government's motion to compel compliance with its subpoena of witness to testify, and its subpoena of documents from witness' public relations firm was granted in part where, although documents withheld from production by public relations firm that were communications among target, her lawyers and public relations firm, or some combination thereof, for purpose of giving or receiving legal advice, were protected by attorney-client privilege, two conversations and e-mail between target and witness were not protected by attorney-client privilege because neither conversations nor e-mail were at behest of target's lawyers or directed at helping lawyers formulate their strategy, and, although documents claimed by public relations firm to be protected work product were prepared in anticipation of litigation, government was allowed to make ex parte submission as to both its claimed need for non-attorney opinion work product portions pursuant to *Fed. R. Civ. P. 26(b)(3)* or Fed. R. Crim. P. 16(b)(2), and necessity of preserving confidentiality of its submission in order to protect grand jury secrecy. In re Grand Jury Subpoenas Dated March 24, 2003 (2003, SD NY) 265 F Supp 2d 321, 61 Fed Rules Evid Serv 1076 (criticized in NXVIM Corp. v O'Hara (2007, ND NY) 241 FRD 109).

**92. Self-incrimination**

In *42 USCS § 1983* case against police officers who had earlier refused discovery on Fifth Amendment grounds, trial judge did not abuse his discretion by declining to order sanctions under *Fed. R. Civ. P. 37(b)(2)* against officers for claiming and then later withdrawing self-incrimination privilege; judge reasonably could have concluded that officers were not "gaming" system but rather were concerned about ongoing special prosecutor's investigation at time they claimed privilege. Evans v City of Chicago (2008, CA7 Ill) 513 F3d 735.

Defendants are not entitled to order compelling answers where such answers will violate plaintiffs' privilege against self-incrimination. Alioto v Holtzman (1970, ED Wis) 320 F Supp 256, 14 FR Serv 2d 1398.

Former employees' motion, pursuant to former *Fed. R. Civ. P. 37(a)(2)(B)*, to compel answers to deposition questions over assertion of Fifth Amendment privilege by former fire department chief was granted with respect to questions that did not invoke reasonable risk of self-incrimination, but was denied as to questions where answers could have provided link in chain of evidence tending to prove wrongdoing. Kluth v City of Converse (2005, WD Tex) 2005 US Dist LEXIS 15218, motion gr, in part, motion den, in part, motion den, injunction gr, in part (2005, WD Tex) 178 BNA LRRM 2250, 152 CCH LC P 60118.

In action in which plaintiffs alleged that defendant provided material support to perpetrators of terrorist attacks, plaintiff's application to compel defendant to comply with requests for production of documents pursuant to *Fed. R. Civ. P. 37(a)(3)(B)(iv)* was granted because discovery was unlikely to implicate defendant's Fifth Amendment rights; even if defendant asserted his Fifth Amendment privilege insofar as plaintiffs inquired about defendant's links to money laundering or false tax returns, it did not follow that plaintiffs would necessarily prevail. Ashton v al Qaeda Islamic Army (In re Terrorist Attacks on September 11, 2001) (2011, SD NY) 2011 US Dist LEXIS 136581, adopted, claim allowed, claim disallowed, without prejudice (2011, SD NY) 2011 US Dist LEXIS 144936, motion gr, dismd (2012, SD NY) 840 F Supp 2d 776.

**93. Statutory privileges**

Navy chaplains' motion to compel testimony of personnel of Navy's chaplain selection board was granted because chaplains had provided adequate factual basis for their belief that requested testimony would provide evidence of government misconduct and testimony of selection-board personnel was not absolutely protected from disclosure under 10 USCS § 618(f) as statute did not contain specific language barring limited discovery. Chaplaincy of Full Gospel Churches v Johnson (2003, DC Dist Col) 217 FRD 250.

California's privacy privilege did not apply to protect plaintiff from answering deposition questions about his sexual relationships because he could not reasonably have expected that his conduct in his personal affairs would be protected given that alleged conduct did not occur in state, but rather primarily occurred in and around Washington, D.C.; further, plaintiff sued defendant in federal court with New York as its forum state; therefore, plaintiff should have expected that his deposition would be taken in New York, evidence would be admitted in New York, and New York's conflict of law rules would apply because New York had compelling interest in ensuring that its citizens, who were sued in its forum state, were allowed full and accurate discovery in order to properly defend themselves in suit. Condit v Dunne (2004, SD NY) 225 FRD 100.

**94. Work product privilege**

Discovery of consultant's discussions with limited liability partnership's (LLP) senior manager and counsel and of consultant's notes of those discussions, which may have reflected mental impressions, opinions, conclusions, and legal theories of LLP's counsel, went to core of work product doctrine, and thus, was discoverable only upon showing of extraordinary circumstances; therefore, because corporation failed to cite any extraordinary circumstances that would justify discovery of information sought, private communications between consultant and counsel

merited protection under work product doctrine, as they reflected and implicated limited liability partnership's legal strategy regarding deposition taken as part of litigation, and district court's grant of corporation's motion to compel production of such communications was reversed. In re Cendant Corp. Sec. Litig. (2003, CA3 NJ) 343 F3d 658, 62 Fed Rules Evid Serv 577, 56 FR Serv 3d 710, subsequent app (2005, CA3 NJ) 404 F3d 173, CCH Fed Secur L Rep P 93211.

Pursuant to *Fed. R. Civ. P. 37* motion to compel in patent infringement litigation, *35 USCS § 271*, drug patent holders' receipt of letter concerning generic manufacturer's Paragraph IV certification, 21 USCS § 355(j)(2)(A)(vii), signaled commencement of litigation, such that documents patent holder created on or after receipt of letter were protected as work product under *Fed. R. Civ. P. 26(b)(3)* . In re Gabapentin Patent Litig. (2003, DC NJ) 214 FRD 178.

Court granted defendant's *Fed. R. Civ. P. 37* motion to compel plaintiff to produce, under Fed. R. Civ. P. 34, letters prepared by her attorney for, and relied upon by, plaintiff's expert witness; court acknowledged tension between expert witness disclosure requirements of *Fed. R. Civ. P. 26(a)(2)(B)* and work-product doctrine codified in *Fed. R. Civ. P. 26(b)(3)*, but history of R. 26 and cases interpreting it, and policy reasons underlying discovery in general supported bright-line rule of disclosure, yet, even if court accepted rule that "core work-product" was not discoverable, attorney's letters, which simply described facts, did not contain core attorney work-product. Baum v Village of Chittenango (2003, ND NY) 218 FRD 36, 57 FR Serv 3d 403.

In action by tenant partners against landlord and its partners alleging, inter alia, breach of contract, fraud, and racketeering violations, tenant partners' motion to compel disclosure of unredacted investigatory report was denied where: 1) investigatory report was protected by attorney-client privilege under *Fed. R. Evid. 501* and work product doctrine under *Fed. R. Civ. P. 26(b)(3)* because it was prepared for criminal defense purposes; 2) crime or fraud exception did not apply because investigatory report was not used to defraud anyone; 3) tenant partners had entire investigatory report minus employee's name; and 4) landlord and its partners waived attorney-client privilege and work product doctrine only to extent of partner's statements to press, which did not include divulging employee's name. Lugosch v Congel (2003, ND NY) 218 FRD 41.

Defendants' motion to compel was granted; plaintiff's assertion of attorney-client privilege and work product immunity was unsupported because at no time had plaintiff provided any type of privilege log or made attempt to describe nature of any of alleged privileged or work product documents so as to enable defendants (or Court) to assess applicability of claimed privilege or protection. DIRECTV, Inc. v Puccinelli (2004, DC Kan) 224 FRD 677 (criticized in Diaz-Padilla v Bristol Myers Squibb Holding Ltd. Liab. Co. (2005, DC Puerto Rico) 2005 US Dist LEXIS 5879) and motion den, motion to strike den (2006, DC Kan) 2006 US Dist LEXIS 94648 and (criticized in Ice Corp. v Hamilton Sundstrand Corp. (2007, DC Kan) 2007 US Dist LEXIS 34578).

Pursuant to former *Fed. R. Civ. P. 37(a)(2)*, golf company and others were entitled to order compelling production of requested documents in their lawsuit against railway company because documents were relevant to lawsuit and contrary to company's contention, documents were not protected by work product privilege as the company's conclusory allegations that

documents were protected was insufficient to establish that they were protected. Hunter's Ridge Golf Co. v Georgia-Pacific Corp. (2006, MD Fla) 233 FRD 678, 64 FR Serv 3d 201, 19 FLW Fed D 533.

In insured's bad faith and breach of contract suit against insurer regarding accident, insured's motion to compel was granted as to request to produce all reports or other documents insurer prepared concerning subject occurrence because insurer's assertion of work product protection was unsupported since nothing in record revealed that insurer provided any type of privilege log or made attempt to describe nature of any of alleged work product documents. Moses v Halstead (2006, DC Kan) 236 FRD 667, summary judgment den, motion to strike den (2007, DC Kan) 477 F Supp 2d 1119.

Bank's request that plaintiffs disclose sources of documents that they may use to support their claims, did not seek thought processes, opinions, or mental processes of plaintiffs' counsel; plaintiffs' response to interrogatory must provide bank with information that would allow bank opportunity to seek documents from same sources from which plaintiffs obtained documents, irrespective of whether plaintiffs also produce copies of documents they obtained from these sources; accordingly, plaintiffs were to respond to interrogatory because disclosure of information sought would not teach bank which individuals plaintiffs considered more or less valuable witnesses and how they were preparing for trial. Weiss v Nat'l Westminster Bank, PLC (2007, ED NY) 242 FRD 33.

In contract suit, federal district court granted defendant's motion to enforce subpoenas served on plaintiff's expert to produce documents and to submit to further questioning under *Fed. R. Civ. P. 26(a)(2)(B)* because expert's preliminary opinions and reports regarding fair market value of realty were not privileged work product, even though expert was acting in dual capacity as plaintiff's consultant and its expert witness when he generated reports; defendant was entitled to recover its costs and reasonable attorney fees of compelling production of reports under *Fed. R. Civ. P. 37*. Stephens v Trust for Pub. Land (2007, ND Ga) 475 F Supp 2d 1299, summary judgment gr, in part, summary judgment den, in part,, motion to strike den (2007, ND Ga) 2007 US Dist LEXIS 21690.

In beneficiary's lawsuit against employer and its plans (defendants), alleging breach of fiduciary duties under Employee Retirement Income Security Act, 29 USCS §§ 1001 et seq., from elimination of certain stock funds from plan, beneficiary was not entitled to *Fed. R. Civ. P. 37(a)* order compelling defendants to produce certain requested documents because they were protected under *Fed. R. Civ. P. 26(b)(3)* as attorney work product since these documents were created after defendants were faced with specific threat of litigation from beneficiary, where threat of litigation was not merely based on possibility of suit from filing of benefits claim, but was expressly stated by beneficiary during conversation with plan benefits compliance manager during conversation regarding his benefits and elimination of certain stock from plan. Tatum v R.J. Reynolds Tobacco Co. (2008, MD NC) 247 FRD 488.

Where art collector had sought discovery in aid of three suits pending in France and Norway regarding breach of contract to purchase certain sculpture, and where collector and art gallery and its owner had stipulated to certain discovery, pursuant to *Fed. R. Civ. P. 37(a)(1)*, collector

was entitled, in part, to order compelling art gallery and its owner to disclose certain information that was within scope of stipulation because only some of material was prepared by attorney for buyers of sculpture in anticipation of litigation, and thus, only some of it was protected by work-product doctrine. In re 28 U.S.C. § 1782 (2008, SD NY) 249 FRD 96.

In vicarious liability suit against company arising from motor vehicle accident, although photographs of accident scene that were allegedly taken at direction of attorney and/or adjuster were likely work-product under *Fed. R. Civ. P. 26(b)(3)(A)*, passenger in truck involved in accident was entitled to compel production under *Fed. R. Civ. P. 37(a)(3)(B)*, having demonstrated need for and inability to obtain such photos. Huggins v Fed. Express Corp. (2008, ED Mo) 250 FRD 404.

In disability discrimination lawsuit, county and two employees were not entitled under *Fed. R. Civ. P. 37(a)* to compel production of investigator's report because it was protected by work product privilege since report, which was prepared at request of plaintiff's counsel and which recorded investigator's interviews with witnesses to alleged incidents of harassment, was clearly prepared in anticipation of litigation. Costabile v County of Westchester (2008, SD NY) 254 FRD 160, 20 AD Cas 1322, 13, 13 CCH Accomodating Disabilities Decisions P 13-134.

Attorneys fees and costs sought under *Fed. R. Civ. P. 37* in connection with defendant's successful motion to compel plaintiff to produce third-party witness affidavits obtained by plaintiff's counsel despite claim that affidavits were nondiscoverable work product were denied; given lack of controlling Eighth Circuit precedent on issue and split in authority in other circuits with respect to applicability of work product doctrine to third-party witness affidavits, plaintiff's counsel was substantially justified in objecting to discovery of affidavits. Murphy v Kmart Corp. (2009, DC SD) 259 FRD 421.

With respect to officer's motion to compel, all that remained were notes and other materials created by United States Attorney incident to prosecution and trial of officer, and clearly, insofar as they yielded information pertaining to decision to prosecute officer, they were pre-decisional and deliberative, and once prosecution began, they were prepared for trial; thus, because all documents in folder met either fundamental requirements for application of deliberative process and work-product privileges or both, officer's motion to compel was denied. Amobi v D.C. Dep't of Corr. (2009, DC Dist Col) 262 FRD 45.

In action against defendants, driver and his employer, arising out of motor vehicle accident on Indiana Toll Road, court denied plaintiffs' motion to compel under *Fed. R. Civ. P. 37(a)(2)*-(3) as it related to DOT Accident Register because it was barred by 49 USCS § 504(f) from disclosure in discovery, and court granted plaintiffs' motion to compel as it related to employer's sideswipe report and computer template used to compile information for DOT Accident Register because neither item fell under work product doctrine set forth in *Fed. R. Civ. P. 26(b)(2)* or attorney-client privilege, and they did not fall under § 504(f). Sajda v Brewton (2009, ND Ind) 265 FRD 334.

In wrongful death action involving truck-automobile collision, few pages of handwritten notes created by defendant's attorney, and contained in investigative file relating to accident, constituted work product protected from discovery because notes were prepared in anticipation

of litigation and not in regular course of business. Gruenbaum v Werner Enters. (2010, SD Ohio) 270 FRD 298.

In minor's excessive force suit against officers and city, documents regarding insurance investigation reports of incident were protected by work-product doctrine under *Fed. R. Civ. P. 26(b)(3)* because reports were prepared in anticipation of litigation and minor's motion to compel failed to support contention that good cause existed to overcome qualified immunity documents possessed. Garcia v City of Imperial (2010, SD Cal) 270 FRD 566.

In employees' suit alleging, among other things, age discrimination and violations of ERISA based in part, on required execution of certain release in order to maintain employment, employees were entitled to order compelling employer to meet and come to agreement regarding search terms it intended to use in responding to discovery requests and related information because such information was not subject to work product privilege. Romero v Allstate Ins. Co. (2010, ED Pa) 271 FRD 96.

Thirteen recent declarations of current and former employees and managers constituted work product until they were filed with plaintiffs' *Fed. R. Civ. P. 23* motion to certify, so failure to provide privileged declarations in advance of filing did not violate *Fed. R. Civ. P. 26* but work product protection was waived upon filing. Lujan v Cabana Mgmt. (2012, ED NY) 284 FRD 50.

**95. --Waiver**

Dismissal of plaintiffs' case with prejudice under *Fed. R. Civ. P. 37(b)(2)* and Fed. R. Civ. P. 41(b) was reversed because plaintiffs' delay or failure to complete their depositions delayed discovery by only few months, plaintiffs made efforts to comply with district court's orders by offering to videotape their depositions, there was no evidence of deliberate misconduct, and plaintiffs were not on realistic notice of possibility that case would be dismissed with prejudice. Malot v Dorado Beach Cottages Assocs. S. En C. Por A (2007, CA1 Puerto Rico) 478 F3d 40.

There was no substantive or procedural abuse of discretion in district court's dismissal of plaintiff's action pursuant to former *Fed. R. Civ. P. 37(b)(2)(C)* because plaintiffs' failure to provide discovery responses after motion to compel was granted was part of broader pattern of delay, for which no legitimate excuse was proffered, and plaintiffs had ample notice of prospect of dismissal and were given opportunity to respond. Malloy v WM Specialty Mortg. LLC (2008, CA1 Mass) 512 F3d 23.

While city established that work product protection applied to items requested by construction company, it did not specifically assert privilege for each item in brief; thus, its assertions of privilege were controlled by its privilege log, leaving some items unprotected; accordingly, company's renewed motion to compel was granted as to any responsive documents for which city had not previously asserted work product protection in privilege log. MCI Constr., LLC v Hazen & Sawyer, P.C. (2003, MD NC) 213 FRD 268.

Since witness' findings were discussed extensively in Fed. R. Civ. P. 30(b)(6) investigation, as were his opinions on such findings, to extent legal memorandum touched on matters discussed in deposition, work product protections had been waived and court granted defendant's *Fed. R.*

*Civ. P. 37* motion to compel copy of memorandum redacted to extent it addressed matters outside findings and opinions of witness discussed in deposition. Sec. Ins. Co. v Trustmark Ins. Co. (2003, DC Conn) 218 FRD 29.

In disability discrimination lawsuit, county and two employees were not entitled under *Fed. R. Civ. P. 37(a)* to compel production of investigator's report because it was protected by work product privilege, and plaintiffs did not waive privilege by providing copy of report to EEOC when pre-suit charge was filed, and they did not place report "at issue" since allegations in complaint were based on plaintiff's report of incidents of harassment, rather than on contents of report. Costabile v County of Westchester (2008, SD NY) 254 FRD 160, 20 AD Cas 1322, 13, 13 CCH Accomodating Disabilities Decisions P 13-134.

Maker of anti-depressant drug did not waive its right to assert privilege with respect to certain discovery requests despite its failure to produce privilege log as required by *Fed. R. Civ. P. 26(b)(5)*; while drug maker's blanket claim of privilege did not require harsh sanction of waiver under *Fed. R. Civ. P. 37*, if drug maker did not produce such privilege log within 30 days, it was warned that such failure would result in waiver of privileges. Cunningham v SmithKline Beecham (2009, ND Ind) 255 FRD 474, 72 FR Serv 3d 972.

**96. Protective orders**

District court properly dismissed plaintiff's action pursuant to former *Fed. R. Civ. P. 37(b)(2)(C)* because plaintiffs proffered no legitimate excuse for delay of over five months after district court's order granting motion to compel; rather, plaintiffs' counsel attributed delay to his inexperience practicing law, incompetence of his support staff, and his own deliberate decision to direct his attention to cases of paying clients instead of plaintiffs' pro bono matter. Malloy v WM Specialty Mortg. LLC (2008, CA1 Mass) 512 F3d 23.

In exercise of court's discretion, availability of confidential information, being subject to abuse, may be disclosed under protective order so as to prevent its improper use. Scovill Mfg. Co. v Sunbeam Corp. (1973, DC Del) 61 FRD 598, 181 USPQ 53, 18 FR Serv 2d 1241.

Trade secrets and other confidential business information are not immune from discovery if relevant and necessary to presentation of case so that licensor's motion to compel licensee to disclose such information was granted subject to limitation that disclosure temporarily be restricted to licensor's trial attorneys. Triangle Ink & Color Co. v Sherwin--Williams Co. (1974, ND Ill) 61 FRD 634, 181 USPQ 438.

Motion pursuant to Rule 37 for order compelling defendants to produce transcripts of all depositions taken by plaintiff in recently settled litigation against same defendant must be granted despite fact that depositions were subject to protective order since party cannot avoid discovery in one case merely because it disclosed same material to adversary bound by protective order in another case. Carter-Wallace, Inc. v Hartz Mountain Industries (1981, SD NY) 92 FRD 67, 1982-1 CCH Trade Cases P 64626, 33 FR Serv 2d 81.

District court denied former employee's motion to compel investigator to produce documents prepared after attorney hired his firm to investigate allegations that employee made against his

immediate supervisor because motion was redundant to issues that supervisor raised in his motion for protective order and employee failed to answer responses that supervisor submitted to his first request for production of documents in timely manner. Sanchez v Matta (2004, DC NM) 229 FRD 649.

Sanctions were not appropriate under *Fed. R. Civ. P. 37* when employer sought protective order from discovery request for oral deposition of corporate representative, though employer admitted information was not protected by attorney-client privilege or work product doctrine if sought by written interrogatories, because parties' respective positions were substantially justified and some federal courts' interpretations of Federal Rules of Civil Procedure supported employer. United States EEOC v Caesars Entm't, Inc (2006, DC Nev) 237 FRD 428, 66 FR Serv 3d 71, summary judgment gr, request gr (2007, DC Nev) 2007 US Dist LEXIS 30365.

In purported class action for violations of state Labor Code, conversion and theft of labor, and unfair business practices under Cal. Bus. & Prof. Code § 17200 et seq., plaintiff was entitled under *Fed. R. Civ. P. 37* to compel production of documents requested under Fed. R. Civ. P. 34; employer failed to meet its burden to show that documents pertaining to its employment policies, practices, and procedures were "confidential proprietary information" for purposes of *Fed. R. Civ. P. 26(c)(7)*. Hill v Eddie Bauer (2007, CD Cal) 242 FRD 556.

In employment discrimination case, with reference to dispute over scope of inquiry for deposition of employer's designated witness under Fed. R. Civ. P. 30(b)(6), employee was not required under *Fed. R. Civ. P. 37(a)(5)(A)* to pay employer's attorneys' fees incurred for making its protective order motion because many of employee's objections to motion for protective order were substantially justified. Murphy v Kmart Corp. (2009, DC SD) 255 FRD 497.

Unpublished Opinions

Unpublished: In action in which former employers alleged that former employees stole trade secrets and shared them with competitor so that competitor could manufacture and sell employers' products as its own, employers were compelled under *Fed. R. Civ. P. 26(b)(1)* *Fed. R. Civ. P. 37(a)(1)* to produce documents describing chemical ingredients and compound formulations for employers' paper thermometer products because employees contended that formulas at issue were not trade secrets and employers' concerns regarding disclosure could be adequately addressed by protective order that limited custody of confidential documents to counsel and required any review by employees and their experts to be conducted under supervision of counsel. Paper Thermometer Co. v Murray (2011, DC NH) 2011 US Dist LEXIS 121775.

**97. Miscellaneous**

Dismissal of plaintiff's action pursuant to former *Fed. R. Civ. P. 37(b)(2)(C)* after plaintiffs failed to comply with order compelling discovery was proper because, although district court did not expressly consider lesser alternatives, none was suggested by plaintiffs; district court's implicit reasons for choosing dismissal with prejudice could be inferred from defendants' arguments in opposition to plaintiffs' motion to vacate, which district court implicitly adopted. Malloy v WM Specialty Mortg. LLC (2008, CA1 Mass) 512 F3d 23.

In libel action, trial court does not abuse its discretion in granting plaintiff's motion to compel defendant-newsman to disclose identity of confidential sources of information, which he has declined to do during taking of pretrial deposition, where, in order to show malice required, plaintiff needs information sought as element in proving defendant had no reliable sources, had misrepresented sources' reports, or had recklessly relied on such reports. Carey v Hume (1974, App DC) 160 US App DC 365, 492 F2d 631, 18 FR Serv 2d 1247, cert dismd *(1974) 417 US 938, 41 L Ed 2d 661, 94 S Ct 2654.*

Motion to compel discovery is granted to plaintiff in antitrust suit, where defendant's accountant had refused to comply with subpoenas based on state accountant-client privilege, since there is no comparable privilege in federal question cases. Coastal Fuels Inc. v Caribbean Petroleum Corp. (1993, DC Puerto Rico) 830 F Supp 80, 1993-2 CCH Trade Cases P 70388, subsequent app, remanded (1996, CA1 Puerto Rico) 79 F3d 182, 1996-1 CCH Trade Cases P 71335, 34 FR Serv 3d 622, cert den *(1996) 519 US 927, 117 S Ct 294, 136 L Ed 2d 214* and (criticized in Indus. Burner Sys. v Maxon Corp. (2003, ED Mich) 275 F Supp 2d 878, 2003-2 CCH Trade Cases P 74140).

In trademark dispute between restaurant and manufacturer that manufactured, marketed, and sold products originally developed in restaurant, common interest doctrine protected some communications between heirs of founder of restaurant and manufacturer, heirs' attorneys, administrator of founder's estate, administrator's counsel, and individuals who worked for that counsel, but doctrine did not protect documents created before heirs and estate had agreed or were close to agreeing to initiate trademark claims against manufacturer; consequently, court granted in part and denied in part manufacturer's motion to compel production of documents and further deposition of one of heirs, and motion of heirs and restaurant for protective order. Ken's Foods, Inc. v Ken's Steak House, Inc. (2002, DC Mass) 213 FRD 89.

Court granted plaintiffs' motion to compel where plaintiffs' line of questioning did not call for privileged information, line of questioning sought information relevant to instant proceedings, and both question and means in which it was asked were proper; transcript of deposition did not lead court to conclude that either plaintiffs' inquiry or manner in which they made their inquiry was improper or constituted harassment. Cobell v Norton (2003, DC Dist Col) 213 FRD 16.

Arrestee's motion to compel production of police officers' personnel files, especially in regards to citizen complaints, was granted because information was relevant to arrestee's claims against municipal defendants, and presumption against invoking privilege in *42 USCS § 1983* case was unrebutted by city and police department, which failed to enunciate specific harms flowing from information's disclosure. Floren v Whittington (2003, SD W Va) 217 FRD 389.

Where plaintiff asserted in its *Fed. R. Civ. P. 37* motion to compel that defendant improperly redacted documents and earlier court order did not instruct defendant not to redact documents falling outside scope of discovery, defendant was ordered to produce unredacted copies of two documents in dispute and not produced on grounds of privilege for in camera review. Sec. Ins. Co. v Trustmark Ins. Co. (2003, DC Conn) 218 FRD 29.

In female pastor's employment discrimination suit against church based upon sexual harassment, court granted pastor's motion to compel discovery, finding that church autonomy

doctrine and "ministerial exception" did not bar requested discovery. Dolquist v Heartland Presbytery (2004, DC Kan) 221 FRD 564.

Former congressman was compelled to answer deposition questions about his financial situation in his defamation action because he placed information directly at issue by alleging special damages arising from his permanent impairment to obtain or maintain gainful employment. Condit v Dunne (2004, SD NY) 225 FRD 100.

Where former firefighter sought to compel, pursuant to *Fed. R. Civ. P. 37*, fire district, its fire chief, and district trustees to produce audiotape of closed board meeting wherein they decided to fire him, there was no federal common law privilege that exempted closed-door meetings from discovery; that defendants' attorney attended did not render entire meeting privileged. Kodish v Oakbrook Terrace Fire Protection Dist. (2006, ND Ill) 235 FRD 447, 70 Fed Rules Evid Serv 17, 64 FR Serv 3d 763.

In consultant's suit against buyer for recovery of allegedly wrongfully obtained funds from settlement agreement, buyer was granted motion to compel consultant to disclose certain IRS correspondence and conversations and for consultant's principal to testify on certain matters because: (1) information was relevant to lawsuit, particularly as IRS information addressed issue raised by consultant, (2) information was not protected by attorney-client privilege, and (3) consultant had waived any protection for this material under work-product doctrine. Comprehensive Habilitation Servs. v Commerce Funding Corp. (2006, SD NY) 240 FRD 78.

Because court found that discovery husband and wife sought was relevant or likely to lead to admissible evidence, and that attorney-client privilege and attorney work-product doctrine did not shield all of discovery sought, court granted motion with respect to: (1) legal issues section of 1999 company news standards; however, receipt was conditioned upon adequate affidavit from company within 10 days declaring that "Legal Issues" section of company news standards was not submitted to persons who did not have responsibility for topics it covered and that those who received it treated it as confidential document; (2) dates, times, subject headings, senders, and receivers of e-mail exchanges between company's employee and company's assistant general counsel because e-mail itself was protected by attorney client privilege under N.M. R. Ann. 11-503(B) since language used in e-mail included evidence that employee made communication for purpose of facilitating rendition of professional legal advice; and (3) documents related to company's response to letter regarding news story since work-product doctrine under *Fed. R. Civ. P. 26(b)(3)* did not protect communications and documents because attorneys did not prepare many of them and because there was no indication that they contain mental impressions, conclusions, opinions, or legal theories of attorney developed in anticipation of litigation, and documents were not protected by attorney-client privilege; however, certain documents related to company's responses to letter regarding news story were privileged attorney-client communications since those documents either sought, facilitated rendition of, or provided professional legal advice. Anaya v CBS Broad., Inc. (2007, DC NM) 251 FRD 645.

Pursuant to *Fed. R. Civ. P. 37(a)*, in former employee's suit against her former employer for discrimination in violation of federal and state law and for intentional and negligent infliction of emotional distress, employer was entitled to compel employee to provide authorizations to

release her medical and psychiatric records because employee had waived psychotherapist-patient privilege by asserting claims for negligent and intentional infliction of emotional distress, and this information was relevant under *Fed. R. Civ. P. 26(b)(1)* for employer to show that alleged emotional distress was caused in part by events that were not related to employment relationship. Green v St. Vincent's Med. Ctr. (2008, DC Conn) 252 FRD 125.

In action under *45 USCS § 51*, employer was entitled to release of medical records from employee's treating physician, pursuant to *Fed. R. Civ. P. 37*, because there was no enumerated privilege for records and employee had put records related to mental health and substance abuse at issue based on his claims. Bruno v CSX Transp., Inc. (2009, ND NY) 262 FRD 131.

In minor's excessive force suit against officers and city, where minor requested production of documents as to officers' income, assets, and liabilities, minor's stated need for financial information to support claim for punitive damages did not outweigh officers' privacy rights under Cal. Const. art. I, § 1. Garcia v City of Imperial (2010, SD Cal) 270 FRD 566.

In civil rights case filed against defendant police officer alleging he used excessive force during traffic stop, plaintiffs sought to depose defendant's former union representative about incident; employee-union representative privilege under 735 ILCS 5/8-803.5 was improperly asserted, because plaintiffs should have been permitted to ask when and where communications occurred, how long conversations lasted, who else was present for conversation, whether union representative understood himself to be acting in his official union capacity regarding each communication, and other questions to determine whether privilege applied and whether it had been waived; district court granted plaintiffs' motion to compel and ordered that union representative's deposition be reconvened at his or his attorney's expense; court found that ordering witness to pay plaintiffs' attorney's fees would be unjust under *Fed. R. Civ. P. 37(a)(5)(A)*. Bell v Vill. of Streamwood (2011, ND Ill) 806 F Supp 2d 1052.

Motion to compel was denied because consideration of manifest privacy considerations that were implicated by plaintiff's ultimate discovery plan, plaintiff's planned discovery of customer social security numbers and other personal identifying information was inappropriate and should not be permitted. Tech v United States (2012, MD Pa) 284 FRD 192, 109 AFTR 2d 2655.

Unpublished Opinions

Unpublished: *Fed. R. Civ. P. 37(a)* sanctions were appropriate because, while attorney argued that he was justified in supporting his clients' refusal to sign medical releases, (1) plaintiffs, former employee and his wife, put their own mental and physical conditions at issue; (2) attorney engaged in four months of delay by refusing to provide medical releases without pursuing good faith discussions with opposing counsel or raising problem with district court; and (3) if attorney believed that certain information was privileged or beyond scope of relevancy, he should have submitted motion rather than refuse to have his clients execute documents. Uszak v Yellow Transp., Inc. (2009, CA6 Ohio) 2009 FED App 593N.

Unpublished: Motion to compel employee of National Association of Securities Dealers to appear at deposition under *Fed. R. Civ. P. 37* in member's civil lawsuit was denied because

testimony sought was protected by investigatory privilege. Fiero Bros. v Mishkin (In re Adler, Coleman, Clearing Corp.) (1999, BC SD NY) 1999 Bankr LEXIS 2032.

Unpublished: In discovery dispute under Fed. R. Bankr. P. 7037, court would not compel debtor church to release its membership list to lender, as such lists were generally subject to heightened protection because of potential chilling effect on First Amendment right to freedom of association. In re Deliverance Christian Church (2011, BC ND Ohio) 2011 Bankr LEXIS 5219.

### C. Appropriate Court

#### 98. Generally

Motion to compel should not have been denied on ground that Fed. R. Civ. P. 45 was inapplicable to Department of State because government was "person" subject to subpoena under Rule, regardless of whether it was party to underlying litigation; framers' use of term "person" did not presumptively exclude government, and purpose, subject matter, context, and history of Rule 45 indicated intent, by use of term "person," to bring government within its scope. Yousuf v Samantar (2006, App DC) 371 US App DC 329, 451 F3d 248, 65 FR Serv 3d 221.

Application to compel answer of party to deposition may be made in court where litigation is pending, rather than court of district where deposition is taken, particularly where deposition is by order of court in which litigation is pending. Plastic Contact Lens Co. v Guaranteed Contact Lenses, Inc. (1964, SD NY) 35 FRD 35, 8 FR Serv 2d 37A.14, Case 1.

#### 99. Magistrate

Magistrates may impose prospective sanctions pursuant to Rule where they are necessary to enforce compliance with valid discovery order. Grimes v San Francisco (1991, CA9 Cal) 951 F2d 236, 91 Daily Journal DAR 15399, 21 FR Serv 3d 526.

Where all matters concerning discovery have been assigned to magistrate in first instance, parties' attempts to bring discovery matters of first impression before court rather than magistrate may be met with sanction under former Rule 37(a)(4). Tarkowski v Pennzoil Co. (1983, ND Ill) 100 FRD 37.

In class action by plaintiff health care consumers for violation of federal Medicaid Act, magistrate granted consumers' motion to compel production of documents having private information regarding class members by both parties defendant (state executive officials) and nonparties; documents sought from non-defendant entities were within control of principal state agency involved, as principal agency directly or indirectly delegated delivery of services to such entities and had right to examine and copy information maintained by them. Rosie D. v Romney (2003, DC Mass) 256 F Supp 2d 115, 55 FR Serv 3d 883, findings of fact/conclusions of law (2006, DC Mass) 410 F Supp 2d 18.

#### 100. Multidistrict litigation

In multidistrict litigation, U.S. magistrate designated by transferee judge to perform duties under *28 USCS § 636* is empowered to order compliance with subpoena duces tecum issued in

deposition court other than transferee court. In re San Juan Dupont Plaza Hotel Fire Litig. (1987, DC Puerto Rico) 117 FRD 30, 9 FR Serv 3d 172.

Pursuant to power granted in Rule 26 (c) court had power to transfer discovery motions to district in which action to which they related and another related action were pending, since discovery motions comprised total of action pending in transferor court, notwithstanding provisions of Rules 45(d) and 37(a), since non-parties were seeking transfer and issues would best be decided by court familiar with case and parties. Pactel Personal Communications v JMB Realty Corp. (1990, ED Mo) 133 FRD 137.

**101. Nonparties**

Where (1) district court of Hawaii, dissatisfied with responses of defendant-corporation on depositions taken in California, orders disclosure of further information in writing, (2) corporate officials contend they are witnesses not parties for purposes of discovery, (3) such officials anticipate court in Hawaii will order sanctions against them personally should they fail to comply, and (4) but rights of corporate officials will be protected sufficiently by ability to disobey anticipated order and test Hawaiian court's discovery order on appeal from any citation for contempt, petition for writ of mandamus or prohibition in effect vacating order of District Court, on ground that it is not the appropriate court under Rule 37(a)(1), will be denied. Belfer v Pence (1970, CA9) 435 F2d 121, 14 FR Serv 2d 982.

District Court for District of Wyoming did not have jurisdiction over nonparty to issue order compelling discovery where depositional hearing was being held in Denver, Colorado, pursuant to subpoena issued by Colorado District Court; any application for order to compel nonparty to testify in depositional hearing held in Denver should have been made in District Court for District of Colorado. First Nat'l Bank v Western Casualty & Surety Co. (1979, CA10 Wyo) 598 F2d 1203, 27 FR Serv 2d 609.

Court where action was pending was not appropriate court to compel answers to questions under former Rule 37(a)(1) where there was no showing that deponents were representatives designated by defendant corporation pursuant to Rule 30(b)(6) to testify on its behalf, thus requiring deponents to be treated as non-parties; appropriate court for application for order would be in district where deposition was being taken. W. R. Grace & Co. v Pullman, Inc. (1977, WD Okla) 74 FRD 80.

Motion for order compelling employee of defendant, a nonparty, to comply with subpoena was filed in wrong court since it was not filed in court in district where deposition was to be taken. Contardo v Merrill Lynch, Pierce, Fenner & Smith (1988, DC Mass) 119 FRD 622, 10 FR Serv 3d 719.

Motion for order to compel nonparty to appear for deposition should be filed in court in district where deposition is to be taken. American Motorists Ins. Co. v General Host Corp. (1988, DC Kan) 120 FRD 129.

Wife's motion to compel corporation to provide information concerning her husband's insurance coverage, his personnel and health records, and records concerning his fatal crash and

investigation was denied where: (1) corporation responded that it was not party to lawsuit and, although husband was driver who performed services for corporation as independent contractor, corporation had no direct knowledge of or stake in lawsuit; (2) corporation stated that its principal offices were in Wisconsin where it maintained records of its independent contractors and that agent it maintained for service of process in Arkansas did not control any of documents referred to or requested by wife; (3) simply because court had jurisdiction over non-parties did not make court most appropriate forum for either issuance or enforcement of subpoenas; (4) appropriate question to ask was whether agent for service of process possessed degree of control over documents which would have made it appropriate to enforce subpoena over corporation from court in one state, when corporation's documents were located in another state; (5) court assumed that persons with most significant control were located in Wisconsin where documents were located; and (6) wife failed to obtain issuance of subpoena from state where production of materials were to be obtained from corporation. Crafton v United States Specialty Ins. Co. (2003, ED Ark) 218 FRD 175.

In class action by plaintiff health care consumers for violation of federal Medicaid Act, magistrate granted consumers' motion to compel production of documents having private information regarding class members by both parties defendant (state executive officials) and nonparties; documents sought from non-defendant entities were within control of principal state agency involved, as principal agency directly or indirectly delegated delivery of services to such entities and had right to examine and copy information maintained by them. Rosie D. v Romney (2003, DC Mass) 256 F Supp 2d 115, 55 FR Serv 3d 883, findings of fact/conclusions of law (2006, DC Mass) 410 F Supp 2d 18.

Although court properly issued protective order under *Fed. R. Civ. P. 26(c)* and Fed. R. Civ. P. 30(b)(2) precluding videotaping of detective's deposition, plaintiff violated order by bringing video camera to deposition, and, despite magistrate's recommendation of dismissal of plaintiff's actions as sanction for this non-compliance, pursuant to *Fed. R. Civ. P. 37(b)*, court allowed plaintiff to proceed if plaintiff affirmed that he would sit for deposition without presence of any video recording equipment, and thereafter sit for deposition at time mutually agreeable to parties. Posr v Roadarmel (2006, SD NY) 466 F Supp 2d 527.

**102. Other particular cases**

Where action is pending in eastern district of New York, but oral deposition of defendant is being taken in southern district of New York, motion to compel responsive answers is properly made in southern district of New York. Braziller v Lind (1963, SD NY) 32 FRD 367, 7 FR Serv 2d 762.

Defendant having unsuccessfully moved, in court in district where plaintiff's ex-wife was being deposed, for order compelling her to answer question in spite of assertion of privilege by plaintiff, defendant cannot thereafter relitigate issue in court in which action is pending by moving for order directing plaintiff not to invoke privilege when his ex-wife is questioned. Dennis v Liberty Mut. Ins. Co. (1984, DC Mass) 39 FR Serv 2d 121.

## D. Payment of Expenses

### 1. In General

### 103. Generally

Award of attorney fees is not warranted where party filing motion does not prevail because there is no provision in Federal Rules of Civil Procedure for award of expenses to parties who do not prevail on motion to compel discovery. Owens-Corning Fiberglas Corp. v Sonic Dev. Corp. (1982, DC Kan) 546 F Supp 533.

Former Rule 37(a)(4) is not general authorization for attorneys' fee awards for violations of Federal Rules of Civil Procedure, and party cannot recover expenses under Rule 37(a)(4) where it has not made Rule 37(a) motion, or where, even if it is deemed to have implicitly made Rule 37(a) motion, court did not issue order compelling discovery. Broder v Perpetual American Bank, F.S.B. (1985, ED Pa) 107 FRD 213.

Former Fed. R. Civ. P. 37(a)(4)(A) permits award of expenses, including attorney's fees, incurred in making motion to compel; thus, any award under Rule 37 is limited to events occurring before orders compelling discovery are entered; reimbursement for any fees incurred as result of alleged subsequent non-compliance with court's orders are governed by *Fed. R. Civ. P. 37(b)(2)*. Gouin v Gouin (2005, DC Mass) 230 FRD 246.

Former Fed. R. Civ. P. 37(a)(4)(A) presumes that costs and fees for bringing successful motion to compel will be granted by federal district court, unless court finds that party to be compelled's position was substantially justified, and it is pinpoint specific as to amount of sanction to be awarded; it provides that court shall require party who fails to make or cooperate in discovery to pay party who makes motion for order compelling disclosure or discovery to pay reasonable expenses incurred in making motion, including attorney fees. Vinton v Adam Aircraft Indus. (2005, DC Colo) 232 FRD 650, injunction den, sanctions disallowed (2007, DC Colo) 2007 US Dist LEXIS 1211.

While defendant argued that American rule did not entitle plaintiff to attorney's fees and costs on motion to compel absent showing of bad faith, whatever common law rule might otherwise be invoked, *Fed. R. Civ. P. 37(a)(4)(A)* still required reimbursement of fees and costs on successful motion to compel. Smith v Mallick (2007, DC Dist Col) 482 F Supp 2d 1.

Former Fed. R. Civ. P. 37(a)(4) counsels against sanctions where failure to comply was substantially justified or that other circumstances make award of expenses unjust. BRAC Group, Inc. v Jaeban (U.K.) Ltd. (In re BRAC Group, Inc.) (2004, BC DC Del) 43 BCD 17, subsequent app, remanded on other grounds (2005, DC Del) 2005 US Dist LEXIS 38911.

### 104. Mandatory nature of requirement

Award of expenses is mandatory against parties whose conduct necessitated motion to compel discovery, and/or against attorney who advised such conduct, unless opposition to motion is substantially justified or other circumstances make award of expenses unjust. Merritt v International Brotherhood of Boilermakers (1981, CA5 Miss) 649 F2d 1013.

Pursuant to former *FRCP 37(a)(4)(A)*, absent finding that opposing party's position was substantially justified, award of expenses is mandatory. Notice v DuBois (1999, DC Mass) 187 FRD 19.

Former FRCP 37(a)(4) contains mandatory requirement for allowance of expenses and attorney's fees to prevailing party when motion is either granted or denied; such requirement furthers policy of *FRCP 37* to discourage litigation concerning propriety of discovery; however, former *FRCP 37(a)(4)* provides for an award only of those fees incurred in opposing motion to compel discovery, and not all expenses incurred with discovery in general. *In re Hunter Outdoor Products, Inc. (1982, BC DC Mass) 21 BR 188.*

Unpublished Opinions

Unpublished: District court did not abuse its discretion in refusing to levy sanctions on bank after granting motion for discovery sanctions because district court was not required to award sanctions and nothing in record provided compelling reason why district court should have felt compelled to levy sanctions. Spizizen v Nat'l City Corp. (2013, CA6 Mich) 2013 FED App 202N.

**105. Hearings and opportunity to be heard**

Parties' submissions in their responsive memoranda constitute "hearing" provided for under former Rule 37(a)(4) and no separate evidentiary "hearing" is required. Persson v Faestel Invest., Inc. (1980, ND Ill) 88 FRD 668, 31 FR Serv 2d 772.

Although evidentiary hearing may be required when court imposes sanctions under its inherent powers alone, hearing is not required for sanctions imposed under *FRCP 26(g)*, 33(b), 34(b) and former 37(a)(4), and 28 USCS § 1927. Medical Billing, Inc. v Medical Mgmt. Sciences, Inc. (1996, ND Ohio) 169 FRD 325, remanded (2000, CA6 Ohio) 212 F3d 332, 2000 FED App 159P, cert den *(2000) 531 US 1051, 148 L Ed 2d 558, 121 S Ct 655.*

Before imposing sanctions pursuant to former *FRCP 37(a)(4)(A)*, court must afford plaintiff opportunity to be heard. Augustine v Adams (1996, DC Kan) 169 FRD 664.

Manufacturer's motion for sanctions under former *Fed. R. Civ. P. 37(a)(4)* was denied because although award of reasonable expenses, including attorney fees, may have been appropriate, before court could make any such award, individuals had to be afforded opportunity to be heard. Cardenas v Dorel Juvenile Group, Inc. (2005, DC Kan) 231 FRD 616, 63 FR Serv 3d 423.

In case in which former employee filed motion to compel production of documents and former employee's request for attorney's fees and costs associated with motion was first raised in her reply brief, district court declined to rule on motion because responding parties had not had opportunity to respond to motion. Thong v Andre Chreky Salon (2008, DC Dist Col) 247 FRD 193.

Bankruptcy court declined to defer hearing on objections to proposed Fed. R. Bankr. P. 7037 sanctions where court had already made determination to hold movants responsible, and all

that remained was as determination on appropriate amount of attorneys' fees and costs. Oscher v Solomon Tropp Law Group, P.A. (In re Atl. Int'l Mortg. Co.) (2007, BC MD Fla) 373 BR 156, 20 FLW Fed B 479, sanctions allowed, judgment entered (2007, BC MD Fla) 373 BR 159, 48 BCD 219, 20 FLW Fed B 556.

**106. Apportionment of expenses**

Magistrate's allowance of 70 percent of attorney's fees expanded in pursuing motions to compel production of documents was reasonable where magistrate determined that movant was successful as to 70 percent of items sought. Cal Dive International, Inc. v M/V Tzimin (1989, SD Ala) 127 FRD 213.

Where court granted in part and denied in part employees' motion to compel, court found it appropriate and just for parties to bear their own expenses and fees incurred in connection with instant motion to compel pursuant to *Fed. R. Civ. P. 37(a)(4)(C)*. Hammond v Lowe's Home Ctrs., Inc. (2003, DC Kan) 216 FRD 666.

Because court ruled for plaintiff employee on many issues in employee's motion to compel, court awarded reasonable costs and fees apportioned to prevailing issues. Sonnino v Univ. of Kan. Hosp. Auth. (2004, DC Kan) 220 FRD 633, motions ruled upon (2004, DC Kan) 2004 US Dist LEXIS 5988.

Because court overruled many of plaintiff's objections to defendants' motions to compel, significant number of which court found were not substantially justified, court deemed it just to allow defendants to recover portion, if not all, of reasonable expenses and attorney fees they incurred in bringing their motion to compel; in absence of any evidence indicating that plaintiff itself was responsible for sanctionable conduct, court will impose sanctions against plaintiff's law firm counsel. DIRECTV, Inc. v Puccinelli (2004, DC Kan) 224 FRD 677 (criticized in Diaz-Padilla v Bristol Myers Squibb Holding Ltd. Liab. Co. (2005, DC Puerto Rico) 2005 US Dist LEXIS 5879) and motion den, motion to strike den (2006, DC Kan) 2006 US Dist LEXIS 94648 and (criticized in Ice Corp. v Hamilton Sundstrand Corp. (2007, DC Kan) 2007 US Dist LEXIS 34578).

Where, motion to compel is granted in part and denied in part, court may apportion reasonable expenses incurred in relation to motion in just manner. In re Sulfuric Acid Antitrust Litig. (2005, ND Ill) 231 FRD 320, 2005-2 CCH Trade Cases P 74939.

**107. Assessment as between attorney and client**

When District Court apportions liability for expenses between party and his attorney pursuant to Rule 37, apportionment determination is as much subject of appellate review as any other and must be adequately explained by specific findings. Weisberg v Webster (1984, App DC) 242 US App DC 186, 749 F2d 864, 40 FR Serv 2d 657.

Where it is unclear that defendant's attorney is principal instigator of unjustified opposition to discovery sought by plaintiffs who are forced to make motion to compel defendant to answer interrogatories and to produce documents, award of costs and attorney's fee to plaintiffs will be

made only against defendant and not against his attorney. Humphreys Exterminating Co. v Poulter (1974, DC Md) 62 FRD 392, 18 FR Serv 2d 809.

Defendants' attorneys are required to pay plaintiffs' reasonable expenses and attorneys' fees incurred by plaintiffs in obtaining discovery order where defendants fail to comply with such order, and advance no reason why order, provision for expenses and attorneys' fees should not be granted. Shenker v Sportelli (1979, ED Pa) 83 FRD 365, 28 FR Serv 2d 344.

Plaintiff's counsel is properly required to pay defendant's reasonable expenses incurred in making motion to compel complete answers to interrogatories, where answers to interrogatories were presumably prepared by plaintiff's counsel, since they were signed by him, and there is no evidence that plaintiff was aware of extreme delay in responding to interrogatories or that answers were evasive and incomplete. Watkinson v Great Atlantic & Pacific Tea Co. (1984, ED Pa) 38 FR Serv 2d 1310.

In action in which court granted plaintiffs' motion for sanctions under former *Fed. R. Civ. P. 37(a)(4)(A)* where defendants had failed to provide any evidence that their repeated objections were "substantially justified," court ordered sanctions to be imposed against defense counsel personally, together with Justice Department attorneys who filed meritless opposition brief that defended her conduct. Cobell v Norton (2003, DC Dist Col) 213 FRD 16.

In products liability case concerning child safety seat, court overruled many of defendant manufacturer's objections, significant number of which court found were not substantially justified, so court deemed it just to allow plaintiffs to recover portion of reasonable expenses and attorney fees incurred in bringing their motion to compel; in absence of any evidence indicating that manufacturer itself was responsible for sanctionable conduct, court imposed sanctions against law firms of manufacturer's counsel. Cardenas v Dorel Juvenile Group, Inc. (2005, DC Kan) 230 FRD 611, 62 FR Serv 3d 1263, motion gr, in part, motion den, in part, request den, motion to strike den, costs/fees proceeding (2005, DC Kan) 230 FRD 635, 62 FR Serv 3d 1328.

**108. Nonparties**

If motion to compel discovery of deponent who is not party is granted, deponent may be required to pay moving party's reasonable expenses unless opposition to motion was substantially justified. Rockwell International, Inc. v Pos-A-Traction Industries, Inc. (1983, CA9 Cal) 712 F2d 1324, 37 FR Serv 2d 580.

Plaintiffs' request for expenses under former Rule 37(a)(4) was denied even though non-party deponents had refused to answer questions that were relevant to litigation, and even though court granted plaintiffs' motion to compel, because deponents were non-parties, were unrepresented by counsel, had never been deposed, had serious concerns respecting confidentiality, and had already provided extensive information during their depositions. Alexander v Cannon Mills Co. (1986, MD NC) 112 FRD 404.

Nonparty witness was entitled to reimbursement for reasonable attorneys' fees as sanction for party's exceeding proper boundaries of discovery process. Browning v Peyton (1988, SD NY) 123 FRD 75.

Unpublished Opinions

Unpublished: Bankruptcy court required non-party to Chapter 7 bankruptcy case to comply with subpoenas issued by U.S. Government which sought documents he possessed that identified or contained evidence of physical or emotional injuries or sickness he sustained as result of being wrongfully arrested, convicted, and incarcerated, but issued protective order under *Fed. R. Civ. P. 26(c)(1)* and Fed. R. Bankr. P. 7026 which limited Government's ability to use documents; however, court refused to strike provision in protective order which allowed Government to disclose information to law enforcement authorities if it believed information non-party provided indicated violation of law, and also found that there was no basis under Rule 26(c)(2) or *Fed. R. Civ. P. 37(a)* for ordering Government to pay attorneys' fees non-party incurred to respond to Government's motion to compel and to seek protective order; non-party had not shown he would be injured by provision which allowed Government to disclose information about violations of law. In re Elkins (2012, BC ND Ohio) 2012 Bankr LEXIS 2402, amd (2012, BC ND Ohio) 2012 Bankr LEXIS 2602.

**109. Postjudgment award**

Where 1) District Court denied motion for discovery after judgment, 2) such motion was made without express reference to Rule 37 but in connection with motion under Rule 60(b) alleging fraud on court, and 3) court made no finding that award of expenses, including reasonable attorney's fee, would be unjust, failure to make such award to party who opposed motion for discovery was improper. H. K. Porter Co. v Goodyear Tire & Rubber Co. (1976, CA6 Ohio) 536 F2d 1115, 191 USPQ 486, 21 FR Serv 2d 1429.

There is no authority that bars post-judgment assessment of discovery expenses where, prior to judgment, court makes finding of liability and reserves ruling on precise amount of sanction; award may not be made without opportunity for hearing but fact that hearing is not conducted until after suit is dismissed does not affect validity of award of attorney's fees. Merritt v International Brotherhood of Boilermakers (1981, CA5 Miss) 649 F2d 1013.

**110. Other particular cases**

Each party in heated controversy was required to bear burden of his own expense in connection with plaintiff's motion to compel discovery where neither had taken position so unjustified as to warrant imposition of costs under former Rule 37(a)(4), even though both sides had gone further than was permissible in seeking and resisting discovery. Payne v Howard (1977, DC Dist Col) 75 FRD 465, 23 FR Serv 2d 1483.

Attorneys' fees and costs award for discovery abuses would run from date court first ordered party to comply with discovery. SEC v Blinder, Robinson & Co. (1989, DC Colo) 126 FRD 61, 14 FR Serv 3d 989.

Law student interns' claim for fee for simple motion to compel was grossly excessive and, while clinical experience is admirable and important part of legal education, it is unfair to defendants to shift all legal interns' time to defendants' pocketbook; request would not be denied entirely

but would be reduced to amount of time reasonably competent and experienced lawyer could have performed tasks, at reasonable hourly rate of $ 90. Brown v Iowa (1993, SD Iowa) 152 FRD 168.

Employment discrimination plaintiffs are awarded total of $ 2,385 in costs and attorney's fees in connection with motion to compel, where rationale used to calculate fee awards in civil rights cases can be helpful in calculating awards under former *FRCP 37(a)(4)*, because 22 hours requested by EEOC counsel for filing joint motion were excessive and must be culled to 5 hours, but otherwise hourly rates requested, hours expended, and documentation thereof are acceptable. EEOC v Accurate Mech. Contrs. (1994, ED Wis) 863 F Supp 828, 74 BNA FEP Cas 1351.

Plaintiff's motion to compel spoke to incomplete answers to interrogatories and when such motion was denied in whole or in part, court could award expenses to winner, pursuant to former *Fed. R. Civ. P. 37(a)(2)(B)*, (3). Mitchell v AMTRAK (2003, DC Dist Col) 217 FRD 53.

Had one defendant's counsel, who knew that no discovery requests had been served on his client, contacted plaintiff's counsel, confusion over whether defendant was required to respond to motion to compel that stated it was directed to "all defendants" but which was not intended to include this particular defendant would have been cleared up and that defendant could have been spared expense of preparing opposition brief; thus, the court found no basis to impose sanctions against plaintiff and denied defendant's request for sanctions. Sonnino v Univ. of Kan. Hosp. Auth. (2004, DC Kan) 220 FRD 633, motions ruled upon (2004, DC Kan) 2004 US Dist LEXIS 5988.

After court decided motion for protective order in case with four plaintiffs and one defendant, given dearth of case law regarding how interrogatories were to be counted and allocated to particular party, pursuant to *Fed. R. Civ. P. 26(c)(3)* none of parties was entitled to any fees or expenses under *Fed. R. Civ. P. 37(a)(5)*. Semsroth v City of Wichita (2008, DC Kan) 2008 US Dist LEXIS 35380, summary judgment gr, judgment entered (2008, DC Kan) 548 F Supp 2d 1203.

Pursuant to *Fed. R. Civ. P. 37(a)(5)*, defendant's lead attorney was personally required to pay $ 2000 in expenses and fees because most of his discovery positions--such as withholding emails encompassed by broad scope of discovery and asserting nebulous "confidentiality" and "privacy" theory of privilege--were not covered by any of exceptions. Adelman v BSA (2011, SD Fla) 276 FRD 681.

**111. Miscellaneous**

Nothing in either Rule 37(a) or 37(b)(2) authorizes award of attorneys' fees for successfully defending against petition seeking to hold allegedly recalcitrant witness in contempt of court for refusing to permit petitioner to videotape deposition absent court order for videotaping. Westmoreland v CBS, Inc. (1985, App DC) 248 US App DC 255, 770 F2d 1168, 2 FR Serv 3d 1451.

Rule 37 does not empower district court to award attorneys' fees to pro se litigant since pro se litigant does not incur such fees; pro se litigant's motion for attorneys' fees may be considered

by court under its inherent power to assess sanctions. Pickholtz v Rainbow Techs., Inc. (2002, CA FC) 284 F3d 1365, 62 USPQ2d 1340, 52 FR Serv 3d 210, reh den (2002, CA FC) 2002 US App LEXIS 11820.

Former Rule 37(a)(4) applies to expenses incurred in opposing motion for protective order where court not only denies protective order but also orders discovery to proceed. Roper Corp. v Litton Systems, Inc. (1984, ND Ill) 106 FRD 1.

Since former *Fed. R. Civ. P. 37(a)(4)* is bottomed on principle of deterrence, where fee award will not discourage abuses of discovery process, motion for fees should not be granted. In re Sulfuric Acid Antitrust Litig. (2005, ND Ill) 231 FRD 320, 2005-2 CCH Trade Cases P 74939.

After granting, in part, their motion to compel production of computer and information contained therein, court directed plaintiffs to submit verified accounting of their fees pertaining to motion and directed defendants to show cause why fees should not be assessed as result of motion to compel, in accordance with *Fed. R. Civ. P. 37(a)(4)(C)*. G.D. v Monarch Plastic Surgery, P.A. (2007, DC Kan) 239 FRD 641.

*Fed. R. Civ. P. 37* provided in pertinent part that if motion to compel discovery was granted in part and denied in part, as was case in children's suit, court could apportion reasonable expenses for motion. Under circumstances of case, court did not find award of expenses to be warranted, and thus, court ordered each party to bear its own expenses related to motion to compel. P.S. v Farm, Inc. (2008, DC Kan) 71 FR Serv 3d 218.

### 2. Moving Party's Entitlement

#### 112. Generally

Trial court may properly order party to pay opponent's expenses where party's conduct during discovery necessitated opponent's bringing motions which otherwise would have been unnecessary, unless party's conduct was substantially justified or other circumstances make award unjust. Marquis v Chrysler Corp. (1978, CA9 Cal) 577 F2d 624, 1978-2 CCH Trade Cases P 62155, 25 FR Serv 2d 1314.

Finding by court that party has engaged in willful disobedience or gross negligence is not required for imposition of sanction of attorney's fees and expenses. Land Ocean Logistics, Inc. v Aqua Gulf Corp. (1998, WD NY) 181 FRD 229.

Plaintiff was entitled to award of 50 percent of her attorney fees under *Fed. R. Civ. P. 37(a)(4)* because district court for most part granted plaintiff's motion to compel production of documents requested under Fed. R. Civ. P. 34 in purported class action for violations of California Labor Code and for unfair business practices under Cal. Bus. & Prof. Code § 17200; only 50 percent was awarded because defendant employer offered to provide "sample" discovery to plaintiff, and plaintiff failed to accept that offer. Hill v Eddie Bauer (2007, CD Cal) 242 FRD 556.

#### 113. Baseless opposition

Defendants may recover expenses for legal fees and court reporter's fee from plaintiff where plaintiff, without any legitimate excuse, refuses to be deposed after district judge denies

plaintiff's motion to stay discovery and directs that all discovery proceed despite plaintiff's pending motion to disqualify defendants' counsel. Weigel v Shapiro (1979, CA7 Ill) 608 F2d 268.

Deponent's refusal to answer in accordance with counsel's advice that other side was not entitled to have 2 attorneys rather than one question deponent was not substantially justified and warranted assessment of expenses. Rockwell International, Inc. v Pos-A-Traction Industries, Inc. (1983, CA9 Cal) 712 F2d 1324, 37 FR Serv 2d 580.

Court granted plaintiffs' motion for sanctions under former *Fed. R. Civ. P. 37(a)(4)(A)* where defendants had failed to provide any evidence that their repeated objections were "substantially justified" and where it was ridiculous to assert that reasonable people could differ as to whether simple yes or no answer to factual question "Did government counsel make any misrepresentations to the court during the December 17 hearing?" would disclose contents of any confidential communications between witness and defense counsel made for purpose of securing legal advice or services. Cobell v Norton (2003, DC Dist Col) 213 FRD 16.

State Police's argument that "law enforcement privilege" was established by W. Va. Code § 29B-1-4(4), was unpersuasive, and contrary to specific holding by Supreme Court of Appeals of West Virginia; State Police's position was not substantially justified and there were not other circumstances which would have made award of expenses unjust; thus, plaintiff could file affidavit seeking reasonable expenses incurred in making motion to compel, including attorney's fees. Wolfe v Green (2009, SD W Va) 257 FRD 109.

Unpublished Opinions

Unpublished: In case in which former employee proffered no justification for his failure to respond to written discovery and repeated refusals to answer deposition questions related to those discovery requests and to merits of his employment discrimination claim and it was apparent that his former employer had made good faith attempt to obtain that information before moving to compel, former employee unsuccessfully challenged district court's imposition of sanctions in amount of $ 1,500 to reimburse his former employer for attorney's fees it incurred in securing appropriate order to compel former employee to respond to written discovery and re-submit himself for deposition. Washington v M Hanna Constr., Inc. (2008, CA5 Tex) 2008 US App LEXIS 23748.

**114. Expert witness fees**

Defendant is liable for costs, expert and attorney fees associated with defendant's failure to make timely production where defendant, through its agents, supplies counsel with misinformation in response to plaintiff's request to produce and counsel easily should have been able to learn answers to questions raised by plaintiff, and where defendant's agents intentionally, recklessly or negligently mislead their counsel, plaintiff and court. Fautek v Montgomery Ward & Co. (1982, ND Ill) 96 FRD 141, 42 BNA FEP Cas 1395, 36 FR Serv 2d 835.

Chemical company was entitled to reasonable attorneys' fees and costs in bringing and defending its motion to compel payment of its expert's fees and costs pursuant to *Fed. R. Civ.*

*P. 37(a)* due to corporation's failure to comply with its obligations to pay chemical company's expert witness deposition fees. New York v Solvent Chem. Co. (2002, WD NY) 210 FRD 462, motion den, motion gr, judgment entered (2002, WD NY) 235 F Supp 2d 238, 55 Envt Rep Cas 1827, summary judgment den, motion to strike den, claim dismissed, motion gr, motion den (2002, WD NY) 242 F Supp 2d 196.

Pursuant to language of *Fed. R. Civ. P. 26(b)(4)(C)*, court has power to order payment of expert fees by party who deposes expert; moreover, this obligation is incidental to discovery and therefore within purview of *Fed. R. Civ. P. 37*. Dukes v State (2006, ND Ga) 428 F Supp 2d 1298, affd (2006, CA11 Ga) 212 Fed Appx 916.

Defendant's motion to compel plaintiff to pay expert fees after deposing two of defendant's experts was made after good faith effort to resolve matter without court's intervention; however, since plaintiff had already paid experts, matter was moot. Because plaintiff acted with substantial justification in waiting to pay experts, court declined to award attorney's fees to defendant in conjunction with her motion to compel, and denied motion to compel as moot. Dukes v State (2006, ND Ga) 428 F Supp 2d 1298, affd (2006, CA11 Ga) 212 Fed Appx 916.

**115. Failure to confer or attempt settlement**

Defendant was entitled to recover expenses incurred in motion to compel discovery, which motion was granted due to plaintiff's filing of opposition to motion without compliance with local rule requiring conference of counsel to settle discovery matters, as such improper opposition could never be substantially justified or outweighed by other circumstances which would make award of expenses unjust. Stornaiuolo v New Hampshire Boat Builders, Inc. (1987, DC Mass) 113 FRD 655.

Plaintiff was entitled to award of expenses incurred in moving to compel discovery, which motion court granted in absence of opposition thereto by defendant, where defendant's counsel improperly attempted to waive compliance with local rule requiring counsel for parties to confer before hearing regarding motions and objections relating to discovery; such attempted waiver could never be substantially justified or outweighed by other circumstances which would make award of expenses unjust. Midland-Ross Corp. v Ztel, Inc. (1987, DC Mass) 113 FRD 664, 7 FR Serv 3d 155.

Defendants were not entitled to attorney's fees and costs pursuant to former *Fed. R. Civ. P. 37(a)(4)(A)* because defendants did not make any effort to resolve discovery dispute concerning scope of examination with defendants' psychiatrist; fact that defendants sent plaintiff's counsel letter outlining their view of dispute before filing their motion was not sufficient effort to resolve dispute. Marsch v Rensselaer County (2003, ND NY) 218 FRD 367.

Plaintiff's motion for award of reasonable costs, including attorney's fees, incurred in obtaining court orders allowing plaintiff's motions to compel, which were granted on ground that defendant failed to respond to motions, would not be denied on ground that defendant did not respond to motions because she thought that motions would be automatically denied based upon plaintiff's counsel failure to comply with U.S. Dist. Ct., D. Mass., R. 37.1, which required

conference of counsel to attempt to resolve discovery disputes before filing of motion to compel and attachment of certificate attesting that such conference was held; nothing in Local Rule 37.1 indicated that court would routinely deny motion that did not comply with Local Rule 37.1, and, in any event, opposition should have been filed within time provided by Local Rule 37.1 when court had not denied motions by time that opposition was due. Gouin v Gouin (2005, DC Mass) 230 FRD 246.

Plaintiff's motion for award of reasonable costs, including attorney's fees, incurred in obtaining court orders allowing plaintiff's motions to compel, which were granted on ground that defendant failed to respond to motions, would not be denied based on defendant's contention that complete agreement would have been reached if conference had been held as required by U.S. Dist. Ct., D. Mass., R. 37.1; such contention was of dubious accuracy given that plaintiff's counsel had already sought to have defendant held in contempt based upon inadequacy of her answers to interrogatories, and, in any event, defendant was obligated to file opposition to motions to compel in order to bring any such deficiencies to court's opinion. Gouin v Gouin (2005, DC Mass) 230 FRD 246.

Patients satisfied good faith certification requirement required by *Fed. R. Civ. P. 26(c)* and *37(a)(2)(B)* and by D. Kan. R. 37.2; patients' certification pursuant to *Fed. R. Civ. P. 26(c)* and *37* found in their motion to compel contained particularized facts that sufficiently described and identified steps taken by parties to resolve their discovery dispute regarding production of computer and information contained therein. G.D. v Monarch Plastic Surgery, P.A. (2007, DC Kan) 239 FRD 641.

Counsel satisfied conference requirements set forth in *Fed. R. Civ. P. 37* and D. Kan. R. 37.2 because various emails exchanged between counsel for parties demonstrated that specific discovery disputes were discussed and despite attempts by counsel for parties to resolve discovery disputes, it appeared that counsel for parties were at impasse and that additional attempts to resolve discovery disputes would have been futile. P.S. v Farm, Inc. (2008, DC Kan) 71 FR Serv 3d 218.

Technology corporation was not entitled to attorney's fees in its action seeking production of settlement agreement between plaintiffs and another corporation, because, before filing its motion to compel, technology company did not attempt in good faith to obtain disclosure without court action; having prepared joint stipulation before conferring about discovery dispute hardly showed "good faith" attempt to avoid court action. Bd. of Trs. v Tyco Int'l. Ltd. (2008, CD Cal) 253 FRD 521.

In mortgagor's fraud suit against defendants, credit management group and lending company, mortgagor was not entitled to sanctions under *Fed. R. Civ. P. 37* where defendants presented Fed. R. Civ. P. 30(b)(6) witness who was unprepared because gaps in witness's knowledge largely related to matters outside scope of court's order, which directed only that witness answer questions regarding adequacy of defendants' document search, and further, mortgagor did not seek in good faith to have gaps filled by another witness. Crawford v Franklin Credit Mgmt. Corp. (2009, SD NY) 261 FRD 34.

Paragraph contained in motion to compel stating that, in counsel's view, responses to written deposition questions were deficient did not meet certification requirement of *Fed. R. Civ. P.*

*37(a)(2)(A)* where there was no mention that both counsel had in good faith conferred with each other. In re Presto (2006, BC SD Tex) 358 BR 290.

Merely pointing out that there were flaws in responses to written deposition questions did not meet certification requirement of *Fed. R. Civ. P. 37(a)(2)(A)*; opposing counsel should have had opportunity to respond. In re Presto (2006, BC SD Tex) 358 BR 290.

**116. Good faith effort to comply with discovery**

Plaintiff's opening of its files to defendant represents good faith attempt to answer interrogatories sufficient for court to deny defendant's motion for expenses and attorney's fees in connection with its motion to compel plaintiff to answer interrogatories. Technitrol, Inc. v Digital Equipment Corp. (1973, ND Ill) 62 FRD 91, 181 USPQ 87, 18 FR Serv 2d 1394.

In action against Secretary of Health and Human Services and other federal officials regarding Government's method of recouping certain overpayments to Supplemental Security Income beneficiaries, District Court properly denies plaintiffs' motion for attorneys' fees under former Rule 37(a)(4), where Government's initial short answer to plaintiffs' interrogatories, i.e., that it did not keep statistics on specific matters requested, is arguably adequate in light of vast bulk and physical dispersion of SSI claimant responses concerned; fact that Government later discussed with plaintiffs possibility that extensive computer run could produce information responsive to plaintiffs' needs does not render its initial response a bad faith response. Cullins v Heckler (1985, SD NY) 108 FRD 172, 3 FR Serv 3d 886.

Where county's failure to provide relevant information and/or documents regarding over-detentions in response to plaintiff's discovery requests and, specifically, to ascertain existence of readily-accessible computer-based information regarding over-detentions, for period of months, was not substantially justified and necessitated motion to compel and follow-up proceedings that ultimately resulted in identification and production of relevant, responsive documents, it was appropriate to require county to pay plaintiff reasonable expenses that were incurred in making motion to compel, including attorney's fees. Green v Baca (2005, CD Cal) 225 FRD 612, 60 FR Serv 3d 1022.

Motion to compel custodians of records of three health care providers to produce records was granted, but counsel's request for fees and costs was denied; although counsel's letter to each custodian of records reminding them of their obligation to produce records had makings of type of good faith effort envisioned by court, court noted few respects in which counsel's effort might have been improved including that follow-up letters did not warn providers that, if they did not perform in timely fashion, they might face motion to compel and attorney's fees and costs; nor did follow-up letters provide new deadline or indicate new time and place for production of records. Boukadoum v Hubanks (2006, DC Md) 239 FRD 427.

In civil action under 18 USCS § 1964, part of Racketeer Influenced and Corrupt Organizations Act, 18 USCS §§ 1961 et seq., plaintiff was entitled to compel supplemental responses to his Fed. R. Civ. P. 34(a) discovery requests; defendant made improper boilerplate objections to requests related to his various and numerous identities and business enterprises, which was

relevant information under *Fed. R. Civ. P. 26(b)(1)*; because plaintiff made good faith effort to obtain disclosure without court action, he was entitled to award of attorney fees under former *Fed. R. Civ. P. 37(a)(4)(A)*. A. Farber & Partners, Inc. v Garber (2006, CD Cal) 417 F Supp 2d 1143, motion gr, in part, motion den, in part, request gr, costs/fees proceeding (2006, CD Cal) 237 FRD 250.

In this patent infringement action, defendants' motion for dismissal and for sanctions was granted where (1) plaintiffs and plaintiffs' attorney improperly withheld tests and reports were related to plaintiffs' patent claims and analogous trade secret water clarification process claims; (2) plaintiffs' proffered reasons for withholding reports were not credible; (3) failure to produce these reports was ongoing act of willful concealment, not mistake of inadvertence; and (4) ongoing concealment of these documents impacted defendants' ability to defend this suit. ClearValue, Inc. v Pearl River Polymers, Inc. (2007, ED Tex) 242 FRD 362.

Subcontractor's motion to compel insurer to produce requested documents was denied because (1) subcontractor did not allege insurer did not comply with specific deadline or was non-responsive, (2) subcontractor did not substantiate certification under D. P.R. R. 26 of good faith efforts to reach agreement with opposing counsel, and (3) insurer produced over 1,000 pages of documents, showed good faith effort to resolve disputes, and agreed to produce additional documents. Brenford Envtl. Sys., L.P. v Pipeliners of P.R., Inc. (2010, DC Puerto Rico) 269 FRD 143.

Mortgage company was not entitled to order compelling discovery because company, although it went through motions of conferring with home loan borrowers, failed to confer in good faith with borrowers prior to company's filing motion to compel discovery. Patrick v Teays Valley Trs., LLC (2013, ND W Va) 297 FRD 248, affd, objection overruled (2014, ND W Va) 298 FRD 333.

Unpublished Opinions

Unpublished: Court ordered payment of costs and fees on apportioned basis under *Fed. R. Civ. P. 37(a)(5)* associated with filing motion to compel where debtors failed to sufficiently answer majority of defendants' propounded discovery requests, which were not burdensome, did not require unreasonable amount of time to answer, and constituted basic, normal discovery requests for this type of action; debtors' avoidance of depositions and failure to answer majority of discovery requests represented lack of good faith. Norris v First Federal Sav. & Loan (In re Norris) (2012, BC ND Ohio) 2012 Bankr LEXIS 1938.

**117. Obstruction of, or interference with, discovery**

Award of attorneys' fees of over $ 165,000 in addition to discovery sanction of $ 10,000 was not abuse of discretion taking into account enormous amount of time spent as result of opposing party's obstructive conduct, a well as waste of precious and valuable court time. Johnson v Kakvand (1999, CA7 Ill) 192 F3d 656, 44 FR Serv 3d 847, reh den (1999, CA7 Ill) 1999 US App LEXIS 25853.

Given defendant's tactics of obstructing discovery, order will issue requiring defendant pay plaintiff amount of reasonable expenses incurred in obtaining order to compel answer, including

reasonable attorneys' fees. Banco Nacional De Credito Ejidal, S. A. v Bank of America Nat'l Trust & Sav. Ass'n (1951, DC Cal) 11 FRD 497.

Request for admission under Fed. R. Civ. P. 36(a), asking for admission that product in photograph in defendant competitor's website, which was sole basis for plaintiff inventors' trade dress infringement claim under § 43(a) of Lanham Act, *15 USCS § 1125(a)*, did not have characteristic of inventor's product, required response on whether it depicted product incorporating that characteristic, and inventors' response that information known or readily available by inventors was insufficient to enable them to admit or deny request without qualification, but that, upon information and belief, inventors denied request, was insufficient; competitor's motion to compel and request for expenses was granted under former *Fed. R. Civ. P. 37(a)(4)(A)* because inventors' position delayed case and interfered with ability to obtain discovery. Lamoureux v Genesis Pharm. Servs. (2004, DC Conn) 226 FRD 154.

Grounds existed under Fed. R. Civ. P. 30(d)(3) and former 37(a)(4)(A) to impose monetary sanctions against inventor and his attorney regarding corporation's motion to compel inventor's deposition where (1) attorney, without making slightest effort to comply with appropriate procedures for terminating deposition under Fed. R. Civ. P. 30(d)(4), took it upon himself to unilaterally terminate deposition of inventor, (2) attorney did not like questions asked about why inventor's deposition was delayed, and he became disruptive and caused inventor's deposition to end abruptly and improperly, (3) such conduct could not have been condoned, and (4) it also appeared from deposition transcript that attorney had not prepared inventor for his deposition, and had not shown him documents to refresh his recollection. Biovail Labs., Inc. v Anchen Pharm., Inc. (2006, CD Cal) 233 FRD 648.

Where defendants argued that plaintiffs' attorneys' unwarranted objections and coaching frustrated fair examination of plaintiffs, sanctions pursuant to *Fed. R. Civ. P. 37(a)(4)* for costs and attorneys' fees required to bring motions to compel answers to questions posed during deposition were not warranted because defendants' attorneys and plaintiffs' attorneys were equally culpable for protracted, contentious discovery that had occurred in case. Pucket v Hot Springs Sch. Dist. No. 23-2 (2006, DC SD) 239 FRD 572.

Deponent and deponent's attorney were jointly liable for sanctions under *Fed. R. Civ. P. 37(a)(5)(A)*; deponent failed without justification to answer questions propounded at deposition, and attorney's failure to intercede and correct deponent's conduct was functional equivalent of advising deponent's conduct under Rule 37(a)(5)(A). GMAC Bank v HTFC Corp. (2008, ED Pa) 248 FRD 182.

Although plaintiffs in a class action alleging violations of the Individuals with Disabilities Education Act were entitled to attorney fees under *Fed. R. Civ. P. 37(a)(5)(A)* after prevailing on a motion to compel discovery against the District of Columbia, which had engaged in a pattern of tardy and piecemeal disclosure, their fee request was excessive with regard to time spent on issues upon which plaintiffs did not prevail; inter alia, the court reduced the fees requested for preparation of the fee petition itself by 75 percent. DL v Dist. of Columbia (2009, DC Dist Col) 256 FRD 239.

Plaintiff continually requested information and defendants did not provide it, forcing plaintiff to expend time and money filing motions, and only after plaintiff filed motions did defendants

produce documents; this was exactly type of behavior contemplated by *Fed. R. Civ. P. 37*'s fee-shifting provision. Lorillard Tobacco Co. v Elston Self Serv. Wholesale Groceries (2009, ND Ill) 259 FRD 323.

Unpublished Opinions

Unpublished: Where plaintiffs' attorney was sanctioned for failing to inform defendants' counsel or magistrate judge in timely fashion that he required additional time to respond to counsel's discovery requests, forcing needless motion practice, wasting time and resources, although sanctions were appropriate, district court improperly calculated attorneys' fees by including attorneys' fees related to counsel's reply to attorney's objections to declaration of fees and costs because sanction did not cover future filings. Mantell v Chassman (2013, CA2 NY) 2013 US App LEXIS 3717.

Unpublished: Fee award following motion to compel was granted to certain extent, pursuant to *Fed. R. Civ. P. 37(a)(4)(A)*, against individuals as they were responsible for discovery dispute in not turning over their personal tax returns; award, though, which included preparation time, time spent on appeal, and time for consultation with experts, was reduced so as not to include time that was not spent directly on motion or that was excessive or duplicative. Enterasys Networks, Inc. v DNPG, LLC (2006, DC NH) 2006 US Dist LEXIS 42225.

**118. Timing of motion to compel**

District court will give plaintiffs benefit of possible doubt as to requirements under Rule 33 to answer fully and decline to award expenses and counsel fees, plaintiff's time to make complete answers not having expired when defendant filed motion for relief under Rules 35 and 37. Nagler v Admiral Corp. (1958, SD NY) 167 F Supp 413, 1 FR Serv 2d 557.

Motion to strike affidavit of defendant's witness and for sanctions will be denied, where plaintiffs assert witness was instructed at deposition to "stonewall" all inquiry into scope of his knowledge, but never filed motion to compel, because former *FRCP 37(a)(4)* provides for award of expenses and sanctions only following filing of motion to compel. Kraus v Celotex Corp. (1996, ED Mo) 925 F Supp 646.

**119. Substantial justification for motion**

Motion to compel answers to interrogatories seeking list of corporate departments, files, and explanation of corporate organization is not obviously improper but is "substantially justified" since list of corporate departments and files will aid in formulation of document request; hence, imposition of $ 350 sanction upon plaintiff's attorney under Rule 37 was improper. *Reygo Pacific Corp. v Johnston Pump Co. (1982, CA9 Cal) 680 F2d 647, 1982-2 CCH Trade Cases P 64858, 34 FR Serv 2d 609.*

Award of attorney's fees and expenses in connection with defendant's seeking protective order regarding conduct of plaintiff's counsel during depositions was warranted where attorney's behavior toward opposing counsel was not merely discourteous, offensive and unprofessional, but in some instances incomprehensibly vicious, and questioning of witnesses was often

improperly argumentative and confrontational. Heinrichs v Marshall & Stevens, Inc. (1990, CA2 NY) 921 F2d 418, 18 FR Serv 3d 1115.

District court did not abuse its discretion in awarding attorneys' fees of $ 968 for work in moving for sanctions and order to compel disclosure, notwithstanding brevity and routine nature of motion, where plaintiff failed to respond to interrogatories and production requests. Collins v Burg (1999, CA8 Mo) 169 F3d 563.

Plaintiff's failure to timely and appropriately respond to defendants' interrogatories, or timely object thereto warrants imposition of sanction in form of reasonable expenses, including attorney fees in favor of defendants in connection with defendants' discovery order. Mann v Newport Tankers Corp. (1982, SD NY) 96 FRD 31.

Rule 37 sanctions not awarded against plaintiffs who moved to compel production of documents, where defendants presented invoice for cost of producing some documents to plaintiffs and advised them that no others would be forthcoming unless plaintiffs bore cost for producing them, so plaintiffs did not lack substantial justification in filing motion. Delozier v First Nat'l Bank (1986, ED Tenn) 109 FRD 161 (criticized in Medtronic Sofamor Danek, Inc. v Sofamor Danek Holding, Inc. (2003, WD Tenn) 2003 US Dist LEXIS 8587) and (criticized in Medtronic Sofamor Danek, Inc. v Michelson (2003, WD Tenn) 229 FRD 550, 56 FR Serv 3d 1159).

Defendants prevailed on compulsion motion where, at minimum, they forced plaintiff specifically to identify list of potential witnesses to incident giving rise to lawsuit and, prior to motion, plaintiff had simply referred defendants to report without any specific designation of potential witnesses, hence defendant was entitled to attorney's fees. Swann v Goldsboro (1990, ED NC) 137 FRD 230, 19 FR Serv 3d 190.

Defendant-counter claimant was entitled to expenses as sanction for counterclaim-defendant's meritless refusal to produce documents which court had previously had said in memorandum opinion were relevant to alter-ego issue and counterclaim-defendant had not contested production request in protective order motions. Green Constr. Co. v Kansas Power & Light Co. (1991, DC Kan) 137 FRD 22.

Bank may be able to recover, under former *FRCP 37(a)(4)*, $ 5,916.34 in fees and costs incurred in seeking discovery orders to compel answers from IRS regarding its rights under mortgage, even though IRS explains its contradictory responses to interrogatories by stating that taxpayers' file was temporarily misplaced, because it does appear that IRS refused to answer several requests and provided bank with information it did not fully verify. First of Am. Bank v Alt (1993, WD Mich) 848 F Supp 1343, 94-1 USTC P 50169, 73 AFTR 2d 898, 94 TNT 23-20.

City would be ordered to pay movant's attorney's fees and costs incurred in making motion to compel and motion for sanctions since city's representation that movant had all discovery he was entitled to was insufficient to obviate need to actually respond to movant's discovery requests. Mahon v City of Bethlehem (1995, ED Pa) 160 FRD 524.

In insured's bad faith and breach of contract suit against insurer, award of fees and expenses pursuant to former *Fed. R. Civ. P. 37(a)(4)(C)* may have been appropriate because insured's

motion to compel was granted as to all but one of discovery requests; because insured did request fees or expenses in motion, insurer was given opportunity to be heard. Moses v Halstead (2006, DC Kan) 236 FRD 667, summary judgment den, motion to strike den (2007, DC Kan) 477 F Supp 2d 1119.

Plaintiffs' objections to a magistrate judge's orders awarding fees and costs pursuant to *Fed. R. Civ. P. 37(a)(5)(B)* were without merit, as plaintiffs had utterly failed to establish substantial justification for their positions, and even where the court granted plaintiffs some relief, it was not based on their arguments and slim-to-none pertinent authority, but largely on an independent look at the disputed discovery in light of the reasonable needs of the case. Proa v NRT Mid Atl., Inc. (2009, DC Md) 633 F Supp 2d 209.

Communications companies were entitled to recover attorney's fees and costs where trucking company, after delaying full compliance for eight months, finally completed producing documents only after motion to compel was filed. Underdog Trucking, L.L.C. v Verizon Servs. Corp. (2011, SD NY) 273 FRD 372.

Discovery which borrowers sought to compel from mortgage company was reasonably calculated to lead to discovery of admissible evidence, and no valid claims of burden, over-broadness, or privilege were advanced by mortgage company; however, all requests except for one request for production were limited to relevant time period, and, with respect to one request for production, mortgage company was ordered to produce complete copy of borrowers' file with all documents from origination of loan to date of amended complaint. Patrick v Teays Valley Trs., LLC (2013, ND W Va) 297 FRD 248, affd, objection overruled (2014, ND W Va) 298 FRD 333.

Unpublished Opinions

Unpublished: In citizen's civil rights action against town, town's police department, and current and former officers, in which citizen successfully resisted motion to compel and sought award of citizen's expenses, under *Fed. R. Civ. P. 37(a)(5)(B)*, motion to compel was substantially justified as to request for medical records of citizen's treatment related to conduct of parties citizen sued because request's legal support was rejected only after close reading. Saalfrank v Town of Alton (2010, DC NH) 2010 DNH 41.

Unpublished: In citizen's civil rights action against town, town's police department, and current and former officers, in which citizen successfully resisted motion to compel and sought award of citizen's expenses, under *Fed. R. Civ. P. 37(a)(5)(B)*, motion to compel was not substantially justified as to request for all of citizen's medical records because relevance of those records was not explained, nor was privilege overcome, as access to records was provided and citizen offered to stipulate that citizen did not seek physical injury damages or medical expenses. Saalfrank v Town of Alton (2010, DC NH) 2010 DNH 41.

Unpublished: In citizen's civil rights action against town, town's police department, and current and former officers, in which citizen successfully resisted motion to compel and sought award of citizen's expenses, under *Fed. R. Civ. P. 37(a)(5)(B)*, motion to compel was not substantially

justified as to request for tax returns, earnings summaries, job applications, and social security disability or workers' compensation records because (1) citizen claimed no loss of income or earning capacity, and (2) information was inadmissible to impeach citizen, as citizen could not be impeached with collateral matters. Saalfrank v Town of Alton (2010, DC NH) 2010 DNH 41.

Unpublished: In citizen's civil rights action against town, town's police department, and current and former officers, in which citizen successfully resisted motion to compel and sought award of citizen's expenses, under *Fed. R. Civ. P. 37(a)(5)(B)*, motion to compel was not substantially justified as to request for records of citizen's prior attorneys because parties citizen sued did not attempt to show request was justified and essentially conceded that request was not justified. Saalfrank v Town of Alton (2010, DC NH) 2010 DNH 41.

Unpublished: In citizen's civil rights action against town, town's police department, and current and former officers, in which citizen successfully resisted motion to compel and sought award of citizen's expenses, under *Fed. R. Civ. P. 37(a)(5)(B)*, motion to compel was not substantially justified as to request to compel citizen to provide authorization to access citizen's probation records because such authorization was unnecessary as records were publicly available pursuant to RSA 91-A:4. Saalfrank v Town of Alton (2010, DC NH) 2010 DNH 41.

Unpublished: Where bankruptcy trustee served discovery requests on transferee of property from bankruptcy debtors, transferee did not respond other than to provide brief telephone message and to send some requested documents by facsimile, trustee was entitled to recover its fees and costs under *Fed. R. Civ. P. 37(a)(4)(A)* and Fed. R. Bankr. P. 7037 for being required to file motion to compel discovery; fact that transferee began producing some documents after discovery motion was filed did not vitiate sanction issue, trustee made good faith effort to get discovery without court intervention, and transferee's conduct necessitated motion to compel. Salven v Miller (In re Noon) (2009, BC ED Cal) 2009 Bankr LEXIS 390.

**120. Substantial justification for opposition**

It is incumbent upon court to make award of costs unless conduct of losing party is found to be substantially justified; presence of genuine dispute over legal issue ordinarily indicates that losing party on motion is substantially justified in his opposition, and award of costs to prevailing party is unwarranted. Quaker Chair Corp. v Litton Business Systems, Inc. (1976, SD NY) 71 FRD 527, 191 USPQ 138.

Former Rule 37(a)(4) only requires District Court to determine whether attorney's position was "substantially justified," an objective test that does not require bad faith; court's focus must be on quality of justification and genuineness of dispute; where impartial observer would agree that party had good reason to withhold discovery, then such justification is "substantial." Alvarez v Wallace (1985, WD Tex) 107 FRD 658.

Pursuant to former *FRCP 37(a)(4)(A)*, unless some special circumstance exists, losing party can avoid paying expenses only if his or her actions were substantially justified; substantially justified does not mean justified to high degree, but rather is satisfied if there is genuine dispute over legal issue. Coleman v Dydula (1997, WD NY) 175 FRD 177.

Court may not award *Fed. R. Civ. P. 37* expenses, if it finds that opposing party's nondisclosure, response, or objection was substantially justified, former *Fed. R. Civ. P. 37(a)(4)*. opposing party's objection qualifies as "substantially justified" if "there is genuine dispute or if reasonable people could differ as to appropriateness of contested action. Chaplaincy of Full Gospel Churches v Johnson (2003, DC Dist Col) 217 FRD 250.

Upon fee request brought pursuant to *Fed. R. Civ. P. 37(a)* for discovery misconduct, inquiry as to substantial justification should be made not into ultimate outcome of objections to discovery but into substantive bases for such objections; just because objections are ultimately withdrawn or overruled, or discovery materials are available under other laws, does not mean that objections as asserted are not substantially justified. Neumont v Monroe County (2004, SD Fla) 225 FRD 266.

In suit alleging that employer discriminated against employee due to her pregnancy and her panic disorder, thus violating District of Columbia Family and Medical Leave Act and District of Columbia Human Rights Act, employee was compelled under *Fed. R. Civ. P. 37* to produce medical records and to answer non-privileged deposition questions, as information pertaining to employee's panic syndrome and treatment thereof, information relating to financial and property losses claimed by employee as resulting from alleged violations, and information regarding employee's work history after she separated from employer, was relevant under *Fed. R. Civ. P. 26(b)*, and employee did not substantially justify her failure to provide such information on grounds of confidentiality where such information was central to employee's claims and employer's defenses. Jackson v CCA of Tenn., Inc. (2008, DC Dist Col) 254 FRD 135, 71 FR Serv 3d 1614.

When court granted motion to compel under *Fed. R. Civ. P. 37(a)*, court had to award prevailing party its attorney's fees and expenses incurred in making motion, unless other party's failure to comply with discovery process was substantially justified or other circumstances made award of expenses unjust. *Fed. R. Civ. P. 37(a)(5)*; because company had not shown that its failures to comply with court's orders and corporation's discovery requests were substantially justified or that sanctions were otherwise unjust, court made such award. Turfco Mfg. v Turfco Pest Control, LLC (2009, WD Tenn) 74 FR Serv 3d 1181.

Court ordered plaintiff to compensate defendant for defendant's reasonable expenses incurred in making its motion to compel pursuant to *Fed. R. Civ. P. 37(a)* because defendant's motion to compel was not premature, and plaintiff's insufficient interrogatory responses and actions with regard to defendant's other discovery requests were not substantially justified. Covad Communs. Co. v Revonet, Inc. (2009, DC Dist Col) 262 FRD 1.

Unpublished Opinions

Unpublished: Plaintiff's motion for costs under *Fed. R. Civ. P. 37(a)(5)(A)* was granted because (1) plaintiff's motion to compel defendants to make their *Fed. R. Civ. P. 26(a)(1)* disclosures had been granted, (2) defendants did not assert that plaintiff did not attempt, in good faith, to obtain disclosures before filing his motion, and plaintiff had sent letter reminding defendants of their disclosure obligations under case management order (CMO); (3) defendants' misinterpretation

of R. 26(a)(1)(B)(iv) did not create situation where award of costs would be unjust; and (4) defendants' failure to provide their R. 26 disclosures was not "substantially justified" as CMO specified day R. 26 disclosures were due, exceptions under R. 26(a)(1)(B) did not apply when court order had been entered, and reasonable people would not differ as to appropriate interpretation of R. 26. Boles v Lewis (2009, WD Mich) 2009 US Dist LEXIS 57644.

**121. --Privileged and confidential matters**

Court would not award expenses against defendant in granting motion to compel where both parties had been negotiating matter, defendant had not acted in bad faith, and had objected on grounds of confidentiality. Vollert v Summa Corp. (1975, DC Hawaii) 389 F Supp 1348, 19 FR Serv 2d 1354.

Defendant in patent infringement suit is entitled to order pursuant to former Rule 37(a)(2) compelling discovery of facially relevant documents, asserted to be subject of secrecy agreement with nonparty, under stipulated protective order to protect confidentially of documents but not to award of expenses pursuant to former Rule 37(a)(4) since plaintiff's position was not totally unjustified. Owens-Illinois, Inc. v E. I. Du Pont de Nemours & Co. (1977, ND Ohio) 25 FR Serv 2d 54.

Plaintiff's motion for costs incurred in obtaining orders compelling discovery is properly denied based on defendant's objections on privacy grounds, where plaintiff who challenged county detention center's policy of indiscriminately subjecting temporary detainees to strip searches sought to discover name of detainee who was present during plaintiff's strip search as well as names of other temporary detainees who had been strip searched without probable cause. Smith v Montgomery County (1983, DC Md) 573 F Supp 604, 14 Fed Rules Evid Serv 1591, 37 FR Serv 2d 1296, app dismd (1984, CA4 Md) 740 F2d 963 and dismd (1985, DC Md) 607 F Supp 1303 and (criticized in Augustin v Jablonsky (2001, ED NY) 2001 US Dist LEXIS 10276).

Since work product doctrine is not free from difficulty and court could find no definitive statement of test to be applied to determine its applicability, defendant's opposition to plaintiff's motion to compel production of documents on that ground would be considered substantially justified within meaning of former Rule 37(a)(4), and award of expenses incurred in obtaining order compelling production would be denied. Scott Paper Co. v Ceilcote Co. (1984, DC Me) 103 FRD 591, 17 Fed Rules Evid Serv 1510, 40 FR Serv 2d 1073 (criticized in Maine v United States DOI (2002, CA1 Me) 298 F3d 60, 53 FR Serv 3d 203, 32 ELR 20804).

Although ultimately unsuccessful, plaintiff's resistance of motion to compel discovery of his bank records on ground of asserted privilege was not without substantial justification necessary to avert imposition of sanctions under former Rule 37(a)(4). Sneirson v Chemical Bank (1985, DC Del) 108 FRD 159, 19 Fed Rules Evid Serv 1004, 3 FR Serv 3d 1044.

Attorneys' fees in connection with opposition to motion to compel production of documents would be denied since motion raised 2 issues upon which parties could legitimately and reasonably disagree, namely waiver of attorney-client privilege and inclusion of irrelevant and sensitive information in computer program which plaintiff sought production of. Rates Technol-

ogy, Inc. v Elcotel, Inc. (1987, MD Fla) 118 FRD 133, 6 USPQ2d 1058, 24 Fed Rules Evid Serv 555, 9 FR Serv 3d 929.

In action by former union members against union and former employer for breach of contract, breach of health plan terms, breach of insurance plan terms, and promissory estoppel, union's and employer's motion to compel production was granted in part; union was entitled to discovery of materials for which union members asserted only attorney-client privilege or no privilege at all, but union was not entitled to costs under former *Fed. R. Civ. P. 37(a)(4)* because union members' position regarding their privilege claim was substantially justified; union and employer's motion to compel was denied as to documents for which attorney work-product doctrine applied because documents were related to investigation by union attorneys in preparation for litigation, and union members did not waive their objections; union members' actions did not constitute unjustifiable delay, inexcusable conduct, or bad faith, and there was no voluntary disclosure. USW v Ivaco, Inc. (2003, ND Ga) 29 EBC 2897.

Where court granted motion to compel because attorney-client privilege did not apply to defense counsel's deposition questions to plaintiffs' principal regarding factual issues, plaintiffs were ordered to show cause as to why court should not impose sanctions. Kan. Wastewater, Inc. v Alliant Techsystems, Inc. (2003, DC Kan) 217 FRD 525.

In female pastor's employment discrimination suit against church based upon sexual harassment, although court granted pastor's motion to compel discovery, finding that church autonomy doctrine and "ministerial exception" did not bar requested discovery, court found that award of expenses and attorneys' fees would be unjust because church was substantially justified in making objections. Dolquist v Heartland Presbytery (2004, DC Kan) 221 FRD 564.

Under former *Fed. R. Civ. P. 37(a)(4)*, costs and fees were awarded to party that moved to compel certain discovery responses withheld on basis of attorney-client and work product privileges because court found withholding party did not substantially justify nearly all of its claims; court referred to withholding party's failure to take seriously its responsibilities under law as "stunning." Neuberger Berman Real Estate Income Fund, Inc. v Lola Brown Trust No. 1B (2005, DC Md) 230 FRD 398, 62 Fed Rules Evid Serv 1170.

Although assistant university professor prevailed in her motion to compel disclosure of documents, she was not entitled to award of costs under *Fed. R. Civ. P. 37(a)(4)(A)*, because defendants acted in good faith in asserting privilege claim, their privilege claim was not frivolous, defendants disclosed all of documents that were not covered by their privilege claim, they made effort to narrow set of documents at issue, they prepared adequate privilege log, and they willingly tendered disputed documents for in camera inspection by court. Qamhiyah v Iowa State Univ. of Sci. & Tech. (2007, SD Iowa) 245 FRD 393.

### 122. --Protective orders

Plaintiffs were not entitled to attorneys' fees because defendant's motion for protective order was substantially justified by existence of parties' general protective order agreement providing defendant with option of moving for specific protective order. Cuno, Inc. v Pall Corp. (1987, ED NY) 117 FRD 506, 5 USPQ2d 1683, 8 FR Serv 3d 343.

In context of *Fed. R. Civ. P. 26(c)*, special master correctly stated that if motion for protective order is denied, moving party can be ordered to pay reasonable expenses incurred in defending motion unless motion was substantially justified or that there were other circumstances that would make award of expenses unjust; thus, special master correctly found that corporation's cross-motion for protective order was, to say least, without substantial justification and that circumstances did indicate that award of expenses would not have been unjust. In re Omeprazole Patent Litig. (2005, SD NY) 227 FRD 227.

Claimant failed to show good cause that protective order was required under *Fed. R. Civ. P. 26(c)* where voice mail messages were to be used to establish truth of case that debt collector and its agents violated Fair Debt Collection Practices Act, 15 USCS §§ 1692 et seq., and thus were substantive evidence; real value was not in impeaching witness but in facts and issues determined by recording; however, because claimant had substantial justification for not producing recording, collector was not entitled to fees and cost under *Fed. R. Civ. P. 37*. Stamps v Encore Receivable Mgmt. (2005, ND Ga) 232 FRD 419, 63 FR Serv 3d 360.

**123. --Other particular cases**

Age discrimination plaintiffs were justified in initially not complying with defendants' discovery requests for income tax forms and details of their attorney fee arrangement, and court therefore should not have imposed attorney's fees and expenses when compelling discovery; plaintiffs relied on Supreme Court dictum regarding attorney's fees issue and on out-of-circuit district court caselaw, where there was no in-circuit caselaw, regarding tax form issue. Maddow v P&G (1997, CA11 Ga) 107 F3d 846, 73 BNA FEP Cas 784, 69 CCH EPD P 44551, 37 FR Serv 3d 594, 10 FLW Fed C 763.

While plaintiff property owners argued they should have been granted sanctions for having to filed motion to compel discovery against defendant county, and county's objections to discovery were based on relevancy grounds, district court's determination of substantial justification on party of county was sufficient for denial of discovery sanctions. Neumont v Florida (2010, CA11 Fla) 610 F3d 1249, 22 FLW Fed C 1071.

Plaintiff is sufficiently justified in opposing defendant's motion to compel answers to interrogatories where dispute exists between parties as to sequence of discovery so that expenses and attorney's fees will be denied defendant. Technitrol, Inc. v Digital Equipment Corp. (1973, ND Ill) 62 FRD 91, 181 USPQ 87, 18 FR Serv 2d 1394.

Where defendant failed to serve answers to interrogatories within 30 days, court may properly grant plaintiff's motion to compel answers as well as $ 1,000 sanction, notwithstanding defendant's contention that its failure to respond was occasioned by restructuring of its business following hostile takeover; defendant's response should have been raised as timely answer to plaintiff's interrogatories. Garrett v Miller Plating Corp. Local 81 Union Employees Pension Plan (1983, ED Mich) 100 FRD 418.

Employee who sued employer for discrimination was substantially justified in not producing tapes of conversations with co-workers which he surreptitiously recorded since employee

subsequently became aware that it was illegal to record conversations without consent of all parties; therefore sanctions of attorneys' fees and expenses would not be imposed. Lockette v American Broadcasting Cos. (1987, ND Ill) 118 FRD 88.

Defendant's opposition to discovery motions in employment discrimination rested on substantial basis so that award of sanctions was not justified. Guruwaya v Montgomery Ward, Inc. (1988, ND Cal) 119 FRD 36, 60 BNA FEP Cas 811, 48 CCH EPD P 38564.

Plaintiff was not substantially justified in opposing motion to compel discovery even though parties were engaging in voluntary settlement negotiations since plaintiff did not assert any agreement between parties to voluntarily to stay discovery pending settlement negotiations. Foxley Cattle Co. v Grain Dealers Mut. Ins. Co. (1992, SD Iowa) 142 FRD 677.

Defendants will not be ordered to pay reasonable expenses incurred by plaintiffs in making motion to compel discovery to allow plaintiffs' experts to visit mental health facilities, observe treatment process, and interview patients and staff, where class action is brought against state mental health officials, because defendants' objections to plaintiffs' discovery request were at least in part substantially justified, and conduct of counsel on both sides made motion necessary. K.L. v Edgar (1996, ND Ill) 945 F Supp 167, motion den, motion to strike den (1996, ND Ill) 948 F Supp 44.

Reasonable expenses were awarded when defendants made good faith effort to obtain discovery without court action, there was lack of substantial legal authority justifying plaintiffs' position, and not to award reasonable expenses would be unjust because it would reward plaintiffs' conduct, which was absolutely without authority and expressly contrary to Federal Rules of Civil Procedure; however, sanctions were not awarded when plaintiffs acted in good faith in part, defendants were not prejudiced, and while need for deterrence was great, there might be less drastic solution. Biovail Corp. v Mylan Labs., Inc. (2003, ND W Va) 217 FRD 380.

As plaintiff was unaware of connection between fact witness and defendants, in part because defendants did not disclose connection in response to question at prior depositions, plaintiff had substantial justification for failure to disclose intent to call fact witness in timely fashion. Wechsler v Macke Int'l Trade, Inc. (2004, CD Cal) 221 FRD 619.

Plaintiffs' fee request for discovery misconduct was improperly granted under *Fed. R. Civ. P. 37(a)* because defendant's objections based upon relevance were substantially justified objections, upon which reasonable minds could have differed; fact that defendant's objections were withdrawn or overruled by magistrate judge did not affect finding of substantial justification under Rule 37. Neumont v Monroe County (2004, SD Fla) 225 FRD 266.

Indian beneficiaries were not entitled to sanctions against defendants, Secretary of Interior and others, under former *FRCP 37(a)(4)*, where court denied majority of beneficiaries' requests for compelled disclosure and defendants' objections to requests were therefore substantially justified, and where court found that it would be unjust to impose expenses upon defendants. Cobell v Norton (2005, DC Dist Col) 226 FRD 67, injunction gr, stay den (2005, DC Dist Col) *357 F Supp 2d 298,* vacated on other grounds (2005, App DC) 368 US App DC 249, 428 F3d 1070.

Very reasons that require denial of motion to compel strongly suggest that award of fees would not further goal of deterrence and would be "unjust." Discovery was rapidly coming to close, and there was heightened sense of need to complete discovery, which plaintiffs believed to be significant to their case; furthermore, whether plaintiffs' deposition notices were timely was reasonably debatable, and thus was substantially justified within meaning of former *Fed. R. Civ. P. 37(a)(4)*. In re Sulfuric Acid Antitrust Litig. (2005, ND Ill) 231 FRD 320, 2005-2 CCH Trade Cases P 74939.

In product liability action involving defective child seat, parents' motion for award of fees and expenses pursuant to former *Fed. R. Civ. P. 37(a)(4)(A)* in connection with motion to compel parent company to produce documents was granted because court granted motion to compel in its entirety and significant number of company's objections were not substantially justified. Cardenas v Dorel Juvenile Group, Inc. (2005, DC Kan) 232 FRD 377, CCH Prod Liab Rep P 17282, 63 FR Serv 3d 722.

Debt collector was required under *Fed. R. Civ. P. 26(a)(1)(A)* to disclose identities of two unknown employees because collector's "use" of employees was necessary for its defense that neither collector nor its agents violated Fair Debt Collection Practices Act, 15 USCS §§ 1692 et seq., and goal of initial disclosure was to get basic information at early stage; because collector provided no substantial justification for its failure to disclose information, claimant was entitled to fees and costs for motion under former *Fed. R. Civ. P. 37(a)(4)*. Stamps v Encore Receivable Mgmt. (2005, ND Ga) 232 FRD 419, 63 FR Serv 3d 360.

Pursuant to Fed. R. Civ. P. 16(f) and former *Fed. R. Civ. P. 37(a)(4)*, U.S. was allowed its reasonable expenses incurred in preparing successful motion to compel discovery and in attending court-mandated status conference because contractor offered no explanation for failing to comply with numerous discovery requests in its action against U.S. and its non-attendance at conference, though not willful, was not substantially justified. O. Ahlborg & Sons, Inc. v United States (2005, DC Mass) 233 FRD 224.

In consultant's suit against buyer for recovery of allegedly wrongfully obtained funds from settlement agreement, although buyer was granted motion to compel consultant to disclose certain IRS correspondence and conversations and for consultant's principal to testify on certain matters, buyer was not entitled to recovery of its attorney's fees and expenses incurred in its motion to compel under *Fed. R. Civ. P. 37(a)(4)(A)* because there was some justification for consultant's opposition to disclosure of requested information. Comprehensive Habilitation Servs. v Commerce Funding Corp. (2006, SD NY) 240 FRD 78.

In breach of contract case in which communications company argued that marketing company was responsible for delay in discovery and that it should not be penalized and communications company asserted that it was engaging in good faith attempt to force marketing company to produce set of electronic documents and so decided to completely remove itself from discovery process, pursuant to *Fed. R. Civ. P. 37(a)(5)(A)*, communications company was ordered to show cause why it should not pay reasonable costs and attorneys fees that marketing company incurred in preparing and filing its motion to compel discovery. Covad Communs. Co. v Revonet, Inc. (2009, DC Dist Col) 258 FRD 17.

Plaintiff's motion for fees and costs associated with filing of its motion to compel was denied because *Fed. R. Civ. P. 37* required payment of reasonable expenses associated with grant of motion to compel, including attorney's fees, unless opposing party's nondisclosure, response, or objection was substantially justified, or other circumstances made award of expenses unjust; because defendants represented to court that they believed that opinion and order rendered moot need to supplemental their response to interrogatory, award of fees would be unjust. United States v Elsass (2012, SD Ohio) 109 AFTR 2d 2075.

University's resistance to bankruptcy debtor's requests for discovery was not substantially justified within meaning of former *FRCP 37(a)(4)*, (b)(2), since matters related to university's conduct in relation to other bankrupt students was clearly relevant, university's minimal efforts did not establish that requested discovery was unduly burdensome, and other students' records were subject to disclosure upon court's order. Ray v Univ. of Tulsa (In re Ray) (2002, BC ND Okla) 283 BR 70.

Fee award was inappropriate with respect to any services relating to bankruptcy debtor's First Motion to Compel since motion was denied because interrogatories at issue were overly broad, as creditor contended; creditor's position was sustained by court and thus was "substantially justified" for purposes of former *FRCP 37(a)(4)*. Ray v Univ. of Tulsa (In re Ray) (2002, BC ND Okla) 283 BR 70.

**124. Other particular cases**

Court does not abuse its discretion in assessing plaintiff for expenses incurred by defendant in conducting discovery into extent of plaintiff's violation of injunctive order of court, pursuant to court's finding plaintiff in contempt for violation of that order and awarded to defendant in response to its motion for sanctions. Sheila's Shine Products, Inc. v Sheila Shine, Inc. (1973, CA5 Fla) 486 F2d 114, 179 USPQ 577, 17 FR Serv 2d 1435 (criticized in, among conflicting authorities noted in Teddygram, Inc. v Boyce (1999, ND Ga) 53 USPQ2d 1804).

Where, after subpoena duces tecum has been served on two officers of defendant-corporation commanding them to appear before notary public and produce certain records and specimens, and to testify, one officer leaves hearing before his examination is concluded, while other refuses to answer certain questions and neither brings records and specimens, court will order each to appear for examination and produce records, and to pay plaintiff expenses in obtaining order and attorney's fees. Bellavance v Frank Morrow Co. (1941, DC RI) 2 FRD 118, 52 USPQ 180.

Costs and expenses in bringing motion will be denied defendant-bank even though defendant's motion is granted compelling answers by plaintiffs to questions aimed at determining whether in class action plaintiffs' counsel has engaged in unethical practices of solicitation and maintenance. Stavrides v Mellon Nat'l Bank & Trust Co. (1973, WD Pa) 60 FRD 634, 17 FR Serv 2d 1126.

Under authority of *42 USCS § 2000e-5(k)*, court awarded attorney's fees and expenses of defendant in connection with motion to compel discovery where defendant was prevailing party

on motion. EEOC v Anchor Continental, Inc. (1977, DC SC) 74 FRD 523, 15 BNA FEP Cas 90, 23 FR Serv 2d 1526.

Burden of persuasion is now on losing party to avoid assessment of expenses and fees, and where plaintiff neither answered, objected to, nor requested additional time to answer defendant's interrogatories, award of expenses for time spent by counsel in preparing motion to compel discovery was justified. Addington v Mid-American Lines (1978, WD Mo) 77 FRD 750, 25 FR Serv 2d 468.

Defendant is fined $ 7,000 for his abusive behavior at deposition, pursuant to court's inherent power, even though sanctions under former *FRCP 37(a)(4)(a)* are denied due to opposing counsel's failure to prepare affidavit of expenses and attorney's fees incurred in filing motion to compel, where defendant repeatedly called plaintiff's counsel "idiot," "ass," and "slimy son-of-a-bitch" instead of responding to relevant questions propounded by him. Carroll v Jaques (1996, ED Tex) 926 F Supp 1282, affd (1997, CA5 Tex) 110 F3d 290, subsequent app (1998, CA5 Tex) *149 F3d 1175,* subsequent app (1998, CA5 Tex) 1998 US App LEXIS 18088.

Fee award of $ 84,950.70 is appropriate sanction against antitrust defendant for flagrantly improper discovery actions, where plaintiff has submitted affidavit containing typed listing based on contemporaneous time records of dates work made necessary by defendant's actions was performed, because former *FRCP 37(a)(4)(A)* and (b)(2) essentially mandate award of attorney's fees for defendant's flouting of discovery obligations and court orders. Envirosource, Inc. v Horsehead Resource Dev. Co. (1998, SD NY) 981 F Supp 876, 1998-1 CCH Trade Cases P 72031.

Fee award made against defendant for alleged discovery misconduct under *Fed. R. Civ. P. 37* was unjust because none of plaintiffs' efforts in underlying disputed discovery motions yielded or led to any admissible evidence Neumont v Monroe County (2004, SD Fla) 225 FRD 266.

District court denied plaintiff's request for attorney fees in connection with three discovery motions because plaintiff's counsel abused discovery process by appearing for deposition after being warned that deponent would not arrive due to delays caused by hurricane and by unreasonably opposing defendant's motion for leave to file responses. Blankenbaker v United Healthcare of Ariz., Inc. (2005, DC Ariz) 36 EBC 2424.

Because arrestees' failure to respond to officer's interrogatories and requests for production of documents was not substantially justified, and no circumstances existed which would have made award of expenses unjust, court found that sanction in form of fees and costs was warranted under *Fed. R. Civ. P. 37(a)(4)(A)* in amount of $ 887.50; although misconduct of arrestees and their counsel was serious, it was not sufficiently egregious or extreme to warrant dismissal. *Afreedi v Bennett (2007, DC Mass) 517 F Supp 2d 521.*

In former employee's suit against her former employer for discrimination in violation of federal and state law and for intentional and negligent infliction of emotional distress, although employer was entitled, pursuant to *Fed. R. Civ. P. 37(a)*, to compel employee to provide authorizations to release her medical and psychiatric records, employer was not entitled to

expenses, although denial was without prejudice to renewal upon conclusion of lawsuit. Green v St. Vincent's Med. Ctr. (2008, DC Conn) 252 FRD 125.

Although employee failed in part to supplement its disclosures in timely manner, and volunteered to provide some of requested documents only after employer had filed its initial motions, sanctions were not currently warranted under *Fed. R. Civ. P. 37(a)(5)(C)* because several of employee's defenses were meritorious, and employer did not succeed on each of its discovery claims. Hadley v Pfizer, Inc. (2009, ED Pa) 73 FR Serv 3d 1046.

Magistrate judge properly sanctioned plaintiffs for refusing to comply with their discovery obligations since as confirmed by later discovery, plaintiffs were essentially leading defendants and court in circles for information concerning their alleged branding/licensing efforts, enforcement efforts, and alleged damages; under those circumstances, magistrate judge properly found that defendants were entitled to fees pursuant to *Fed. R. Civ. P. 37(a)(5)(A)*; it was not clear error for magistrate judge to find that, under exceptional circumstances presented by case, efforts undertaken with respect to initial motion to compel and/or as necessary precursor to renewed motion to compel were properly reimbursable pursuant to *Fed. R. Civ. P. 37(a)(5)(A)*. Moore v Weinstein Co., LLC (2012, MD Tenn) 2012 US Dist LEXIS 66179, motion gr, motion to strike gr, in part, motion to strike den, in part, summary judgment gr, claim dismissed (2012, MD Tenn) 88 Fed Rules Evid Serv 602.

Defendant was entitled to order compelling plaintiff in employment discrimination case to respond to its discovery; plaintiff was not excused from responding to defendant's discovery simply because she believed that defendant had not provided her with documents she had requested. Ward v Am. Pizza Co. (2012, SD Ohio) 279 FRD 451.

### 3. Opposing Party's Entitlement

#### 125. Generally

Former Rule 37(a)(4) does not provide for award of attorneys' fees and costs incurred in defending against motion to compel discovery where such motion is voluntarily withdrawn. Dataq, Inc. v Tokheim Corp. (1984, CA10 Okla) 736 F2d 601, 222 USPQ 677, 39 FR Serv 2d 344.

Unwarrantedly burdensome demands for production of records should be discouraged, and penalty of expenses and counsel fees may be imposed upon moving party. Vendola Corp. v Hershey Chocolate Corp. (1940, DC NY) 1 FRD 359.

When opposition to discovery efforts is not substantially justified, expenses incurred in obtaining order should encompass all expenses, including attorneys' fees, whenever incurred that would not have been sustained had opponent conducted itself properly. Aerwey Laboratories, Inc. v Arco Polymers, Inc. (1981, ND Ill) 90 FRD 563, 32 FR Serv 2d 672.

#### 126. Prior rulings

Trial judge did not err in assessing reasonable expenses incurred in successfully opposing motion to compel answers to certain questions asked on adverse examination during discovery

proceedings, where such motion was contrary to previous and repeated rulings of court in case and hence was made without substantial justification. Unilectric, Inc. v Holwin Corp. (1957, CA7 Ill) 243 F2d 393, 113 USPQ 242, cert den *(1957) 355 US 830, 2 L Ed 2d 42, 78 S Ct 42, 115 USPQ 427.*

When, by order of court, discovery has been temporarily restricted to matters of jurisdiction, party who attempts to extend discovery far beyond that field and brings court proceedings to enforce such discovery can be forced to pay costs and attorney's fees of successful opposing party, these being only sanctions provided for such conduct under 1970 amendments of Rule 37. Whitehouse Invest., Ltd. v Bernstein (1970, SD NY) 51 FRD 163, 14 FR Serv 2d 1287.

Defendant would be required to reimburse plaintiff for expenditures necessarily made in pursuing plaintiff's discovery rights, including expenses made opposing interlocutory appeals by defendant against court's discovery orders, where material sought by plaintiff was relevant to issues in suit, defendant had ability to comply expeditiously with plaintiff's discovery quest, court order was entered directing defendant to exert every effort to comply with discovery request, and defendant deliberately and willfully refused discovery for unreasonable period of time without justification, Ohio v Crofters, Inc. (1977, DC Colo) 75 FRD 12, 23 FR Serv 2d 876, affd (1978, CA10) 570 F2d 1370, 24 FR Serv 2d 1139, cert den *(1978) 439 US 833, 58 L Ed 2d 129, 99 S Ct 114.*

Expenses are allowable under Rule 37(a) where party failed to obey first court order to comply with discovery notwithstanding fact that court allowed party to submit allegedly privileged document to in camera inspection after second order. In re Air Crash Disaster near Chicago (1981, ND Ill) 90 FRD 613, 32 FR Serv 2d 319.

**127. Other particular cases**

Trial judge erred in civil rights action by denying plaintiffs' motion for award of attorneys' fees incurred in opposing defendants' motion for protective order, notwithstanding trial judge's determination that prior judge, who had also denied expenses to plaintiffs unless they ultimately prevailed in litigation, had presumably concluded that defendants' motion was substantially justified or that award of expenses would be unjust, where it is unclear that prior judge decided issue of whether fees should be awarded under former Rule 37(a)(4), as distinct from whether such award would be forthcoming under *42 USCS § 1988* if plaintiffs ultimately prevailed in suit. Mercy v County of Suffolk (1984, CA2 NY) 748 F2d 52, 40 FR Serv 2d 755.

In class action filed by plaintiff youth program participants alleging that defendants, local government and officials, continued to support program after learning program director was sexual molester, it was abuse of discretion to award defendants attorneys' fees under former *FRCP 37(a)(4)(B)* for successfully defending motion to compel discovery even if motion itself was properly denied because, between time of motion to compel that was filed by participants and time of ruling, defendants had produced thousands of pages of requested documents and thus, motion to compel had been substantially justified. Doe v Lexington-Fayette Urban County Gov't (2005, CA6 Ky) 407 F3d 755, 2005 FED App 206P, reh den, reh, en banc, den (2005, CA6) 2005 US App LEXIS 18565 and cert den *(2006) 546 US 1094, 126 S Ct 1069, 163 L Ed 2d 862.*

Defendant was not entitled to counsel fees under Rule 37 where plaintiff filed unfounded, meritless, frivolous and vexatious motion to strike motion of defendant for extension of time in which to respond to plaintiff's request for admissions and interrogatories. EEOC v New Enterprise Stone & Lime Co. (1977, WD Pa) 74 FRD 628, 15 BNA FEP Cas 25, 14 CCH EPD P 7690, 23 FR Serv 2d 1518.

Plaintiff is entitled to expense of filing and briefing motions to compel production of documents requested by discovery where defendant "volunteered" material he had previously refused to produce at hearing on motion but before court made its ruling; party cannot be permitted, without justification, to delay acquisition of properly discoverable information without becoming liable for reasonable expenses incurred to obtain that information. Liberty Leather Corp. v Callum (1980, DC Mass) 86 FRD 550.

Plaintiff is entitled to award of attorneys' fees and costs in responding to and opposing defendants' motion, where underlying discovery dispute did not even rise to level of dispute before defendant filed motion to compel, 2 instances of plaintiff's noncompliance were explained and apologized for by plaintiff's counsel, and defendant proceeded in uncooperative way when agreed order was not timely complied with, moving for drastic sanctions without so much as telephoning plaintiff's counsel for explanation, and where fact that plaintiff's counsel was able to file interrogatories only a few hours after defendant's motion was filed corroborates his explanation that notice of motion for sanctions was first indication he received that agreed order had been entered. Jenkins v Toyota (1984, DC NY) 106 FRD 185, 40 FR Serv 2d 1125.

Attorneys' fees for opposition to motion to compel surveillance evidence would not be awarded since court's position on surveillance issue had varied during recent years. Romero v Chiles Offshore Corp. (1992, WD La) 140 FRD 336.

Award of expenses against party moving to compel production of documents relating to plaintiff's expert's testimony would be unjust because of application of revised rules which substantially liberalize discovery concerning basis of testifying expert's opinion. All W. Pet Supply Co. v Hill's Pet Prods. Div. (1993, DC Kan) 152 FRD 634 (criticized in Simon Prop. Group L.P. v mySimon, Inc. (2000, SD Ind) 194 FRD 644) and (criticized in Suskind v Home Depot Corp. (2001, DC Mass) 2001 US Dist LEXIS 1349) and (criticized in Gall v Jamison (In re Gall) (2002, Colo) 44 P3d 233).

Party challenging validity of patent was substantially justified in proceeding with hearing on its discovery fraud claim after accuracy of deposition testimony given by opponent's employee was called into doubt, and, thus, would not be held liable under former *FRCP 37(a)(4)(B)* for attorney's fees and expenses incurred by opponent in connection with hearing. Sigma-Tau Industrie Framaceutiche Riunite, S.P.A. v Lonza, Ltd. (2000, DC Dist Col) 106 F Supp 2d 8.

In discrimination suit, employees' motion for costs and fees associated with responding to employers' motion to compel was denied because motion to compel was not considered on its merits after summary judgment was granted to employers. Cooper v Southern Co. (2003, ND Ga) 213 FRD 683.

Because filing of motion for protective order was substantially justified and award of costs and fees would have been unjust under *Fed. R. Civ. P. 26(c)* and former *Fed. R. Civ. P. 37 (a)(4)*,

child's request for costs and fees was denied. Doe v District of Columbia (2005, DC Dist Col) 230 FRD 47, 62 FR Serv 3d 836.

Denial of health-care provider's motions to compel depositions of insurer's witnesses did not require imposition of sanctions under *Fed. R. Civ. P. 37(a)(5)(B)*, as motions were substantially justified; there was genuine dispute regarding propriety of individual capacity deposition of insurers' corporate designee, and there was colorable argument when motions were filed regarding propriety of additional Fed. R. Civ. P. 30(b)(6) depositions. State Farm Mut. Auto. Ins. Co. v New Horizont, Inc. (2008, ED Pa) 254 FRD 227.

In declaratory judgment suit against insurer by assignee of insured, neither attorney-client privilege nor work-product doctrine applied to shield discovery materials in possession of law firm retained by insurer to defend insured in underlying personal injury suit. Under *Fed. R. Civ. P.* Rule 37(a)(4)(A), court ordered insurer to pay attorney fees patron expended as result of insurer's motion for protective order. McGrath v Everest Nat'l Ins. Co. (2009, ND Ind) 73 FR Serv 3d 831, motion to strike gr, claim dismissed (2009, ND Ind) 2009 US Dist LEXIS 71535, motion to strike den, motion to strike gr, partial summary judgment gr, in part, partial summary judgment den, in part (2009, ND Ind) *668 F Supp 2d 1085,* motion den, motion to strike den (2009, ND Ind) 2009 US Dist LEXIS 88180.

**L.** P. and LLC ("investors") that invested in mutual fund that invested, in turn, in another mutual fund that held promissory notes issued by LLC ("debtor") that declared Chapter 11 bankruptcy were entitled under *Fed. R. Civ. P. 37* and 45 to recover attorneys' fees and costs they incurred to defend subpoenas debtor issued because they prevailed on their motions to quash debtor's subpoenas and debtor did not take all steps it could have taken to prevent placing undue burdens on investors; however, investors were allowed to recover only part of $ 49,495 in attorneys' fees they requested because some documents debtor sought were relevant to issues that were in dispute in its bankruptcy case. In re Morreale Hotels LLC (2014, BC CD Cal) 517 BR 184.

Unpublished Opinions

Unpublished: In former assistant chief of police's *42 USCS § 1983* suit against city and its former police chief, imposition of sanctions under *Fed. R. Civ. P. 37(a)(5)(B)* against assistant chief was substantially justified because assistant chief's motion to compel production was frivolous, as document he sought, indictment which assistant chief improperly alleged was secret grand jury transcript, was publicly available. De Angelis v City of El Paso (2008, CA5 Tex) 2008 US App LEXIS 3477.

Unpublished: Magistrate did not abuse its discretion in ordering former employee to pay attorneys' fees and costs incurred by former employer in opposing employee's motions to compel because employee's motions to compel were both meritless and failed to comply with procedural rules, and prior to magistrate's order awarding fees and costs, employee failed to present any mitigating circumstances that would have made award of fees unjust. Kelly v Old Dominion Freight Line, Inc. (2010, CA11 Ga) 2010 US App LEXIS 8730.

## III. FAILURE TO COMPLY WITH COURT ORDER [RULE 37(b)]

### A. In General

#### 128. Generally

Court possesses and must possess authority to enforce order for production of evidence with view to interests of all parties in litigation and with balanced view of public interest involved; court must not fashion its orders and remedies solely at behest of any one party, even Attorney General of United States. Socialist Workers Party v Attorney Gen. of United States (1978, SD NY) 458 F Supp 895, 25 FR Serv 2d 877, vacated on other grounds (1979, CA2 NY) 596 F2d 58, 27 FR Serv 2d 207, cert den *(1979) 444 US 903, 62 L Ed 2d 141, 100 S Ct 217, 28 FR Serv 2d 98* and (criticized in In re Kessler (1996, App DC) 321 US App DC 401, 100 F3d 1015, 36 FR Serv 3d 636).

Trial court has latitude to go beyond specified items of Rule 37 and fashion other sanctions which would be appropriate. Socialist Workers Party v Attorney Gen. of United States (1978, SD NY) 458 F Supp 895, 25 FR Serv 2d 877, vacated on other grounds (1979, CA2 NY) 596 F2d 58, 27 FR Serv 2d 207, cert den *(1979) 444 US 903, 62 L Ed 2d 141, 100 S Ct 217, 28 FR Serv 2d 98* and (criticized in In re Kessler (1996, App DC) 321 US App DC 401, 100 F3d 1015, 36 FR Serv 3d 636).

Failure to obey discovery order is ground for sanctions under Rule 37(b)(2). United States v Nassau County (1979, ED NY) 28 FR Serv 2d 165.

Predominate purpose of *FRCP 37(b)* is to punish litigants and attorneys for their noncompliance with discovery and pretrial orders. Resolution Trust Corp. v Williams (1996, DC Kan) 165 FRD 639.

*FRCP 37(b)* necessarily applies only after litigation has formally commenced and some form of court order has not been obeyed. McGuire v Acufex Microsurgical (1997, DC Mass) 175 FRD 149.

Court should only issue sanctions pursuant to *FRCP 37(b)* for violation of court order regarding discovery. Telewizja Polska USA, Inc. v Echostar Satellite Corp. (2004, ND Ill) 65 Fed Rules Evid Serv 673.

Sanctions may be warranted under *Fed. R. Civ. P. 37(b)(2)* for failure to obey discovery order as long as established issue bears reasonable relationship to subject of discovery that was frustrated by sanctionable conduct. In re Heritage Bond Litig. (2004, CD Cal) 223 FRD 527 (criticized in UMG Recordings, Inc. v Hummer Winblad Venture Partners (In re Napster, Inc. Copyright Litig.) (2006, ND Cal) 2006-1 CCH Trade Cases P 75205).

In deciding whether to grant motion for sanctions under *Fed. R. Civ. P. 37(b)(2)(A)*-(C) for noncompliance with discovery, court should consider (1) public's interest in expeditious resolution of litigation, (2) court's need to manage its docket, (3) risk of prejudice to party seeking sanctions, (4) public policy favoring disposition of cases on their merits, and (5) availability of less drastic sanctions. Since first two of these factors favor imposition of sanctions

in most cases, while fourth cuts against sanction, key factors are prejudice and availability of lesser sanctions; nevertheless, sanctions under *Fed. R. Civ. P. 37(b)(2)* may be appropriate when three factors strongly favor imposition of such sanctions. In re Heritage Bond Litig. (2004, CD Cal) 223 FRD 527 (criticized in UMG Recordings, Inc. v Hummer Winblad Venture Partners (In re Napster, Inc. Copyright Litig.) (2006, ND Cal) 2006-1 CCH Trade Cases P 75205).

Imposition, in proceeding under *Fed. R. Civ. P. 37(b)(2)*, of sanction of either dismissal or default is authorized only in extreme circumstances, as are orders taking adverse party's allegations as established and awarding judgment against that party; such terminating sanctions are appropriate where pattern of deception and discovery abuse made it impossible for district court to conduct trial with any reasonable assurance that truth would be available. United States v Hempfling (2008, ED Cal) 2008-1 USTC P 50230, 101 AFTR 2d 1372.

Unpublished Opinions

Unpublished: Although terminating sanction is extreme remedy under *Fed. R. Civ. P. 37(b)(2)(C)*, there comes time when enough is enough; when party has steadfastly refused to comply with court orders, and has demonstrated habitual pattern of gamesmanship and distortion of facts, terminating sanctions are appropriate and even necessary to preserve integrity of judicial process. Schuette v Lebbos (In re Lebbos) (2008, BC ED Cal) 2008 Bankr LEXIS 413.

**129. Discretion of court, generally**

Although court should impose sanctions no more drastic than those actually required to protect rights of other parties, Rule 37 makes clear that application of sanctions is entrusted to discretion of trial judge, and overly lenient sanctions are to be avoided where inadequate protection of discovery process results. Diaz v Southern Drilling Corp. (1970, CA5 Tex) 427 F2d 1118, 71-1 USTC P 9236, 13 FR Serv 2d 1018, 26 AFTR 2d 5397, cert den *(1970) 400 US 878, 91 S Ct 118, 27 L Ed 2d 115,* reh den *(1971) 400 US 1025, 91 S Ct 580, 27 L Ed 2d 638* and (criticized in United States v Alisal Water Corp. (2004, CA9 Cal) 370 F3d 915, 58 Envt Rep Cas 1694, 58 FR Serv 3d 562).

Sanctions available to trial judge under Rule 37(b) are discretionary. General Dynamics Corp. v Selb Mfg. Co. (1973, CA8 Mo) 481 F2d 1204, 17 FR Serv 2d 1221, cert den *(1974) 414 US 1162, 39 L Ed 2d 116, 94 S Ct 926.*

Although choice of appropriate sanction under Rule 37(b)(2) against party who fails to comply with discovery order is committed to sound discretion of District Court, such discretion is not without bounds. Di Gregorio v First Rediscount Corp. (1974, CA3 Del) 506 F2d 781, 19 FR Serv 2d 728.

Decision whether to impose sanctions for failure to make discovery rests with District Court and not appellate courts. Britt v Corporacion Peruana de Vapores (1975, CA5 Tex) 506 F2d 927, 19 FR Serv 2d 887.

By very nature of its language, sanctions imposed under Rule 37(b) must be left to sound discretion of trial judge. David v Hooker, Ltd. (1977, CA9 Cal) 560 F2d 412, 3 BCD 857, 14 CBC 303, CCH Bankr L Rptr P 66564, 24 FR Serv 2d 159.

Sanctions enumerated by Rule 37 are not exclusive or arbitrary but are flexible and, within reason, may be applied in as many or varied forms as court desires by exercise of broad discretion taking into consideration facts of each case; Rule 37 only requires sanctions to "hold the scales of justice even". *Guidry v Continental Oil Co. (1981, CA5 La) 640 F2d 523, 31 FR Serv 2d 443,* cert den *(1981) 454 US 818, 70 L Ed 2d 87, 102 S Ct 96.*

Under Rule 37(b)(2), court in which action is pending may impose variety of sanctions upon party for failure to comply with order compelling discovery and, in exercising such discretion, court should take into account full record of case. Krieger v Texaco, Inc. (1972, WD NY) 373 F Supp 108, 1974-2 CCH Trade Cases P 75163, 1974-2 CCH Trade Cases P 75164.

Although district court has wide latitude in framing orders and in penalizing failures to comply, that discretion has constitutional limits. Watkis v Payless Shoesource (1997, MD Fla) 174 FRD 113, 38 FR Serv 3d 1274, 11 FLW Fed D 65.

Unpublished Opinions

Unpublished: District court did not abuse its discretion in imposing monetary sanction because employee twice failed to provide additional discovery as ordered by court, and finding of bad faith was not necessary. Hogan v Raymond Corp. (2013, CA3 Pa) 2013 US App LEXIS 17282.

**130. Necessity of court order and disobedience thereof**

Rule 37(b), providing comprehensively for sanctions for failure to obey discovery orders, has no application if there has not been court order. Fox v Studebaker-Worthington, Inc. (1975, CA8 Minn) 516 F2d 989, 20 FR Serv 2d 248.

Rule 37(b) sanction should not be imposed by trial court unless Rule 37(a) order is in effect; this prerequisite insures that party failing to comply with discovery is given adequate notice and opportunity to contest discovery sought prior to imposition of sanctions. Dependahl v Falstaff Brewing Corp. (1981, CA8 Mo) 653 F2d 1208, 2 EBC 1521, 31 FR Serv 2d 1604, cert den *(1981) 454 US 968, 70 L Ed 2d 384, 102 S Ct 512, 2 EBC 2392* and cert den *(1981) 454 US 1084, 70 L Ed 2d 619, 102 S Ct 641, 2 EBC 2392* and (superseded by statute on other grounds as stated in Ford v Uniroyal Pension Plan (1998, CA6 Mich) 154 F3d 613, 22 EBC 1681, 1998 FED App 276P).

District court's decision to deny plaintiff officer's motion for sanctions for discovery misconduct was correct because plaintiff did not point to any order to provide or permit discovery that could have formed basis of *Fed. R. Civ. P. 37(b)(2)(A)* sanction; plain language of Rule 37(b) provided that before court could impose sanctions, offending party had to fail to obey order to provide or permit discovery. Melendez-Garcia v Sanchez (2010, CA1 Puerto Rico) 629 F3d 25.

*FRCP 37(b)* necessarily applies only after litigation has formally commenced and some form of court order has not been obeyed. McGuire v Acufex Microsurgical (1997, DC Mass) 175 FRD 149.

Language of *FRCP 37(b)(2)* clearly requires two things as conditions precedent to engaging gears of rule's sanction machinery; court order must be in effect, and then must be violated,

before enumerated sanctions can be imposed. Big Top USA, Inc. v Wittern Group (1998, DC Mass) 183 FRD 331, 43 FR Serv 3d 158.

Since *FRCP 37(b)(2)* applies only to situations where party fails to obey order to provide or permit discovery, rule does not provide authority for court to impose sanctions against party that failed to pay court-ordered sanctions (which sanctions were ordered for party's refusal to cooperate with reasonable discovery requests). New York v Gleave (1999, WD NY) 189 FRD 263, 45 FR Serv 3d 642, 30 ELR 20167.

Plain language of *FRCP 37(b)(2)* requires that court order be in effect before sanctions are imposed. Buffalo Carpenters Pension Fund v CKG Ceiling & Partition Co. (2000, WD NY) 192 FRD 95, 46 FR Serv 3d 1073.

*Fed. R. Civ. P. 37* grants discretion to district court to impose wide range of sanctions when party fails to comply with discovery rules or court orders enforcing same; though central factor to *Fed. R. Civ. P. 37(b)(2)* sanction is justice, sanction that is imposed must be specifically related to claim which was at issue in discovery order. United States v Hempfling (2008, ED Cal) 2008-1 USTC P 50230, 101 AFTR 2d 1372.

Because contractors utilized their motion for *Fed. R. Civ. P. 37* sanctions as mechanism by which to address their concern that deposition testimony of test plaintiffs varied from their questionnaire responses, contractors were not entitled to sanctions as they did not show that test plaintiffs failed to obey discovery order. Arias v DynCorp (2010, DC Dist Col) 271 FRD 397.

Unpublished Opinions

Unpublished: Because seller's failure to comply with discovery order was knowing, voluntary, and, in every respect, without justification, seller was in contempt under *Fed. R. Civ. P. 37(b)(2)(A)(vii)*; therefore, seller was to pay manufacturer's reasonable costs and attorneys' fees related to manufacturer's filing of contempt motion. Coach, Inc. v Gata Corp. (2011, DC NH) 2011 US Dist LEXIS 33934.

### 131. Preservation of evidence

Although duty to preserve evidence preexists imposition of discovery ruling, *FRCP 37(b)(2)* may only be invoked against parties who have disobeyed discovery ruling of some sort. P&G v Haugen (1998, DC Utah) 179 FRD 622, 1998-2 CCH Trade Cases P 72283.

Plaintiff in misappropriation-of-trade-secrets action is entitled to have sanctions imposed against defendants under *FRCP 37*, where there was clear court order to preserve integrity of all computers at issue, because, at minimum, defendants were not reasonably diligent and energetic in attempting to accomplish what was ordered. Illinois Tool Works, Inc. v Metro Mark Prods., Ltd. (1999, ND Ill) 43 F Supp 2d 951.

### 132. --Destruction or spoliation of evidence

Court has power to impose sanctions against litigant who is on notice that documents and information in its possession are relevant to litigation, or potential litigation, or are reasonably

calculated to lead to discovery of admissible evidence, and destroys such documents and information. P&G v Haugen (1998, DC Utah) 179 FRD 622, 1998-2 CCH Trade Cases P 72283.

District court has authority to impose sanctions for destruction of evidence; where spoliation prevents party from complying with discovery order, sanctions may be awarded pursuant to *FRCP 37(b)*. Mathias v Jacobs (2000, SD NY) 197 FRD 29, vacated in part on other grounds, sanctions disallowed, summary judgment gr, summary judgment den (2001, SD NY) 167 F Supp 2d 606.

With regard to evidentiary remedy for spoliation, *Fed. R. Civ. P. 37(b)(2)* empowers court to impose sanctions against litigant who is on notice that documents and information in its possession are relevant to litigation, or potential litigation, or are reasonably calculated to lead to discovery of admissible evidence, and destroys such documents and information; however, rule only applies to parties who have violated court order or acted in bad faith and mere negligence in losing or destroying records is not enough because it does not support inference of consciousness of weak case. Cook Assocs. v PCS Sales (USA), Inc. (2003, DC Utah) 271 F Supp 2d 1343, 56 FR Serv 3d 56.

Defendant failed to take reasonable steps to preserve, search for, and collect potentially relevant information, particularly electronic data, after its duty to preserve evidence was triggered by being served with complaint, and defendant's failure to take steps to preserve evidence may have resulted in destruction of relevant evidence; as sanction, defendant bore forensic examination costs to date, and plaintiff was also entitled to award of reasonable costs, including its attorney fees, associated with bringing motion; however, because likelihood that relevant information would be revealed by mirror imaging was small, plaintiff's request was denied as to those computers. Nacco Materials Handling Group, Inc. v Lilly Co. (2011, WD Tenn) 278 FRD 395.

In Title VII of Civil Rights Act of 1964 action, plaintiff's motion for spoliation sanctions was granted in part and denied in part; just because defendant was aware or should have known that her statements were racially biased, it did not mean that she should have anticipated plaintiff's filing employment discrimination action against her that very instant. Curcio v Roosevelt Union Free Sch. Dist. (2012, ED NY) 283 FRD 102.

In Title VII of Civil Rights Act of 1964 action, plaintiff's motion for spoliation sanctions was granted in part and denied in part; to extent plaintiff sought sanctions pursuant to documents or audiotapes that were ultimately produced, defendants did not breach their obligation as standard required, to timely produce this evidence in light of disregard of deadlines contained in Case Management and Scheduling Order. Curcio v Roosevelt Union Free Sch. Dist. (2012, ED NY) 283 FRD 102.

In Title VII of Civil Rights Act of 1964 action, plaintiff's motion for spoliation sanctions based upon unproduced audiotapes was denied because court was not persuaded that defendants' efforts in preserving and storing audiotapes in basement of high school or district's search for audiotapes were utterly deficient as suggested. Curcio v Roosevelt Union Free Sch. Dist. (2012, ED NY) 283 FRD 102.

### 133. Gross negligence

Considerations of fair play may dictate that courts eschew harshest sanctions where failure to comply is due to mere oversight of counsel amounting to no more than simple negligence, but where gross professional negligence has been found, that is where counsel clearly should have understood his duty to court, full range of sanctions may be marshaled. Cine Forty-Second Street Theatre Corp. v Allied Artists Pictures Corp. (1979, CA2 NY) 602 F2d 1062, 1979-2 CCH Trade Cases P 62778, 27 FR Serv 2d 828, 49 ALR Fed 820.

Order of preclusion under gross negligence standard is inappropriate where record indicates that plaintiff substantially complied with court's discovery order. Erie Conduit Corp. v Metropolitan Asphalt Paving Asso. (1983, ED NY) 560 F Supp 305, 1983-1 CCH Trade Cases P 65388.

Although showing of willful disobedience or gross negligence is required to impose harsher sanction of order of dismissal or entry of default judgment, finding of willfulness or contumacious conduct is not necessary to support sanctions which are less severe. Martinelli v Bridgeport Roman Catholic Diocesan Corp. (1998, DC Conn) 179 FRD 77, 41 FR Serv 3d 817.

In accounting malpractice action brought against Chapter 7 debtor's former accountants by Chapter 7 trustee, trustee and his attorney were grossly negligent in failing to disclose until trial 36 boxes of documents, containing many documents that firm had requested two and one-half years earlier, which gross negligence fell within category of fault under *Fed. R. Civ. P. 37(b)(2)(C)*, warranting dismissal of action with prejudice. Shapiro v Plante & Moran, LLP (In re Connolly N. Am., LLC) (2007, BC ED Mich) 376 BR 161.

### 134. Willfulness, bad faith or fault

In determining sanctions, courts will consider "willfulness" on part of person or party failing to act in accordance with discovery procedures. Diaz v Southern Drilling Corp. (1970, CA5 Tex) 427 F2d 1118, 71-1 USTC P 9236, 13 FR Serv 2d 1018, 26 AFTR 2d 5397, cert den *(1970) 400 US 878, 91 S Ct 118, 27 L Ed 2d 115,* reh den *(1971) 400 US 1025, 91 S Ct 580, 27 L Ed 2d 638* and (criticized in United States v Alisal Water Corp. (2004, CA9 Cal) 370 F3d 915, 58 Envt Rep Cas 1694, 58 FR Serv 3d 562).

Provision of Rule 37(b) for entry of such orders "as are just" permits court to judge fault of party and to decree appropriate sanction. Independent Productions Corp. v Loew's, Inc. (1962, SD NY) 30 FRD 377, 5 FR Serv 2d 438.

Mere failure to comply with order under Rule 37(a) is sufficient to justify imposition of sanctions under Rule 37(b); proof of willfulness is not required. Independent Productions Corp. v Loew's, Inc. (1962, SD NY) 30 FRD 377, 5 FR Serv 2d 438.

Whether party can be subjected to sanctions is not contingent upon prior finding of wilfulness, although some showing of wilfulness may be necessary if severe sanction of dismissal is invoked. In re Professional Hockey Antitrust Litigation (1974, DC Pa) 63 FRD 641, 1974-2 CCH Trade Cases P 75209, revd on other grounds (1976, CA3 Pa) 531 F2d 1188, 1976-1 CCH Trade Cases P 60747, 21 FR Serv 2d 391, revd on other grounds (1976) 427 US 639, 96 S Ct 2778,

49 L Ed 2d 747, 1976-1 CCH Trade Cases P 60941, 21 FR Serv 2d 1027, reh den *(1976) 429 US 874, 97 S Ct 196, 97 S Ct 197, 50 L Ed 2d 158* and affd without op (1976, CA3 Pa) 541 F2d 275 and affd without op (1976, CA3 Pa) 541 F2d 275 and affd without op (1976, CA3 Pa) 541 F2d 275 and affd without op (1976, CA3 Pa) 541 F2d 275 and affd without op (1976, CA3 Pa) 541 F2d 275.

Sanctions under Rule 37(b) do not turn upon whether omission of parties was wilful. Roberson v Christoferson (1975, DC ND) 65 FRD 615, 19 FR Serv 2d 1160.

Any order imposing sanctions on defendants for failure to comply with discovery orders must be preceded by finding that defendants have acted willfully or in bad faith so as to obstruct discovery by plaintiffs. In re Anthracite Coal Antitrust Litigation (1979, MD Pa) 82 FRD 364, 1979-1 CCH Trade Cases P 62511, 27 FR Serv 2d 1079.

Burden is on noncomplying party to show that failure to comply with court's discovery order was due to inability and not to willfulness, bad faith, or fault; rationale behind this presumption is that if party has ability to comply with discovery order and does not, dismissal is not abuse of discretion. Intercept Sec. Corp. v Code-Alarm, Inc. (1996, ED Mich) 169 FRD 318.

Sanctions under *FRCP 37(b)* may only be imposed where party displays wilfulness, bad faith, or fault; fault does not mean noncomplying party's subjective motivation, but rather, only describes reasonableness of conduct, or lack thereof, which eventually culminated in violation. Second Chance Body Armor, Inc. v American Body Armor, Inc. (1998, ND Ill) 177 FRD 633, 41 FR Serv 3d 184, summary judgment proceeding (1999, ND Ill) 1999 US Dist LEXIS 12277, affd (1999, ND Ill) 43 CBC2d 136.

Under *Fed. R. Civ. P. 37(b)(2)(A)*-(C), sanctions are appropriate only in extreme circumstances and where violation is due to willfulness, bad faith, or fault of party, and disobedient conduct not shown to be outside litigant's control meets this standard. In re Heritage Bond Litig. (2004, CD Cal) 223 FRD 527 (criticized in UMG Recordings, Inc. v Hummer Winblad Venture Partners (In re Napster, Inc. Copyright Litig.) (2006, ND Cal) 2006-1 CCH Trade Cases P 75205).

Company had established that it was entitled to sanctions based upon debtor's repeated failure to produce documents and to comply with court orders related to discovery, however, company's request to strike pleadings and to enter default judgment was too severe; based upon debtor's discovery misconduct, court imposed negative inference from documents that were not produced, deemed certain facts to be established, and precluded debtor from offering certain evidence that had been requested by company and not produced but had been listed as exhibits by debtor. Cadle Co. v Stasch (In re Stasch) (2007, BC SD Fla) 21 FLW Fed B 35.

Sanctions for spoliation of evidence pursuant to *Fed. R. Civ. P. 37* were warranted against Chapter 7 debtor because debtor had duty to preserve electronic evidence, and deliberate and intentional use of wiping software program and timing of its use constituted willful and intentional destruction of electronically stored evidence. United States v Krause (In re Krause) (2007, BC DC Kan) 367 BR 740, 99 AFTR 2d 3098.

**135. --Particular cases**

Failure of Chinese corporation to comply with discovery request was sanctionable under *FRCP 37(b)(2)*, where judgment creditor of corporation's wholly owned subsidiary, in attempting to establish that subsidiary was alter ego of Chinese parent, requested all correspondence between parent and subsidiary relating to New York business, and violation of subsidiary in denying existence of correspondence was willful, particularly in view of counsel's repeated failure to reveal his narrow reading of discovery order that, since in view of parent it did no business in New York, correspondence with subsidiary did not relate to New York business. Satcorp Int'l Group v China Nat'l Import & Export Corp. (1996, SD NY) 917 F Supp 271, 34 FR Serv 3d 1157, remanded (1996, CA2 NY) 101 F3d 3, 36 FR Serv 3d 463.

In civil enforcement action, government's failure to attach computer disk to its discovery requests did not violate U.S. Dist. Ct., M.D. Fla., R. 3.03, which recommended but did not require such action and, thus, did not excuse defendant's willful failure to respond to government's document requests and interrogatories; consequently, magistrate found that further contempt proceedings pursuant to *28 USCS § 636* or sanctions pursuant to former *Fed. R. Civ. P. 37(b)(2)(B)* and (C) against defendant were warranted. United States v Bosset (2002, MD Fla) 90 AFTR 2d 7747, judgment entered (2003, MD Fla) 91 AFTR 2d 1308.

In action in which opera association filed suit against international union et al., asserting causes of action for, inter alia, defamation, violation of Lanham Act, product disparagement, and unlawful secondary boycotting, sanctions were appropriate under *FRCP 37*, where union failed to comply with several court orders, constituting willfulness and bad faith, and where falsehoods uttered by union and union's counsel as to simple but material factual matters also constituted willfulness and bad faith requiring severe sanctions. Metro. Opera Ass'n v Local 100, Hotel Emples. & Rest. Emples. Int'l Union (2003, SD NY) 212 FRD 178, 171 BNA LRRM 2897.

Where magistrate unquestionably limited injured party's discovery to accidents involving specific type of forklift that led to his own serious injury, manufacturer's refusal to furnish far broader scope of evidence sought could not be characterized as willful violation of its discovery obligations so as to justify imposition of sanctions under former *FRCP 37(b)(2)(C)*, notwithstanding that magistrate's ruling was overly restrictive. Phillips v Raymond Corp. (2003, ND Ill) 213 FRD 521, CCH Prod Liab Rep P 16590, motion to strike gr, in part (2005, ND Ill) 364 F Supp 2d 730.

In employment discrimination action, sanctions against employer were not proper pursuant to *Fed. R. Civ. P. 37* for production of certain personnel files because employer merely responded to employee's request and fact that employee mis-worded his original request and had to revise request was hardly willful or sanctionable behavior on part of employer. Peterson v Hantman (2005, DC Dist Col) 227 FRD 13, 86 CCH EPD P 42093.

Defendants in contract dispute were subject to sanctions under *Fed. R. Civ. P. 37* because they committed various abuses of discovery rules, including violation of magistrate judge's orders granting plaintiff's pending motions to compel. Violation did not constitute substantial compliance and was not based on good faith and reasonable interpretation of those orders. Rio Props. v Stewart Annoyances, Ltd. (2006, DC Nev) 420 F Supp 2d 1127.

In company's suit accusing defendants of cybersquatting, company's motion for sanctions under *Fed. R. Civ. P. 37(b)* was denied with regard to order requiring defendants to produce certain contracts because although defendants produced compact disc of documents after discovery closed, they contended that documents themselves were produced before close of discovery, and there was no evidence of bad faith. Eagle Hosp. Physicians, LLC v SRG Consulting, Inc. (2007, ND Ga) 509 F Supp 2d 1337, amd (2007, ND Ga) 2007 US Dist LEXIS 46649.

In fraud action brought by insurance companies against health-care providers, court granted providers' motion for sanctions pursuant to *Fed. R. Civ. P. 37(b)(2)(C)* because companies' corporate designee was so unprepared for Fed. R. Civ. P. 30(b)(6) deposition that court was left with impression that companies took neither court's guidance as to level of preparation required in this case nor requirements of R. 30(b)(6) seriously; however, court reviewed Poulis factors and found that although companies bore responsibility for failure to prepare designee as required by R. 30(b)(6), and such failure was willful, remaining Poulis factors suggest that dismissal of companies' claims was too harsh sanction and that monetary sanctions were appropriate. State Farm Mut. Auto. Ins. Co. v New Horizont, Inc. (2008, ED Pa) 250 FRD 203, 70 FR Serv 3d 764.

In action that was before court to determine whether former counsel for defendant should be sanctioned under *Fed. R. Civ. P. 37(b)(2)*, 28 USCS § 1927, and court's inherent powers, rule to show cause directed at attorney was discharged where (a) problems in this case fell into two categories: (1) overly aggressive advocacy; and (2) failure to acknowledge prior adverse rulings when allegedly raising these previously-rejected arguments to preserve record; and (b) shining light on litigation tactics used in this case was most appropriate way to resolve rule to show cause. United States CFTC v Lake Shore Asset Mgmt. (2008, ND Ill) 540 F Supp 2d 994, motion gr, judgment entered, injunction gr (2008, ND Ill) 2008 US Dist LEXIS 33773.

Where transferee was under obligation to retain all electronic discovery related to trustee's adversary proceeding, and computer expert concluded that disk cleaning program was used to delete over 16,000 on at least two computers and other programs were used to conceal deletions, court found that even if transferee did not destroy files himself, at very least transferee acted in reckless disregard of his discovery obligations; such disregard was sufficient to establish bad faith, and *Fed. R. Civ. P. 37(b)(2)(B)* sanctions order was upheld. Grochocinski v Schlossberg (2009, ND Ill) 402 BR 825.

Whether district made good-faith effort to produce all responsive e-mails before trial was irrelevant; district was not sanctioned for failing to make good-faith effort; rather, it was sanctioned for openly, continuously, and repeatedly violating multiple court orders, failing to adhere to or even acknowledge existence of federal rules' discovery framework, and committing discovery abuse so extreme as to be literally unheard. D.L. v District of Columbia (2011, DC Dist Col) 274 FRD 320.

Bankruptcy court found that person who was allowed to intervene in adversary proceeding that committee of unsecured creditors filed against bank that loaned money to corporate debtor failed to provide discovery and missed scheduled deposition in attempt to delay trial of

committee's action against bank, and it awarded bankruptcy trustee attorney fees, expenses, and costs she incurred to compel intervenor to comply with court's orders, and ordered intervenor to make himself available to trustee for additional examination in Montana and to produce documents trustee requested, pursuant to *Fed. R. Civ. P. 37(b)(2)* and (d) and Fed. R. Bankr. P. 7037; however, court exercised its discretion under Rule 37(b)(2) and decided not to render judgment by default against intervenor because of availability of lesser sanctions. Crum v Blixseth (In re Big Springs Realty LLC) (2010, BC DC Mont) 52 BCD 195, 63 CBC2d 9.

Unpublished Opinions

Unpublished: Excluding defendant insured's business income loss evidence as *Fed. R. Civ. P. 37(b)(2)(A)(ii)* discovery abuse sanction was proper because despite district court's granting of plaintiff insurer's motion to compel, on insured's counsel's instruction, tenant appeared without producing documents requested. Certain Underwriters at Lloyds London v Corporate Pines Realty Corp (2009, CA5 Tex) 2009 US App LEXIS 21882.

Unpublished: Because defendant mortgagee failed to produce document after being compelled to do so, discovery sanctions were proper under *Fed. R. Civ. P. 37(b)(2)(C)*, and amount of sanction was reasonably related to plaintiff mortgagors' additional expenses due to mortgagee's recalcitrance, as district court could fairly determine based on its knowledge of case and of customary fees and costs in community. Oliva v Nat'l City Mortg. Co. (2012, CA9 Nev) 2012 US App LEXIS 16129.

Unpublished: Poulis factors did not weigh in favor of dismissing defendants' defense claims as sanction pursuant to *Fed. R. Civ. P. 37(b)(2)(A)* after they failed to timely comply with court order requiring them to obtain new counsel after their prior counsel withdrew since (1) dismissal was extreme sanction; (2) defendants were not entirely at fault for failing to promptly hire new counsel because court clerk had not timely notified them of court's order; and (3) although defendants were week late, they had complied with order, no willful bad faith on their part was shown, record did not show that they otherwise had history of dilatoriness, they had diligently attempted to move case forward since obtaining new counsel, and plaintiff suffered, at most, minor inconvenience as result of their tardy compliance with order. Bosch Rexroth, S.P.A. v Taylor's Int'l, LLC (2008, DC NJ) 2008 US Dist LEXIS 41842.

Unpublished: Sanctions for failure to comply with order to compel Sanctions pursuant to *Fed. R. Civ. P. 37*, as rendered applicable by Fed. R. Bankr. P. 7037, were properly awarded against debtors who persistently failed to provide full, complete and non-evasive answers to interrogatories and to produce documents, even after court ordered them to do so, because their historical failure to comply with rules and related orders constituted actionable bad faith by reason of which party seeking discovery was entitled to fees and costs. Craver v Stuckey (In re Stuckey) (2010, BC ND Ind) 2010 Bankr LEXIS 2049.

Unpublished: In imposing sanctions under *Fed. R. Civ. P. 37(b)(2)(A)*, bankruptcy court did not abuse its discretion in directing entry of default and striking debtor's answer where, as directed by Ninth Circuit, court determined that debtor's sanctionable conduct was result of willfulness, bad faith, or fault; debtor never suggested that his failure to participate in discovery or to attend

court hearings occurred for reasons beyond his control, and court gave debtor clear warning of sanctions that could be imposed. Pryor v RW Inv. Co. (In re Pryor) (2011, BAP9) 2011 Bankr LEXIS 4332.

### 136. Pro se litigants

All litigants, including those proceeding pro se, have obligation to comply with court orders, and when they flout that obligation, they, like all litigants, must suffer consequences of their actions. Baba v Japan Travel Bureau Int'l (1996, SD NY) 165 FRD 398, 34 FR Serv 3d 1521, affd (1997, CA2 NY) 111 F3d 2, 74 BNA FEP Cas 864, 70 CCH EPD P 44592.

If pro se litigant ignores discovery order, he is subject to sanction like any other litigant. Watkis v Payless Shoesource (1997, MD Fla) 174 FRD 113, 38 FR Serv 3d 1274, 11 FLW Fed D 65.

In pro se employment retaliation case in which employer moved for sanctions pursuant to *Fed. R. Civ. P. 37(b)(2)(A)*, arguing that employee failed to serve initial disclosures on date certain as required by court, although employee did not provide all information required by *Fed. R. Civ. P. 26(a)(1)*, she did respond to at least some of employer's discovery requests by court's deadline; additionally, employer nowhere contended that employee's failure to provide adequate initial disclosures had hampered its ability to litigate case. Robinson-Reeder v Am. Council on Educ. (2009, DC Dist Col) 262 FRD 41.

Unpublished Opinions

Unpublished: Inmate's complaint, which asserted disability discrimination claims against prison officials, was properly dismissed pursuant to *Fed. R. Civ. P. 37(b)(2)(C)* because inmate deliberately failed to appear for his court-ordered deposition without justification and inmate, who proceeded pro se, was warned that noncompliance might result in dismissal. Barclay v Doe (2006, CA2 NY) 2006 US App LEXIS 30072.

Unpublished: Federal district court's dismissal of pro se plaintiff's *42 USCS § 1983* claims against sheriff's deputies who stood by while private owners evicted plaintiff and his chattels from disputed land was proper *Fed. R. Civ. P. 37* sanction for plaintiff's refusal to file discovery responses; although plaintiff was accorded some leeway because he was self-represented, he willfully and repeatedly failed to respond to discovery requests, even though admitting that he had information requested, which prevented law enforcement officials from obtaining information essential to preparing their defense. Bevan v Lee County SO (2007, CA11 Fla) 2007 US App LEXIS 216.

Unpublished: Pro se debtor's suit alleging illegal collection efforts with regard to outstanding student loan debt was dismissed with prejudice as sanction under *Fed. R. Civ. P. 37(b)(2)(A)(v)* because he failed to appear for his deposition, failed to comply with court orders regarding discovery, and his conduct was found willful and not merely negligent nor inadvertent since he consistently disregarding court's orders to provide defendants with documents and answers to interrogatories; court noted that since debtor was proceeding pro se, he was wholly responsible for his failure to obey court's orders and comply with discovery and no alternative sanction (such as monetary sanctions) was appropriate since he was proceeding pro se and in forma pauperis. Huertas v United States Dep't of Educ. (2010, DC NJ) 2010 US Dist LEXIS 69640.

**137. Third persons**

District Court may not enter judgment against party who is not properly before it, nor, in absence of valid service of process, declare that party is properly before it as sanction for party's failure to comply with discovery. Aetna Business Credit, Inc. v Universal Decor & Interior Design, Inc. (1981, CA5 Tex) 635 F2d 434, 30 FR Serv 2d 1598.

Third person is not bound by order compelling discovery, where (1) he was not party to case, nor in privity with any party, (2) he received neither notice of defendant's motion nor opportunity to object or be heard, and (3) he received no notification of order emanating therefrom until well after all applicable appeal periods had expired. Fischer v McGowan (1984, DC RI) 585 F Supp 978, 10 Media L R 1650, 38 FR Serv 2d 1475.

City's motion to compel, pursuant to *Fed. R. Civ. P. 37*, was granted with regard to third-party attorney witnesses, concerning whom plaintiff had failed to maintain her burden of establishing privilege; attorney-client privilege, with respect to documents that were in question, had been waived given that they were voluntarily disclosed and counsel did not employ reasonable precautions to prevent inadvertent disclosure or to protect any privilege upon discovery of disclosure; moreover, argument that attorneys should not be bound by previous ruling failed because it did not appear that they had made any effort to proceed pursuant to Fed. R. Civ. P. 45(c)(3)(A)(iii) to quash or modify deposition subpoena. Louen v Twedt (2006, ED Cal) 236 FRD 502.

**138. Waiver or loss of right to seek sanction**

Where plaintiff in personal injury action does not comply with court's order to appear before named doctor for physical examination at specified time, date, and place, defendant, in attempting to arrange other appointments for plaintiff to be examined, waives any right it may have had to seek penalty of dismissal against plaintiff. Hinson v Michigan Mut. Liability Co. (1960, CA5 La) 275 F2d 537, 3 FR Serv 2d 663.

Rule 37(b) motion for default judgment against defendants for failing to appear for taking of depositions will be denied where moving party has waited over 18 months to make motion, and where counsel for defendants avers that defendants are under impression agreement adjourning depositions has been reached. SEC v North American Research & Dev. Corp. (1972, SD NY) 59 FRD 111, CCH Fed Secur L Rep P 93575, 16 FR Serv 2d 931.

University was not entitled to sanctions under former *Fed. R. Civ. P. 37(b)(2)(A)*, (B), and (C) in form of excluding coach's testimonial reference to athletic director's communication threatening retaliation if she filed discrimination claims where, in response to university's document production request for copy of communication, coach stated that she was in process of locating it and agreed to produce it, university did not argue that disclosure was independently required under *Fed. R. Civ. P. 26(a)*, and university had never filed motion to compel production under *Fed. R. Civ. P. 37(a)(2)(B)*. Mehus v Emporia State Univ. (2004, DC Kan) 326 F Supp 2d 1221.

Filing of motion for summary judgment by trustee does not waive rights of trustee to list required by discovery order; where court had previously issued order compelling discovery, trustee had

right to receive documents and noncompliance was adjudged contempt. In re Fulghum Constr. Corp. (1982, BC MD Tenn) 20 BR 925.

### 139. Protective orders

Rule 37 does not allow sanctions for violation of Rule 26 protective order; Rule 26(c) protective order is not order to provide or permit discovery and therefore protective orders do not fall within scope of Rule 37 which permits sanctions for failure to obey order for discovery. Lipscher v LRP Publs., Inc. (2001, CA11 Fla) 266 F3d 1305, 60 USPQ2d 1468, 2001-2 CCH Trade Cases P 73477, 51 FR Serv 3d 172, 14 FLW Fed C 1343 (criticized in Whitehead v Gateway Chevrolet (2004, ND Ill) 2004 US Dist LEXIS 11979).

In case in which law firm and attorney appealed district court's award of sanctions under *Fed. R. Civ. P. 37(b)* in amount of $ 29,667.71 in attorneys' fees and expenses for their admitted violation of protection order, citing Lipscher decision, they unsuccessfully argued that district court lacked authority to impose Rule 37(b) sanctions for violation of *Fed. R. Civ. P. 26(c)* orders; by prescribing method and terms of discovery of confidential material, order was granted to provide or permit discovery of confidential documents within meaning of Rule 37(b). Smith & Fuller, P.A. v Cooper Tire & Rubber Co. (2012, CA5 Tex) 685 F3d 486.

Defendant may not condition its compliance with court order compelling discovery upon acceptance of protective order which contains counter-request for discovery from plaintiff. Roper Corp. v Litton Systems, Inc. (1984, ND Ill) 106 FRD 1.

Nonparty witness was not entitled to sanctions against plaintiff for violation of stipulated protective order upon which it relied in allowing depositions of its employees where order itself was ambiguous, nonparty did not designate depositions to be confidential, and plaintiffs' counsel did not violate literal terms of order by showing depositions to employee of another furniture manufacturer. Parkway Gallery Furniture, Inc. v Kittinger/Pennsylvania House Group, Inc. (1988, MD NC) 121 FRD 264.

Plaintiff's counsel was enjoined from further contact with franchisees and former licensees identified by defendants in materials produced subject to protective order; counsel's inquiries were directed to franchisees who were not similarly situated to plaintiff in that franchisees had never been licensees and, therefore, it could not be alleged that defendants made misrepresentations to those persons about future franchisee agreements. Coleman v Sears, Roebuck & Co. (2003, WD Pa) 221 FRD 433.

### 140. Miscellaneous

Failure to comply with subpoena is violation of court order for purposes of sanctions under *Federal* Rules of Civil Procedure Rule 37; motion to set aside subpoena is ineffective to excuse compliance where motion not granted before scheduled deposition. King v Fidelity Nat'l Bank (1983, CA5 La) 712 F2d 188, 11 BCD 223, 9 CBC2d 179, CCH Bankr L Rptr P 69396, 37 FR Serv 2d 346, cert den *(1984) 465 US 1029, 104 S Ct 1290, 79 L Ed 2d 692* and (criticized in In re Bowshier (2004, BC SD Ohio) 313 BR 232, 52 CBC2d 1045, 59 FR Serv 3d 495).

No authority supports proposition that order must refer to specific interrogatories in order to form basis for imposition of sanctions under Rule 37(b)(2), and nothing in language of rule

suggests such interpretation. Fjelstad v American Honda Motor Co. (1985, CA9 Mont) 762 F2d 1334, 2 FR Serv 3d 196.

Record amply supported district court's determination that nothing short of defendant's imprisonment would secure his compliance with court's orders, where he refused throughout district court proceedings to participate in discovery or comply with court's orders, and where, even in face of imminent incarceration, he continued to interpose frivolous arguments and objections rather than indicating any sort of willingness to provide discovery responses in accordance with court's clear and repeated instructions. United States v Conces (2007, CA6 Mich) 507 F3d 1028, 2007 FED App 457P.

Sanction of attorney for failure to appear at deposition in direct contravention of court's discovery order was not abuse of discretion. Wolters Kluwer Fin. Servs. v Scivantage (2009, CA2 NY) 564 F3d 110.

Court may proceed on its own motion to dismiss plaintiffs from action for noncompliance with order to respond to defendant's discovery where defendants had not filed motion for sanctions under Rule 37. Booker v Anderson (1979, ND Miss) 83 FRD 284.

Court did not err in failing to hold evidentiary hearing before imposing civil sanctions for discovery abuse since evidentiary hearing need not precede imposition of sanctions and record reflected that parties and counsel fully explained their oppositions to each of opposing party's motions to compel discovery. Kraszewski v State Farm General Ins. Co. (1984, ND Cal) 130 FRD 111, 36 BNA FEP Cas 1367, 34 CCH EPD P 34503, 39 FR Serv 2d 427.

In suit alleging that computer owner violated copyrights by downloading music to her computer without paying for it, default judgment was entered against computer owner pursuant to *Fed. R. Civ. P. 37(b)(2)* because she, deliberately, in bad faith, and with knowledge that copyright owners wished to examine her computer, permanently destroyed data that supported copyright owners' case; less severe sanction would not deter other litigants in similar cases from destroying damning evidence. Arista Records, L.L.C. v Tschirhart (2006, WD Tex) 241 FRD 462.

While court had concerns about manufacturer's compliance with discovery order, evidence of non-compliance was not sufficiently certain to allow court to impose sanctions; therefore, corporation's motion for sanctions was denied. Tower Mfg. Corp. v Shanghai Ele Mfg. Corp. (2007, DC RI) 244 FRD 125, 69 FR Serv 3d 155.

As to custodial production, sanctions were warranted for defendant's failure to produce "usable" or "reasonably accessible" documents, *Fed. R. Civ. P. 37(b)(2)*. In re Seroquel Prods. Liab. Litig. (2007, MD Fla) 244 FRD 650.

In civil rights suit, protestors were entitled, pursuant to *Fed. R. Civ. P. 37(b)(2)*, to attorney's fees and costs from District of Columbia because District repeatedly violated court orders requiring production of command center resume from day of protestors' arrest, and fact that protestors failed to attach D.D.C. Civ. R. 7(m) certificate to their motion was not fatal to protestors' request for sanctions, as parties had engaged in numerous discovery-related discussions over 14-month

period, and when protestors sought to confer further, District ignored their requests. Bolger v District of Columbia (2008, DC Dist Col) 248 FRD 339.

In context of *Fed. R. Civ. P. 37*, gravamen of "prejudice to judicial system" is that counsel may not pick and choose when to comply with court order depending on counsel's unilaterally determined excuses or justifications not to comply with order; order is either obeyed or appealed; nor should courts issue orders which they are unwilling to enforce; there is importance per se in not allowing party to ignore orders-the litigation process would otherwise descend into chaos. Moore v Chertoff (2008, DC Dist Col) 255 FRD 10, 105 BNA FEP Cas 409.

Court adopted magistrate's recommendation of sanctions under *Fed. R. Civ. P. 37(b)* because by its plain terms, *Fed. R. Civ. P. 37(b)* authorized sanctions for failure to comply with discovery order, including but not limited to orders issued under *Fed. R. Civ. P. 37(a)*, and company failed to comply with court's scheduling order of March 4, 2009, under which company was to respond to corporation's discovery requests by March 27, 2009; moreover, history of litigation undercut company's arguments that health problems and obtaining of new counsel prevented company from complying with court's discovery order since company did not object to deadline set at March 4, 2009 hearing, and court warned company at that time that failure to comply with discovery schedule could result in sanctions. Turfco Mfg. v Turfco Pest Control, LLC (2009, WD Tenn) 74 FR Serv 3d 1181.

In this patent-infringement dispute involving mobile-banking technology, plaintiff's motion for monetary and preclusion sanctions was denied because defendants reasonably complied with all discovery-related orders and directives set forth by court. MShift, Inc. v Digital Insight Corp. (2010, ND Cal) 747 F Supp 2d 1147.

Although mother of deceased may not have specifically requested appeals manual previously, court found that such request would fall within broad parameters of documents requested prior to March 4, 2010, which judge ordered insurance company to produce; accordingly, within 10 days of entry of order, insurance company had to produce any guidelines or manuals that appeals specialists may use in handling claim-denial appeals, regardless of whether any such guidelines or manuals were used by insurance company's appeals specialist who ultimately denied mother's claim. Ulyanenko v Metro. Life Ins. Co. (2011, SD NY) 275 FRD 179.

Although *Fed. R. Civ. P. 37* authorized sanctions when party failed to obey order to provide or permit discovery, and *Fed. R. Civ. P. 37* did not require hearing prior to sanctions, it did require opportunity to be heard in some circumstances. *Fed. R. Civ. P. 37(c)(1)*; defendant had opportunity to be heard prior to imposition of sanctions, and therefore, defendant's request for hearing was denied. United States v Elsass (2012, SD Ohio) 110 AFTR 2d 6192.

Unpublished Opinions

Unpublished: Sanctions against plaintiff consumer in favor of defendant credit card company under *Fed. R. Civ. P. 37* were proper as the district court noted the consumer steadfastly refused to accept the dismissal of the Fair Debt Collection Practices Act, 15 USCS §§ 1692 et seq., claims, and failed to modify discovery to the only remaining Fair Credit Reporting Act, 15

USCS §§ 1681 et seq., claim. Brooks v Citibank (South Dakota), N.A. (2009, CA9 Or) 2009 US App LEXIS 20119.

Unpublished: Corporation and its officers argued that sanctions recommended by magistrate on them pursuant to *Fed. R. Civ. P. 37* were improper because failures to comply with discovery obligations were fault of counsel, and although court agreed that counsel's conduct with respect to discovery proceedings fell short of level of cooperation and responsiveness expected by this court, court also found that corporation and officers maintained continuous and integral role in discovery process and that they bore responsibility for much of misconduct; moreover, electronic communications were improperly deleted by corporation and officers, and because communications had been in dispute and their production outstanding for at least seven months, whether such communications were ultimately produced by corporation and officers by close of discovery, either to counsel or to plaintiffs, did not excuse corporation and officers' evasive and dilatory conduct in violation of earlier court orders. Mikhlyn v Bove (2011, ED NY) 2011 US Dist LEXIS 110956.

**B. Mitigating Factors**

**141. Generally**

If party's failure to produce is caused by inability fostered neither by its own conduct nor by circumstances within its control, it is exempt from penal sanctions of Rule 37. Read v Ulmer (1962, CA5 La) 308 F2d 915, 6 FR Serv 2d 766.

Considerations of fair play may dictate that courts eschew harshest sanctions where failure to comply is due to mere oversight of counsel amounting to no more than simple negligence. Cine Forty-Second Street Theatre Corp. v Allied Artists Pictures Corp. (1979, CA2 NY) 602 F2d 1062, 1979-2 CCH Trade Cases P 62778, 27 FR Serv 2d 828, 49 ALR Fed 820.

Desire to settle, though laudable, does not excuse deliberate failure to comply with express discovery orders. Luft v Crown Publishers, Inc. (1990, CA2 NY) 906 F2d 862, 16 FR Serv 3d 1321.

**142. Good faith**

Although Rule 37(b) applies to all failures to comply with court orders, whether willful or not, presence or lack of good faith in parties is relevant to orders which should be given. B. F. Goodrich Tire Co. v Lyster (1964, CA5 Ala) 328 F2d 411, 8 FR Serv 2d 37B.232, Case 1.

Good faith dispute concerning discovery question might constitute "substantial justification" amounting to special circumstances to excuse failure to comply with motion for discovery and relieve party from sanctions. Liew v Breen (1981, CA9 Cal) 640 F2d 1046, 8 Fed Rules Evid Serv 136, 31 FR Serv 2d 767.

**143. --Particular cases**

Motion for sanctions under Rule 37 must be denied where plaintiff has acted in good faith and dilatory tactics were fault of former counsel. Curtin v Curtin (1981, ND Ohio) 90 FRD 582.

French Blocking Statute may provide basis for finding that defendant French body corporate's noncompliance with order compelling discovery is not willful; court may also consider whether defendant has made genuine effort to comply with order despite Blocking Statute, by determining that defendant has (1) secured exemption from France, (2) complied with as much of court's order as possible outside territorial reach of Blocking Statute, (3) effected as much compliance as possible under procedures of Hague Convention, and (4) provided court with firm basis for understanding manner in which France enforces its Blocking Statute. Graco, Inc. v Kremlin, Inc. (1984, ND Ill) 101 FRD 503, 222 USPQ 986, 39 FR Serv 2d 78.

Failure to timely produce known, requested and discoverable documents was serious procedural and ethical violation, and one that could not be dismissed lightly, even where failure was result of mere carelessness; because bank's failure to timely produce documents was in good faith, it had admitted its fault and apologized therefore, and because minimal prejudice was suffered by opposing party, court limited its sanction to written reprimand. SCADIF, S.A. v First Union Nat'l Bank (2002, SD Fla) 208 F Supp 2d 1352, 48 UCCRS2d 232, 15 FLW Fed D 406, affd (2003, CA11 Fla) 344 F3d 1123, 56 FR Serv 3d 929, 51 UCCRS2d 320, 16 FLW Fed C 1053.

In employment discrimination action, sanctions against employer were not proper pursuant to *Fed. R. Civ. P. 37* for production of information related to work place safety because employer did not have that information because it was technically in possession of Department of Labor; thus, there was nothing more that employer could do and employer was simply objecting to being compelled to produce what it did not have. Peterson v Hantman (2005, DC Dist Col) 227 FRD 13, 86 CCH EPD P 42093.

Unpublished Opinions

Unpublished: Sanctions of fees and costs were properly awarded to employee in her Fair Labor Standards Act action because doctor employer had engaged in most of acts causing doctor's deposition to end prematurely by abruptly pushing court reporter's chair, causing her to fall from her chair, and causing reporter to leave deposition; *Fed. R. Civ. P. 37*, 30(d)(3) and 28 USCS § 1927 provided legal basis for sanctions; and finding of bad faith was not required for sanctions. Carlson v Bosem (2007, CA11 Fla) 2007 US App LEXIS 15925.

**144. Notice and opportunity to comply**

Sanctions imposed by Rule 37(b)(2) clearly presupposes opportunity to comply with court's order followed by failure to do so. O'Toole v William J. Meyer Co. (1957, CA5 Fla) 243 F2d 765.

Rule 37(b) sanction should not be imposed by trial court unless Rule 37(a) order is in effect; this prerequisite insures that party failing to comply with discovery is given adequate notice and opportunity to contest discovery sought prior to imposition of sanctions. Dependahl v Falstaff Brewing Corp. (1981, CA8 Mo) 653 F2d 1208, 2 EBC 1521, 31 FR Serv 2d 1604, cert den *(1981) 454 US 968, 70 L Ed 2d 384, 102 S Ct 512, 2 EBC 2392* and cert den *(1981) 454 US 1084, 70 L Ed 2d 619, 102 S Ct 641, 2 EBC 2392* and (superseded by statute on other grounds as stated in Ford v Uniroyal Pension Plan (1998, CA6 Mich) 154 F3d 613, 22 EBC 1681, 1998 FED App 276P).

Court may impose sanctions for failure to comply with discovery order whether or not opposing party first gave notice by moving to compel. Professional Seminar Consultants v Sino Am. Technology Exch. Council (1984, CA9 Cal) 727 F2d 1470, 38 FR Serv 2d 1374.

Plaintiffs' previous motion to compel, and court's order setting evidentiary hearing on motion gave defendant sufficient notice of discovery conduct plaintiffs were challenging and possibility for sanctions if it was not resolved; therefore, court could sanction defendant for its conduct, *Fed. R. Civ. P. 37(b)(2)*. In re Seroquel Prods. Liab. Litig. (2007, MD Fla) 244 FRD 650.

**145. --Particular cases**

District Court order which required defendant to answer all of plaintiffs' interrogatories completely was not too vague to support imposition of discovery sanctions, where order in question focused defendant's attention upon interrogatories relating to 10 specified topics, and where had defendant conceded that answers that formed basis for imposition of sanctions were incomplete and had promised that further information would be forthcoming. Fjelstad v American Honda Motor Co. (1985, CA9 Mont) 762 F2d 1334, 2 FR Serv 3d 196.

Court of Appeals reversed district court's dismissal with prejudice for repeated failure to meet deadlines for depositions, where district court did not attempt to exhaust its milder options, nor did it first warn plaintiffs that they might face dismissal with prejudice. Malot v Dorado Beach Cottages Assocs. S. En C. Por A (2007, CA1 Puerto Rico) 478 F3d 40.

Discovery sanctions would not yet be ordered for plaintiff's inadequate and incomplete responses to reasonable discovery requests since no previous order to comply had been issued, but plaintiff would be put on notice that noncompliance with instant order might subject him to sanctions. Factor v Mall Airways (1990, SD NY) 131 FRD 52.

In company's suit accusing defendants of cybersquatting, company's motion for sanctions under *Fed. R. Civ. P. 37(b)* was denied with regard to order requiring defendants to produce certain tax return forms because court's order was not clear as to whether defendants were required to produce tax forms for year following date of order. Eagle Hosp. Physicians, LLC v SRG Consulting, Inc. (2007, ND Ga) 509 F Supp 2d 1337, amd (2007, ND Ga) 2007 US Dist LEXIS 46649.

**146. Privileged and confidential matters**

Where regulations concerning disclosure of information have been promulgated by Administrator of Small Business Administration pursuant to statute establishing SBA, and where such regulations have been followed by local SBA officials, their refusal to produce certain documents in response to subpoena duces tecum in antitrust suit, to which SBA is not party, is proper; order compelling production will be set aside. Saunders v Great Western Sugar Co. (1968, CA10 Colo) 396 F2d 794, 1968 CCH Trade Cases P 72495, 12 FR Serv 2d 1028.

Defendant citizen of Colombia is subject to sanctions under Rule 37 for failure to attend deposition in accordance with District Court's order, where, even assuming that defendant is privileged against such personal examination under Columbian law, he makes no claim that he

would have been punished for voluntarily giving his deposition. Shawmut Boston International Banking Corp. v Duque-Pena (1985, CA11 Fla) 767 F2d 1504, 2 FR Serv 3d 1174.

Order compelling defendant to produce documents pursuant to grand jury subpoena was reviewable because it was basis for civil contempt order against her and earlier review was not available; however, court lacked jurisdiction because it was not final order *28 USCS § 1291*, and collateral order doctrine did not apply to her attorney-client privilege claim because there were other avenues for review, including interlocutory appeal under 28 USCS § 1292 and incurring sanctions under *Fed. R. Civ. P. 37(b)(2)*. United States v Myers (2010, CA4 W Va) 593 F3d 338.

British partnership may not use confidentiality laws as blanket excuse for not disclosing subpoenaed financial documents, even though it asserts hardship based on legal liabilities raised by potential violations of English and Cayman confidentiality laws on one hand and contempt of discovery order on other, because concern may be unwarranted if consent to disclosure is acquired and, if consent is not acquired, prohibition of foreign law may be presented as "substantial justification" permitted for nondisclosure by *FRCP 37(c)*. First Am. Corp. v Price Waterhouse LLP (1997, SD NY) 988 F Supp 353, affd (1998, CA2) 1998 US App LEXIS 19166.

Conduct of officer, who was corporate defendant's designee, of claiming privilege against self-incrimination in deposition, despite officer's waiver of privilege as to same matters in prior affidavits, warranted sanctions under *FRCP 37(b)*, where officer acted in bad faith, and, thus, court would strike prior affidavits and gratuitous speech made by officer at end of his deposition as corporate designee and would order officer to appear for further depositions. Nutramax Lab., Inc. v Twin Lab., Inc. (1999, DC Md) 32 F Supp 2d 331, affd (2003, CA FC) 82 Fed Appx 696.

Sanctions against plaintiff for failure to respond to discovery request were not appropriate where it responded to discovery request by objecting to production of confidential information in absence of protective order and agreed to produce requested documents subject to objection, since response was not so evasive and misleading as to constitute failure to respond. Badalamenti v Dunham's, Inc. (1990, CA) 896 F2d 1359, 13 USPQ2d 1967, reh den (1990, CA FC) 1990 US App LEXIS 6257 and reh den, en banc (1990, CA FC) 1990 US App LEXIS 7145 and cert den *(1990) 498 US 851, 112 L Ed 2d 109, 111 S Ct 142.*

Where non-party promoter of tax strategies in tax case objected to use of promoter's tax return information in deposition of former employee on ground that information was unlawfully disclosed by IRS, but promoter eventually conceded that its tax return information, even if unlawfully disclosed, could be used in deposing employee, sanctions for disruption and delay of deposition were not warranted; at time of deposition, counsel for promoter was apparently unaware that Government intended to use information or that precedent established that information could be used in such manner, and thus promoter was not engaging in discovery abuse by attempting to protect what counsel reasonably believed to be promoter's rights of confidentiality. Jade Trading, LLC v United States (2005) 65 Fed Cl 641, 2005-1 USTC P 50386, 95 AFTR 2d 2609.

**147. Unjust order**

Dismissal of action with prejudice was erroneous where it was conditioned on plaintiff's complying with all outstanding discovery requests by close of business day on which order was

issued, since it was unreasonable condition because it could not be complied with. Diehl v H.J. Heinz Co. (1990, CA7 Ill) 901 F2d 73, 16 FR Serv 3d 1064.

Sanctions can be imposed for failure to obey order compelling discovery under Rule 37(a) only if that order was justified. Black Panther Party v Smith (1981, App DC) 213 US App DC 67, 661 F2d 1243, 8 Fed Rules Evid Serv 1155, 32 FR Serv 2d 1, vacated on other grounds, remanded *(1982) 458 US 1118, 73 L Ed 2d 1381, 102 S Ct 3505.*

**148. Miscellaneous**

Although District Court's finding relative to "personal difficulties" of party is not model of clarity and specificity, court's refusal to impose Rule 37 sanctions against party on basis of this finding was not abuse of discretion. Hazen v Pasley (1985, CA8 Mo) 768 F2d 226.

In diversity contract action, although normal sanctions under Rule 37 may not be available for defendant's failure to co-operate in pretrial disclosure of relevant matters where motion for stay in trial is granted pending completion of arbitration proceedings, arbitrators may be able to devise appropriate sanctions if defendant impedes or complicates arbitration process by lack of co-operation in discovery. Bigge Crane & Rigging Co. v Docutel Corp. (1973, ED NY) 371 F Supp 240, 17 FR Serv 2d 337 (criticized in Interchem Asia 2000 PTE Ltd. v Oceana Petrochemicals AG (2005, SD NY) 373 F Supp 2d 340).

It is no justification for refusing compliance with court order to produce documents that such refusal is necessary in order to preserve right to "full appellate review" where Court of Appeals dismissed prior appeal, but entertained and ruled upon mandamus petition expressly resolving each relevant question of law, and holding that order of District Court was valid exercise of discretion. Socialist Workers Party v Attorney Gen. of United States (1978, SD NY) 458 F Supp 895, 25 FR Serv 2d 877, vacated (1979, CA2 NY) 596 F2d 58, 27 FR Serv 2d 207, cert den *(1979) 444 US 903, 62 L Ed 2d 141, 100 S Ct 217, 28 FR Serv 2d 98* and (criticized in In re Kessler (1996, App DC) 321 US App DC 401, 100 F3d 1015, 36 FR Serv 3d 636).

Failure of witnesses to conduct investigation more extensive than that which they undertook, prior to date of their depositions, as to subject matter of depositions, was insufficient to warrant sanctions, as such further investigation would not have produced any discoverable evidence which had not been previously revealed to plaintiffs, and defendants believed that they complied with court's orders. In re Anthracite Coal Antitrust Litigation (1979, MD Pa) 82 FRD 364, 1979-1 CCH Trade Cases P 62511, 27 FR Serv 2d 1079.

Sanctions would not be imposed under Rule 37(b) against defendants for alleged dilatory discovery tactics in view of defendants having remedied condition and having appeared in compliance with discovery. Ortho Pharmaceutical Corp. v Sona Distributors, Inc. (1986, SD Fla) 117 FRD 170, judgment entered (1987, SD Fla) 663 F Supp 64 and affd (1988, CA11 Fla) 847 F2d 1512, 11 FR Serv 3d 687.

In former employee's suit to obtain deferred compensation from his former employer, employee was not entitled to discovery sanctions under *Fed. R. Civ. P. 37(b)(2)* where, although employer was somewhat slow in its responses, the delay was attributable mainly to nature of discovery

in complex case; thus, such award would have been unjust. Fraser v Nationwide Mut. Ins. Co. (2004, ED Pa) 334 F Supp 2d 755, 21 BNA IER Cas 1142, 59 FR Serv 3d 479.

County had not demonstrated that magistrate judge was clearly wrong in denying motion for sanctions, as was required by Fed. R. Civ. P. 72(a); while county argued that magistrate judge failed to comply with *Fed. R. Civ. P. 37(b)(2)*, it failed to address fact that Rule 37(b)(2) permitted, but did not require, imposition of certain sanctions as punishment for one party's failure to allow opposing party to conduct discovery; county also failed to address directly magistrate judge's conclusion that sanctions were unwarranted because defendants, county and others, could have conducted medical examination in conformance with court's order but for defendants' decision to recover no-show fee from individual prior to rescheduling examination; magistrate judge's reasoning and conclusion were reasonable in light of parties' actions and earlier orders. Dominguez v Metro. Miami-Dade County (2004, SD Fla) 359 F Supp 2d 1344.

In employment discrimination action, sanctions against employer were not proper pursuant to *Fed. R. Civ. P. 37* for length of discovery period because both parties had sought extensions for discovery matters and delay was not based solely on employer's refusal to produce documents and to respond to interrogatories where employer had informed employee's counsel of need for additional time and had provided detailed explanation for seeking enlargement of time. Peterson v Hantman (2005, DC Dist Col) 227 FRD 13, 86 CCH EPD P 42093.

In former employee's discrimination suit against his former employer, where court had ordered employer to submit for in camera inspection 400 documents for which it claimed attorney-client and/or work product protection, and where employer failed to comply with this order as to certain documents, court declined to impose sanctions on employer where (1) employer contended that failure to comply with order was inadvertent, (2) there was no showing that failure to comply was intentional, (3) there was no showing that employee was prejudiced by delayed compliance with order, and (4) sanction proposed by employee of waiver of claimed privilege for all of documents would be disproportionate to offense. Banks v Office of the Senate Sergeant-At-Arms & Doorkeeper (2005, DC Dist Col) 233 FRD 1, 87 CCH EPD P 42267.

Court denied corporation's motion for sanctions with regard to manufacturer's conduct related to deposition of its Fed. R. Civ. P. 30(b)(6) witness because (1) manufacturer's actions in seeking protective order did not weigh in favor of granting sanctions; and (2) although manufacturer's refusal to agree to have Fed. R. Civ. P. 30(b)(6) deposition conducted in Hong Kong violated order that deposition was to be conducted in People's Republic of China, there were mitigating circumstances since it was determined that conducting deposition in Mainland China was problematic. Tower Mfg. Corp. v Shanghai Ele Mfg. Corp. (2007, DC RI) 244 FRD 125, 69 FR Serv 3d 155.

### C. Appeal and Review

### 149. Abuse of discretion

Sanctions available to trial judge under Rule 37(b) are discretionary; Court of Appeals cannot reverse trial court unless discretion is abused. General Dynamics Corp. v Selb Mfg. Co. (1973,

CA8 Mo) 481 F2d 1204, 17 FR Serv 2d 1221, cert den *(1974) 414 US 1162, 39 L Ed 2d 116, 94 S Ct 926.*

By very nature of its language, sanctions imposed under Rule 37(b) must be left to sound discretion of trial judge; on review, question is not whether reviewing court would have applied sanction but whether district court abused its discretion in so doing. David v Hooker, Ltd. (1977, CA9 Cal) 560 F2d 412, 3 BCD 857, 14 CBC 303, CCH Bankr L Rptr P 66564, 24 FR Serv 2d 159.

In evaluating whether district court abuses its discretion when it imposes severe sanctions upon party that violates order, important factor is whether entry of that order was itself abuse of discretion; this is not to say, however, that sanctions based on erroneous discovery orders will never be upheld. Cotton v Mass. Mut. Life Ins. Co. (2005, CA11 Ga) 402 F3d 1267, 35 EBC 1028, 18 FLW Fed C 324.

**150. --Particular cases**

Although it is questionable whether goal of judicial economy was served by dismissing action on third day of trial, dismissal for failure to comply with discovery order under Rule 37(b) did not constitute abuse of discretion by trial court where (1) record indicates that plaintiff's failure to comply promptly and fully with discovery request was not because of inability to do so, (2) trial judge properly considered full record and looked at cumulative effect of plaintiff's conduct in deciding that his behavior warranted dismissal, and (3) severity of sanction is mitigated by fact that dismissal was without prejudice. Cross v General Motors Corp. (1983, CA8 Mo) 721 F2d 1152, 40 BNA FEP Cas 418, 32 CCH EPD P 33923, 37 FR Serv 2d 955, cert den *(1984) 466 US 980, 104 S Ct 2364, 80 L Ed 2d 836, 40 BNA FEP Cas 432, 34 CCH EPD P 34375* and (criticized in McAndrew v Lockheed Martin Corp. (1999, CA11 Ga) 177 F3d 1310, 138 CCH LC P 58654, 12 FLW Fed C 936).

Where plaintiff attempted to perform inspection of defendant's plant pursuant to warrant, which defendant refused to honor, and plaintiff filed action to hold defendant in civil contempt, District Court lacked power to order plaintiff to submit to discovery of facts outside "4 corners" of warrant application and thus abused its discretion in dismissing plaintiff's complaint as sanction under Rule 37(b)(2) for failure to comply. Donovan v Mosher Steel Co., Div. of Trinity Industries (1986, CA11 Ala) 791 F2d 1535, 5 FR Serv 3d 295, reh den, en banc (1986, CA11 Ala) 797 F2d 982 and cert den *(1987) 479 US 1030, 93 L Ed 2d 829, 107 S Ct 874, 13 BNA OSHC 1376.*

Where defendant was found to have violated order requiring defendant to preserve documents, and plaintiffs' motion for sanctions was granted but imposition of sanctions was deferred until trial, court's subsequent grant of summary judgment to defendant without imposing any sanctions was abuse of discretion. Phillips v Cohen (2005, CA6 Ohio) 400 F3d 388, 95 BNA FEP Cas 520, 2005 FED App 117P.

District court's imposition of sanctions pursuant to *Fed. R. Civ. P. 37* for car manufacturer's failure to produce allocation documents in car dealership's suit concerning termination of its satellite agreement and discriminatory allocation of vehicles violated district court's discretion

because, inter alia, district court ordered manufacturer to produce documents that preceded time period stated by dealership for its claim, and district court misinterpreted earlier order allowing discovery on misallocation of vehicles, rather than on allocation of vehicles. Serra Chevrolet, Inc. v GMC (2006, CA11 Ala) 446 F3d 1137, 64 FR Serv 3d 725, 19 FLW Fed C 439.

In action in which plaintiff asserted negligence and nuisance claims, district court did not abuse its discretion by denying plaintiff's request to re-designate doctor, who was disclosed as rebuttal witness under progression order, as witness in plaintiff's case-in-chief because plaintiff identified doctor as expert witness two years after deadline for disclosing primary witnesses, defendant based its litigation strategy on initial disclosure of primary experts, and fact that new scientific evidence was published after deadline for primary expert disclosure did not provide good cause for modifying progression order; instead of seeking to re-designate doctor, plaintiff should have sought leave under *Fed. R. Civ. P. 26(e)* to present supplemental opinions by her existing primary experts. Marmo v Tyson Fresh Meats (2006, CA8 Neb) 457 F3d 748, reh den, reh, en banc, den (2006, CA8) 2006 US App LEXIS 23594.

Given that plaintiff plan participant asserted dual-role conflict of interest against defendant insurer and plan administrator, district court was not prohibited from supplementing administrative record with vendor services agreement (VSA), including terms of defendant's delegation of authority to administrator to administer mental health claims, and district court did not abuse its discretion; any delay in disclosing VSA was harmless or justified for purposes of *Fed. R. Civ. P. 37*; no evidence of bad faith or willfulness existed, and plaintiff should not have been surprised that agreement between defendant and administrator existed, given that each letter denying benefits explained as much, there was no evidence that admitting VSA was disruptive to litigation process, and plaintiff never requested copy of VSA in discovery or otherwise. Eugene S. v Horizon Blue Cross Blue Shield of N.J. (2011, CA10 Utah) 663 F3d 1124.

In case in which law firm and attorney appealed district court's award of sanctions under *Fed. R. Civ. P. 37(b)* in amount of $ 29,667.71 in attorneys' fees and expenses for their admitted violation of protection order, to extent they argued that tire company relied on multiple firms and generated unreasonable fees to investigate violation of protective order, district court considered various investigative actions, motion preparations, and hourly rates to conclude that company's claimed expenses were reasonable, and there was no abuse of discretion by district court. Smith & Fuller, P.A. v Cooper Tire & Rubber Co. (2012, CA5 Tex) 685 F3d 486.

Unpublished Opinions

Unpublished: District court did not abuse its discretion in declining to award plaintiff attorney's fees for plaintiff's preparation of his motion for evidentiary and monetary sanctions because, although motion prompted magistrate judge to warn defendants to cooperate in discovery, it was denied as filed in violation of *Fed. R. Civ. P. 37(b)*. Hager v Karkhanechin (2008, CA9 Cal) 2008 US App LEXIS 16817.

Unpublished: Because record was clear that district court imposed sanctions against defendant employers as result of their having twice failed to honor discovery deadlines, and plaintiff

employees had provided detailed accounting of their costs and fees resulting from discovery violations, and amount awarded was reasonable, it was not abuse of discretion to impose discovery sanctions against employers. Rother v Lupenko (2013, CA9 Or) 2013 US App LEXIS 7416.

Unpublished: In light of defendant's continuing violations of discovery orders and failure to comply with bankruptcy court's prior sanctions order, bankruptcy court did not abuse its discretion by prohibiting defendant from testifying or presenting evidence. S. Mgmt. Corp. Ret. Trust v Rood (2013, CA4 Md) 2013 US App LEXIS 13946.

**151. Miscellaneous**

Commitment for contempt of court of party failing to comply with order of federal district court for physical examination made under authority of Rule 35 is reversible error, in view of express exception of such order in provision of Rule 37(b)(2). Sibbach v Wilson & Co. (1941) 312 US 1, 85 L Ed 479, 61 S Ct 422, reh den *(1941) 312 US 713, 85 L Ed 1144.*

Court of Appeals would reverse District Court's dismissal of complaint, pursuant to Rule 37(b), ordered upon defendant's motion to dismiss for plaintiff's failure to comply with court order compelling answers to interrogatories, where information requested was not sufficiently relevant to subject of action to come within parameters of Rule 26(b). Dunbar v United States (1974, CA5 Fla) 502 F2d 506, 74-2 USTC P 9744, 19 FR Serv 2d 359.

After bankruptcy court granted IRS' motion to compel discovery and for sanctions under *Fed. R. Civ. P. 37(b)(2)*, and imposed sanctions, IRS then moved for reconsideration, seeking order directing full responses to outstanding discovery and allowing debtor's deposition; court noted numerous discovery disputes and found that IRS would not admit full disclosure and debtor would not admit other documents existed, thus, court granted motion for reconsideration but only to extent of allowing one final deposition of debtor. O'Callaghan v United States, IRS (In re O'Callaghan) (2002, BC MD Fla) 16 FLW Fed B 27, discharge granted, judgment entered (2004, BC MD Fla) 316 BR 550.

In appeal of action to recover damages for personal injuries received in automobile accident, where appellant alleges it was error to deny its motion to strike respondent's affirmative defenses upon respondent's failure to answer interrogatories until after appellant had filed its motion to strike, motion's denial was proper; no good reason was offered to interfere with sound discretion of trial court. Phillips v Richmond (1962) 59 Wash 2d 571, 369 P2d 299.

Unpublished Opinions

Unpublished: District court's order directing counsel to perform community service in response to motion for sanctions, which was taken under advisement and dismissed upon counsel's completion of community service, was vacated where district court effectively barred meaningful appellate review by withholding formal disposition of motion for sanctions until community service had been completed, and made question of whether sanctions should be imposed contingent upon whether those very sanctions had been completed. Felton v Dillard Univ. (2004, CA5 La) 122 Fed Appx 726.

Unpublished: Because there was ample indication that one defendant himself ignored or defied court orders and was largely uncooperative, but there was little or no mention in district court record of other defendants' fault in matter, appellate court vacated default judgment as to remaining defendants, and appellate court remanded to district court or further proceedings, which could include reconsideration and clarification as to whether and why entry of default judgment was appropriate with respect to other defendants. Stamtec, Inc. v Anson (2006, CA6 Ky) 195 Fed Appx 473.

Unpublished: In case in which home owner appealed *Fed. R. Civ. P. 37(b)(2)* dismissal of his claims against his insurer and insurer moved for sanctions pursuant to *Fed. R. App. P. 38*, appeal was wholly without merit. By moving for sanctions, insurer put owner on notice, and owner, given opportunity, declined to respond. Chisesi v Auto Club Family Ins. Co. (2010, CA5 La) 2010 US App LEXIS 4941.

**D. Particular Sanctions**

**1. In General**

**152. Adverse inference or presumption**

In plaintiff terrorist victims' suit under 18 USCS § 2333 and 28 USCS § 1350 alleging defendant Arab Bank had provided financial services in support of terrorist groups, district court's discovery sanctions order, that it intended to instruct jury that it could infer Bank provided financial services to foreign terrorist groups, and that Bank did so knowingly and purposefully, was not reviewable as collateral order, as it was intertwined with merits of victims' cases and was effectively reviewable after final judgment. Linde v Arab Bank, PLC (2013, CA2 NY) 706 F3d 92.

Discovery sanctions of expenses, attorney's fees, and establishment of adverse inferences would be ordered against class representative and his law firm for failure to comply with discovery orders where plaintiff and his counsel initiated suit and continued its prosecution for 8 months despite fact that plaintiff was inadequate class representative who never intended to comply with his discovery obligations. Goldman v Alhadeff (1990, WD Wash) 131 FRD 188, CCH Fed Secur L Rep P 95285.

Finding of bad faith or intentional misconduct is not sine qua non to sanctioning spoliator of evidence with adverse inference instruction. Mathias v Jacobs (2000, SD NY) 197 FRD 29, vacated in part on other grounds, sanctions disallowed, summary judgment gr, summary judgment den (2001, SD NY) 167 F Supp 2d 606.

In mother and son's action for negligence, spoliation was established because camp had obligation to preserve records, camp's failure to produce expert disclosure and report together with its apparent misrepresentation that expert had been retained supported finding of negligence, and mother and son established that missing records were relevant to their claims because reasonable trier of fact could have concluded that maintenance records contained notation that brakes on quad were loose; however, no sanctions under *Fed. R. Civ. P. 37*, including requested adverse inference instruction, were warranted because sanction rationales

were not served by punishing camp, and there was no escaping conclusion that inspection of quad itself in aftermath of accident would have provided best evidence. Klezmer v Buynak (2005, ED NY) 227 FRD 43.

Because city should have known that certain documents were relevant, and because trigger date for discovery of those documents had passed, court concluded that documents could have led to admission of relevant evidence at trial; adverse rebuttable presumption was appropriate *Fed. R. Civ. P. 37* sanction and was to provide that unless other evidence was provided to contradict presumption, trier of fact could presume that City feared that contents of destroyed documents would have been adverse, or detrimental, to City's case. Clark Constr. Group v City of Memphis (2005, WD Tenn) 229 FRD 131, 62 FR Serv 3d 27.

In suit by shipper and insurer against vessel and others (defendants), seeking recovery for damage to shipment of corn, where court concluded that certain document retention memo and 27 categories of documents should have been preserved and produced in lawsuit, and that defendants were at least negligent in their disposal of these documents, which were relevant to defendants' affirmative defense in case, pursuant to *Fed. R. Civ. P. 37(b)(2)*, adverse inference was warranted to effect that these spoliated documents would have indicated that defendants failed to take adequate steps to provide seaworthy crew, and that this spoliation caused loss in lawsuit. Kyoei Fire & Marine Ins. Co. v M/V Mar. Antalya (2007, SD NY) 248 FRD 126, 2007 AMC 2839.

In stock analyst's suit against corporation, its officers, and consultant (defendants), alleging defamation related to alleged campaign to discredit him, even though defendants clearly failed to take adequate measures to prevent destruction of certain discoverable electronically stored materials, analyst was not entitled to adverse inference instruction under *Fed. R. Civ. P. 37(b)* because he failed to demonstrate likelihood that any destroyed evidence would have supported his claims. Treppel v Biovail Corp. (2008, SD NY) 249 FRD 111.

In seller's breach of contract suit, imposition of sanctions under *Fed. R. Civ. P. 37* against wife, who was one of buyers, was appropriate because she spoliated relevant evidence by allowing reinstallation of her computer's operating system after suit was filed and after seller requested all evidence, including computerized data, that related to parties' transaction, but adverse inference was not appropriate because there was no evidence that any destroyed documents would have been unfavorable to wife and because destroyed documents were allegedly recorded onto compact disc that was given to seller. Green v McClendon (2009, SD NY) 262 FRD 284.

Defendant had shown that discovery sanctions were warranted, including spoliation instruction, additional discovery, and costs, against 13 plaintiffs because plaintiffs acted with negligence or gross negligence in instituting document preservation policies and there was evidence that relevant documents had been lost or destroyed. Pension Comm. of Univ. of Montreal Pension Plan v Banc of Am. Sec., LLC (2010, SD NY) 685 F Supp 2d 456, amd, sanctions allowed, in part (2010, SD NY) 2010 US Dist LEXIS 4546.

It was indisputable that someone marked attendance card and discipline tracking log at some point during litigation while they were in employer's possession; that fact alone evinced some

degree of negligence by employer, and established requisite culpability for spoliation; nevertheless, on facts presented, adverse inference sanction pursuant to *Fed. R. Civ. P. 37* was unwarranted because altered documents were not particularly relevant to litigation neither party has ever alleged that employee's attendance played any role in employer's decision to fire her. Riordan v BJ's Wholesale Club, Inc. (2011, ND NY) 78 FR Serv 3d 663.

Because plaintiffs essentially played game of "hide ball" with respect to their licensing efforts, enforcement efforts, and alleged damages, and provided evasive discovery responses, and refused to produce responsive records or to declare that none existed, court found no clear error in magistrate judge's recommendation of adverse inference that was broader than self-serving language plaintiffs would prefer; however, to ensure that record was clear, court modified adverse inference to form originally requested by defendants in their motion for sanctions, which read as follows: "the plaintiffs have never received income for or related to any purported trademarks, rights of publicity, or other rights asserted in this lawsuit." Moore v Weinstein Co., LLC (2012, MD Tenn) 2012 US Dist LEXIS 66179, motion gr, motion to strike gr, in part, motion to strike den, in part, summary judgment gr, claim dismissed (2012, MD Tenn) 88 Fed Rules Evid Serv 602.

Unpublished Opinions

Unpublished: In copyright infringement action brought by photographer against publisher, district court acted well within its discretion in declining to draw adverse inference from publisher's inability to respond to certain discovery requests precisely because publisher had removed photographer's photographs from its website at insistence of photographer. Dallal v New York Times Co. (2006, CA2 NY) 2006 US App LEXIS 5171.

**153. Claims or defenses precluded**

Where defendant-trustee is directed pursuant to IRS summonses to appear, testify and produce records of trust and fails to do so, and where his affirmative defenses are stricken, it is immaterial whether such action is directed as sanction for defendant-trustee's derelictions pursuant to Rule 37 or as failure of proof by defendant-trustee who has burden of proof. United States v Hayes (1969, CA7 Ill) 408 F2d 932, 69-1 USTC P 9231, 23 AFTR 2d 663, cert den *(1969) 396 US 835, 90 S Ct 94, 24 L Ed 2d 86.*

Trial judge does not abuse his discretion in striking defendant's defenses, issuing permanent injunction in favor of plaintiff, and awarding plaintiff $ 1,000 for attorneys' fees incurred in its unsuccessful discovery efforts, where representative designated by defendant under Rule 30(b)(6) failed to appear for deposition and to produce documents and items requested, as ordered by court, and where defendant's supervisory employee also failed to appear at deposition, as ordered by court, and failed to forewarn plaintiff or explain failure to appear. Eastway General Hospital, Ltd. v Eastway Women's Clinic, Inc. (1984, CA5 Tex) 737 F2d 503, 39 FR Serv 2d 917, cert den *(1985) 470 US 1052, 84 L Ed 2d 816, 105 S Ct 1752.*

Although defendant had filed motion to dismiss for lack of personal jurisdiction, District Court did not abuse its discretion on plaintiff's motion for Rule 37 sanctions in conclusively presuming

personal jurisdiction, where defendant, as guarantor of loan, had expressly submitted himself to personal jurisdiction of United States courts. Shawmut Boston International Banking Corp. v Duque-Pena (1985, CA11 Fla) 767 F2d 1504, 2 FR Serv 3d 1174.

Sanction of precluding defendant in fraud and conversion lawsuit from presenting defense was appropriate sanction for his failure to answer interrogatories and requests for production of documents or to make himself available for deposition as ordered, notwithstanding that defendant was unrepresented at trial, since he was represented by counsel for significant portion of litigation and his attorneys were substantially involved, hence defendant could not claim unawareness of need to comply with discovery, nor did he offer any explanation for his failure to comply. Oklahoma Federated Gold & Numismatics v Blodgett (1994, CA10 Okla) 24 F3d 136.

District court's imposition of sanctions pursuant to *Fed. R. Civ. P. 37*, which consisted of striking of car manufacturer's defenses of res judicata, collateral estoppel, judicial estoppel, and law of case doctrine, violated due process because those defenses were not at all related to documents that manufacturer failed to produce in car dealership's suit concerning termination of its satellite agreement and discriminatory allocation of vehicles, as documents concerned manufacturer's satellite program and its allocation records, rather than anything concerning whether claims were barred due to previous litigation. Serra Chevrolet, Inc. v GMC (2006, CA11 Ala) 446 F3d 1137, 64 FR Serv 3d 725, 19 FLW Fed C 439.

Although district court did not abuse its discretion when it imposed preclusion sanctions on student athlete's mother under *Fed. R. Civ. P. 37(c)(1)*, (b)(2)(B), based on her failure to disclose information about athlete's drug abuse, it erred in barring her from presenting evidence concerning athlete's depression and from opposing appellees' claim, that athlete's drug abuse rendered him unqualified to participate in intercollegiate athletic programs: (1) athlete alleged that his rights under 42 USCS § 12132 and 29 USCS § 794(a) were violated when, due to his learning disabilities, he was designated as being academically unqualified to participate in intercollegiate sports; (2) district court imposed sanctions after finding that mother failed to fulfill their duty under *Fed. R. Civ. P. 26(e)* to supplement her discovery responses; (3) mother had been asked to disclose identities of all of doctors that had treated athlete, she failed to disclose names of doctors who treated him for drug abuse, and appellees were prejudiced because, if full disclosure had been made, they would have discovered evidence concerning athlete's drug addiction several years earlier; (3) no willful Rule 26(e) violation occurred with regard to evidence pertaining to athlete's depression because he had forthright about his depression and he had claimed, from outset of suit, damages for emotional distress that he purportedly suffered as result of appellees' alleged discrimination; and (5) district court erred in barring mother from opposing appellees' claim, that athlete was not "qualified individual" due to his drug abuse because relevant time period for determining qualification, for purposes of his discrimination claim, was time when alleged discrimination occurred and drug abuse occurred in years after alleged discrimination took place. Bowers v NCAA (2007, CA3 NJ) 475 F3d 524.

District court did not err in barring shoe manufacturer from pursuing claim of infringement under doctrine of equivalents for failure to disclose basis for asserting doctrine; manufacturer had over three years to investigate merits of possible doctrine of equivalents case and, if it needed

more time to substantiate its infringement claim, it could have delayed filing suit until its factual investigation was complete or requested more time for discovery, rather than waiting until after close of discovery to begin testing to investigate whether it could prove infringement under doctrine of equivalents. Nike Inc. v Wolverine World Wide (1994, CA FC) 43 F3d 644, 33 USPQ2d 1038, 30 FR Serv 3d 458.

District court has power to make order precluding defendant from supporting defense of defective merchandise under former Rule 37(b)(2)(B), where discovery with respect to defendant's defense has twice been stymied by defendant's disobedience of discovery orders. Metropolitan Greetings, Inc. v Michael McDonough, Inc. (1973, ED Pa) 60 FRD 58, 17 FR Serv 2d 1590.

Defendant's affirmative defenses would be stricken, default judgment would be entered against him, and monetary sanctions against his attorney would be imposed for failure to comply with discovery orders where numerous orders to compel discovery had been ignored and warnings of sanctions had been given. *Marshall v F.W. Woolworth, Inc. (1988, DC Puerto Rico) 122 FRD 117.*

Defendant's affirmative defenses would be stricken, default judgment would be entered against him, and monetary sanctions against his attorney would be imposed for failure to comply with discovery orders where numerous orders to compel discovery had been ignored and warnings of sanctions had been given. *Marshall v F.W. Woolworth, Inc. (1988, DC Puerto Rico) 122 FRD 117.*

Port Authority would be precluded from raising defense that it was not on notice regarding criminal activities taking place on premises and in vicinity where robbery victim was tragically wounded, as sanction for its delinquent response to broad discovery orders requiring it to produce history of criminal activity in area, which caused injured party, owner of premises above train station, and other parties unnecessary and wasteful delays and excessive litigation expenses. Monaghan v SZS 33 Assocs., L.P. (1994, SD NY) 154 FRD 78.

Defendant's defense cannot be permitted to go forward given pattern of discovery abuse, where, inter alia, defendant sought to avoid testimony of central financial figure in closing of base, because defendant's obstruction of discovery, including failure to answer interrogatories, deposition, and trial questions truthfully, and its destruction or nonproduction of documents warrants severe sanction of striking defense that base closed for financial reasons related to excess capacity. Millsap v McDonnell Douglas Corp. (2001, ND Okla) 162 F Supp 2d 1262, subsequent app, remanded (2004, CA10 Okla) 368 F3d 1246, 32 EBC 2586.

Deckhand who brought personal injury suit against towing company was not entitled to strike pursuant to *Fed. R. Civ. P. 37(c)(1)* towing company's affirmative defense of limitation of liability under Limitation of Shipowners' Liability Act of 1851, 46 USCS app. §§ 181-189, based on towing company's late assertion of vessel's value; although towing company's failure to disclose its evidence of value until pretrial narrative statement was unjustified, rather than striking defense court ordered payment of deckhand's additional discovery costs and attorney's fees. Cody v Phil's Towing Co. (2002, WD Pa) 247 F Supp 2d 688, 2002 AMC 2542, 55 FR Serv 3d 662.

Trial court denied plaintiffs' motion for preclusion, as plaintiffs did not show that defendants' alleged failure to disclose in their discovery responses corporate history, status, and relationships among them and three entities warranted sanction of preclusion, which was essentially request for dismissal as discovery sanction; dismissal was not warranted, especially in light of fact that no lesser sanctions had been considered. Signature Combs, Inc. v United States (2004, WD Tenn) 222 FRD 343.

Where defendants failed to substantially comply with discovery order to provide documents material to plaintiffs' fraudulent transfer claim, court precluded defendants from defending against fraudulent transfer claim. In re Heritage Bond Litig. (2004, CD Cal) 223 FRD 527 (criticized in UMG Recordings, Inc. v Hummer Winblad Venture Partners (In re Napster, Inc. Copyright Litig.) (2006, ND Cal) 2006-1 CCH Trade Cases P 75205).

In patent infringement case, motion to strike defense was granted because non-disclosure of defense was not harmless, nor was it justified under circumstances of case since there was opportunity to amend responses prior to filing of motion for summary judgment. Briggs & Stratton Corp. v Kohler Co. (2005, WD Wis) 398 F Supp 2d 925, reinstated, in part, motion gr, patent interpreted (2006, WD Wis) 408 F Supp 2d 697.

In suit by shipper and insurer against vessel and others (defendants), seeking recovery for damage to shipment of corn, where defendants produced deponent who did not have personal knowledge about defendants' training and auditing, and where defendants refused to produce for deposition person with this knowledge, court concluded that this deposition testimony amounted to nonappearance, that sanctions were warranted, and that pursuant to *Fed. R. Civ. P. 37(b)(2)*, for purposes of lawsuit, fact was established that no proper audits of master or vessel were performed. Kyoei Fire & Marine Ins. Co. v M/V Mar. Antalya (2007, SD NY) 248 FRD 126, 2007 AMC 2839.

In recording companies' copyright infringement suit against related computer companies and their owner (defendants) based on defendants' services, whereby subscribers accessed unlimited downloads of copyrighted sound recordings without authorization, as a sanction under *Fed. R. Civ. P. 37* for defendants' spoliation of evidence by deleting the contents of the hard drives of seven employee computers and by deleting e-mails from other employee computers, and for defendants' other discovery misconduct, including their failure to comply with discovery orders to produce evidence, defendants were precluded from asserting an affirmative defense under the safe harbor provision of 17 USCS § 512. Arista Records LLC v USENET.com (2009, SD NY) 633 F Supp 2d 124, 91 USPQ2d 1744, injunction gr (2009, SD NY) 2009 US Dist LEXIS 74209.

Defendant repeatedly failed to comply with court's discovery orders and deprived plaintiff of discovery to which it was entitled, court's orders were clear that defendant was required to provide full response to interrogatory but he had, without justification, failed to do so, and there was no doubt that plaintiff had been prejudiced by defendant's repeated failures to cooperate in discovery; moreover, plaintiff expended time, money and effort in pursuit of discovery that defendant was legally obligated to provide, and defendant was advised by court that his failure to fully respond to interrogatory may result in imposition of severe sanctions, including entry of

his default; nevertheless, because court preferred that cases, to extent possible, be resolved on merits of parties' claims and defenses after full opportunity to engage in discovery authorized by Federal Rules of Civil Procedure, to extent that motion requested preclusion order, plaintiff's motion for sanctions under *Fed. R. Civ. P. 37* was without merit; defendant was ordered to provide full and complete response to interrogatory. United States v Elsass (2012, SD Ohio) 110 AFTR 2d 6192.

**154. --Willfulness, bad faith or fault**

Noncompliance by corporation's sole owner with court order to answer interrogatories constitutes "fault," "wilfulness," or bad faith justifying dismissal of his counterclaim and striking of his affirmative defenses pursuant to Rule 37(b), where owner gives repeated blanket refusal to respond on ground of right against self-incrimination, but makes no attempt to explain to trial court how responses to each of interrogatories, even by implication, may be incriminating, even though many questions are wholly devoid of incriminatory potential and should be answered without hesitation. General Dynamics Corp. v Selb Mfg. Co. (1973, CA8 Mo) 481 F2d 1204, 17 FR Serv 2d 1221, cert den *(1974) 414 US 1162, 39 L Ed 2d 116, 94 S Ct 926.*

Where discovery violations only involved documents relating to counterclaim, it was appropriate sanction to dismiss counterclaim, but inappropriate to prevent defendants from defending against plaintiff's claim, where District Court did not make any specific findings of willfulness or bad faith, case had been proceeding in timely fashion, there was no evidence of actual prejudice to plaintiffs, and policy favors disposition of cases on merits. United States use of Wiltec Guam, Inc. v Kahaluu Constr. Co. (1988, CA9 Guam) 857 F2d 600, 12 FR Serv 3d 367.

Defendants' failure to answer interrogatories and requests for production of documents as required by order granting plaintiff's motion to compel discovery constituted flagrant disregard of order, for which striking of defendants' affirmative defenses was appropriate sanction. Wight v Agristor Leasing (1985, DC Kan) 113 FRD 498.

In civil rights action against police officers, defendants' affirmative defenses would be stricken and defendants would be precluded from offering any evidence at trial on issue of liability, as sanction for willful refusal to comply with 2 explicit discovery orders seeking personnel disciplinary records of defendant police officers, town's police rules and regulations on which defendants testified they relied in demanding that plaintiff submit to strip search, and names of witnesses to incident besides 4 police officers described in complaint, since, in addition to 2 explicit court orders which were ignored, defendants ignored plaintiff's counsel's numerous telephone calls and correspondence and at no time did defendants seek either protective order or extension of time in which to comply. Conway v Dunbar (1988, SD NY) 121 FRD 211.

When debtor attempted to perpetrate fraud in discovery process by eliminating crucial sentence concerning its liability from accountant's report, court granted sanctions under *Fed. R. Civ. P. 37* and struck all defenses raised by debtor that challenged creditor's eligibility under 11 USCS § 303. In re Bimini Island Air, Inc. (2006, BC SD Fla) 355 BR 358, 20 FLW Fed B 84.

Company had established that it was entitled to sanctions based upon debtor's repeated failure to produce documents and to comply with court orders related to discovery, however, company's

request to strike pleadings and to enter default judgment was too severe; based upon debtor's discovery misconduct, court imposed negative inference from documents that were not produced, deemed certain facts to be established, and precluded debtor from offering certain evidence that had been requested by company and not produced but had been listed as exhibits by debtor. Cadle Co. v Stasch (In re Stasch) (2007, BC SD Fla) 21 FLW Fed B 35.

**155. Dismissal of count**

District court errs in striking plaintiff's claim for item of damages when it is not shown that failure of plaintiff to supply information required by production order was wilful, in bad faith, or that plaintiff has not made diligent effort to obtain such information. Dorsey v Academy Moving & Storage, Inc. (1970, CA5 Fla) 423 F2d 858, 14 FR Serv 2d 90.

District court did not abuse its discretion in dismissing discrimination plaintiff's emotional distress claims as discovery sanction where plaintiff stalled and haggled for months over extent of information to be discovered from her doctors, psychologists, psychiatrists, and counselors, finally executed releases during discovery conference, but then attempted to prevent defendant from gathering information by requesting that counselors to whom releases were directed decline disclosure on the basis of privilege; plaintiff willfully violated district court's discovery order and prejudiced defendant, which had to spend its time hounding her for releases court had already ordered her to provide. Schoffstall v Henderson (2000, CA8 ND) 223 F3d 818, 84 BNA FEP Cas 1411, 79 CCH EPD P 40335, 55 Fed Rules Evid Serv 11, 47 FR Serv 3d 605.

District court did not abuse its discretion when it overruled decedent's mother's *Fed. R. Civ. P. 37(c)(1)* exclusion request and allowed medical examiner and assistant medical examiner to testify as expert witnesses during trial of mother's *42 USCS § 1983* excessive force claim, arising out of decedent's fatal shooting by police officer; although examiners had not signed it, defendants had timely-filed expert discovery disclosure that substantially complied with *Fed. R. Civ. P. 26(a)(2)(B)* requirements, as it described experts' qualifications and backgrounds, detailed what their proposed testimony would include, and stated basis for their expert opinions, and examiners cured any technical deficiency by subsequently executing affidavits adopting defendants' discovery response. Jenkins v Bartlett (2007, CA7 Wis) 487 F3d 482, reh den (2007, CA7 Wis) 2007 US App LEXIS 15574.

In action by husband to recover damages for personal injuries allegedly sustained in automobile collision, in which wife seeks recovery of damages for loss of services, dismissal of husband's claim on basis of willful obstruction of discovery requires dismissal of wife's loss of services claim since husband's willful obstruction is attributable to wife who aided and abetted husband's misconduct. Nittolo v Brand (1983, SD NY) 96 FRD 672, 38 FR Serv 2d 1239.

In products liability action against manufacturer of intrauterine device, count which depends upon allegation that manufacturer had notice or should have had notice of dangerous propensities of device is properly dismissed, where plaintiff, 3 weeks prior to trial, has failed to comply with order that it respond fully to interrogatory designed to obtain information upon which allegation is based and can be proved. Snell v G.D. Searle & Co. (1984, ND Ala) 595 F Supp 654, CCH Prod Liab Rep P 10499, 40 UCCRS 129.

Pursuant to *Fed. R. Civ. P. 37(b)(2)(A)(v)*, plaintiff's defamation claim was dismissed where he had waived objections to defendants' interrogatories by not objecting in timely manner, he selectively answered only first 19 interrogatories, and he did not seek protective order to limit number of interrogatories he was to answer. *Colon v Blades (2010, DC Puerto Rico) 268 FRD 137.*

Unpublished Opinions

Unpublished: District court specifically found that United States was prejudiced by claimant's conduct because his conduct caused United States to expend additional time, effort, and expense in prosecuting its case, that claimant had wasted judicial resources, and that claimant was fully culpable for his behavior; district court warned claimant twice that his failure to follow court's orders would likely lead to dismissal of his claim, and, district court found that lesser sanctions would have been ineffective, based on claimant's pattern of behavior; therefore, because those findings, supported by record, met criteria for sanctions and supported district court's conclusion that dismissal as sanction was just, *Fed. R. Civ. P. 37(b)(2)(A)*, district court's order dismissing claimant's claim as sanction for noncompliance with discovery order was not abuse of discretion. United States v 72,100.00 in United States Currency (2009, CA10 Utah) 2009 US App LEXIS 2107.

Unpublished: Because plaintiff homeowner not only failed to make required discovery disclosures to defendant, attorney for defendant lender, in timely manner, but also failed to remedy his noncompliance after court admonished him, and district court determined it was manifestly unjust to require attorney to proceed to trial given homeowner's ongoing refusal to comply with W.D. Tex. R. CV-16(e) and court's orders, dismissal of suit against attorney as sanction for such misconduct under Fed. R. Civ. P. 16(f), *37(b)(2)(A)(v)*, was not abuse of discretion. McGillivray v Countrywide Home Loans, Inc. (2010, CA5 Tex) 2010 US App LEXIS 540.

**156. Dismissal of counterclaim**

Trial court abused its discretion when it dismissed counterclaim as sanction for defendant's failure to produce requested documents as ordered where (1) defendant continually represented to plaintiff and to court that documents were lost at sea with ship, and that he had produced all documents (i.e., repair invoices) he was able to obtain, (2) there is no evidence that defendant acted willfully, in bad faith, or was at fault in failing to produce documents which he attempted but was unable to obtain, (3) plaintiff had ability to subpoena documents by taking deposition of custodians of records of companies concerned but did not attempt to do so, and (4) District Court made no findings as to whether measure less drastic than dismissal would have been appropriate sanction. Searock v Stripling (1984, CA11 Fla) 736 F2d 650, 39 FR Serv 2d 716.

Dismissal of Environmental Protection Agency's counterclaim in engineering company's suit seeking declaratory relief from proposed action against company for violation of Clean Water Act, was not issued under Rule 37 and therefore did not constitute an order for purposes of reviewing it under that rule where District Court nowhere invoked Rule and did not notify defendant that its discovery conduct would lead to dismissal. Halaco Engineering Co. v Costle

(1988, CA9 Cal) 843 F2d 376, 27 Envt Rep Cas 1481, 10 FR Serv 3d 1152 (criticized in Anheuser-Busch, Inc. v Natural Beverage Distribs. (1995, CA9 Cal) 69 F3d 337, 95 CDOS 8383, 95 Daily Journal DAR 14487, 33 FR Serv 3d 266).

District court did not abuse its discretion in dismissing all of pro se trademark infringement defendants' counterclaims as sanctions for discovery abuses where record exhibited numerous and flagrant discovery violations. Creative Gifts, Inc. v UFO (2000, CA10 NM) 235 F3d 540, 57 USPQ2d 1321, 2001 Colo J C A R 198, 48 FR Serv 3d 621.

District court did not abuse its discretion in dismissing defendant's counterclaims for patent infringement for discovery abuses since material defendant failed to produce was specifically related to its counterclaim and prejudiced plaintiff, court's order warned defendant that noncompliance was serious abuse for which sanctions could be imposed, and court implicitly considered lesser transactions. Seal-Flex, Inc. v Athletic Track & Court Constr. (1999, CA FC) 172 F3d 836, 50 USPQ2d 1225.

Defendant's counterclaim will be dismissed with prejudice where 6 months elapse since interrogatories were filed for defendant to answer, which interrogatories sought information relating to defendant's counterclaim, and where defendant's assertion that his attempts to comply failed because of limited time allowed by court is not persuasive. Harlem Book Co. v Hurtt (1962, ED Mo) 31 FRD 177, 6 FR Serv 2d 764, app dismd (1962, CA8 Mo) 308 F2d 949.

Defendant's flagrant disregard of court's order to appear for physical/mental exam, court's scheduling order, and defendants' failure to appear at scheduled depositions warranted sanctions of dismissal of counterclaims, particularly since discovery abuses were related to counterclaims. Commercial Nat'l Bank v Tapp (1989, DC Kan) 125 FRD 695.

In company's suit accusing defendants of cybersquatting, company's motion for sanctions under *Fed. R. Civ. P. 37(b)* for defendants' failure to pay, as required by court order, attorney's fees for one defendant's failure to appear at his deposition and for costs related to company's motion to compel was denied, but defendants were warned that failure to pay sum within 30 days would result in sanctions, including striking of defendants' breach of contract counterclaims. Eagle Hosp. Physicians, LLC v SRG Consulting, Inc. (2007, ND Ga) 509 F Supp 2d 1337, amd (2007, ND Ga) 2007 US Dist LEXIS 46649.

**157. --Deception**

District court did not abuse discretion in imposing sanction of dismissal of counterclaims under either Rule 37 or court's inherent power to control proceedings before it when party sanctioned failed to comply in timely manner with magistrate's discovery order compelling disclosure of invoices and financial statements, represented to court that it did not have documents in question, and later produced large number of these documents, and District Court adopted magistrate finding that party obstructing discovery willfully violated discovery order and prejudiced opponent's ability to prepare for imminent trial. North American Watch Corp. v Princess Ermine Jewels (1986, CA9 Cal) 786 F2d 1447, 5 FR Serv 3d 807.

Wholesale distributor's counterclaim in manufacturer's suit seeking declaratory judgment that it would be acting within terms of distributorship agreement it if terminated distributorship

agreement was properly dismissed where, despite distributor's claims that relevant documents were destroyed in warehouse fire district court found on basis of considerable evidence that distributor knew almost immediately after fire several years earlier that documents survived. Anheuser-Busch, Inc. v Natural Beverage Distribs. (1995, CA9 Cal) 69 F3d 337, 95 CDOS 8383, 95 Daily Journal DAR 14487, 33 FR Serv 3d 266.

**158. --Prejudice or lack thereof**

District court did not abuse discretion in imposing sanction of dismissal of counterclaims under either Rule 37 or court's inherent power to control proceedings before it when party sanctioned failed to comply in timely manner with magistrate's discovery order compelling disclosure of invoices and financial statements, represented to court that it did not have documents in question, and later produced large number of these documents, and District Court adopted magistrate finding that party obstructing discovery willfully violated discovery order and prejudiced opponent's ability to prepare for imminent trial. North American Watch Corp. v Princess Ermine Jewels (1986, CA9 Cal) 786 F2d 1447, 5 FR Serv 3d 807.

Although prejudice sustained by plaintiff would justify granting of its request that defendant's counterclaim be stricken and defendant precluded from presenting evidence regarding subject matter of unanswered interrogatories where defendant's counsel ignored request for answers to interrogatories and discovery orders and later filed deliberately callous, totally unresponsive, and evasive answers, in interest of having issues determined on merits, motion for sanction is denied; counsel fees are awarded to plaintiff for expense of preparing motions to compel and for sanctions. Burroughs Corp. v Philadelphia AFL-CIO Hospital Asso. (1978, ED Pa) 26 FR Serv 2d 839.

**159. --Willfulness, bad faith or fault**

Noncompliance by corporation's sole owner with court order to answer interrogatories constitutes "fault," "wilfulness," or "bad faith" justifying sanctions, including dismissal of his counterclaim, pursuant to Rule 37(b), where owner gives repeated blanket refusal to respond on ground of right against self-incrimination, but makes no attempt to explain how responses to each of interrogatories, even by implication, may be incriminating, even though many questions are wholly devoid of incriminatory potential and should be answered without hesitation. General Dynamics Corp. v Selb Mfg. Co. (1973, CA8 Mo) 481 F2d 1204, 17 FR Serv 2d 1221, cert den *(1974) 414 US 1162, 39 L Ed 2d 116, 94 S Ct 926.*

District court did not abuse discretion in imposing sanction of dismissal of counterclaims under either Rule 37 or court's inherent power to control proceedings before it when party sanctioned failed to comply in timely manner with magistrate's discovery order compelling disclosure of invoices and financial statements, represented to court that it did not have documents in question, and later produced large number of these documents, and District Court adopted magistrate finding that party obstructing discovery willfully violated discovery order and prejudiced opponent's ability to prepare for imminent trial. North American Watch Corp. v Princess Ermine Jewels (1986, CA9 Cal) 786 F2d 1447, 5 FR Serv 3d 807.

Default judgment and dismissal of counterclaim with prejudice were not abuse of discretion where court had previously lifted 3 entries of default, imposed 4 orders for money sanctions

against defendant for failure to comply with discovery requests and court orders, and held numerous hearings on motions to comply with discovery requests, yet defendants failed to follow court's order requiring them to submit fully responsive answers and to identify documents requested, since defendants followed deliberate, willful, studied course of frustrating plaintiff's attempts at discovery, complicating proceedings, and ignoring court orders. Nilsson, Robbins, Dalgarn, Berliner, Carson & Wurst v Louisiana Hydrolec (1988, CA9 Cal) 854 F2d 1538, 11 FR Serv 3d 1219.

Where deposition of owner of stock of corporate defendant is essential for proper presentation of plaintiff's case and failure of stock-owner to appear for taking of deposition is result of clear and studied determination by corporate defendant after all efforts to postpone appearance of a stock-owner have failed, and default is deliberate and wilful, court is justified in entering default judgment against defendant and dismissing counterclaims against plaintiff with prejudice. Trans World Airlines, Inc. v Hughes (1963, SD NY) 32 FRD 604, 7 FR Serv 2d 766.

In contract action, in which plaintiff moves for sanctions against defendants for their alleged willful failure to comply with discovery orders, magistrate does not abuse its discretion in sanctioning defendants by striking their counterclaim in view of defendants' repeated failure over nearly one year's period to answer interrogatory disregarding numerous court orders to do so. Devore & Sons, Inc. v Aurora Pacific Cattle Co. (1983, DC Kan) 560 F Supp 236, 38 FR Serv 2d 176.

In litigation between home health care provider and defendant who had undertaken development of software for it, defendant's counterclaim would not be dismissed for its pre-litigation destruction of team members' personal files on computer before returning computer to plaintiff; defendant's conduct did not constitute deliberate undermining of discovery request. ABC Home Health Servs. v IBM Corp. (1994, SD Ga) 158 FRD 180.

Counterclaim has properly been stricken pursuant to former *FRCP 37(b)(2)(C)* as sanction for discovery misconduct, where defendant has still offered no legitimate explanation for his failure to comply with plaintiff's discovery requests and still has not complied with outstanding requests for answers to interrogatories and production of documents, because defendant's noncompliance is willful and harsh sanction is nevertheless "just" in that it properly relates to misconduct and claim at issue. Cooperative Fin. Ass'n v Garst (1996, ND Iowa) 917 F Supp 1356.

**160. Dismissal of party**

Trial court does not abuse its discretion in refusing to dismiss as to certain employees in suit for unpaid overtime where they fail to comply with pretrial discovery procedures when information sought is already available to court. Craig v Far West Engineering Co. (1959, CA9 Cal) 265 F2d 251, 36 CCH LC P 65339, 2 FR Serv 2d 637, 72 ALR2d 1143, cert den *(1959) 361 US 816, 80 S Ct 57, 4 L Ed 2d 63.*

Dismissal of some county employees from FLSA suit for failure to respond properly to interrogatories was inappropriate where lesser sanction was available and noncompliance did

not prejudice defendant since it admitted in oral argument that it obtained proper or complete answers during plaintiffs' depositions. Wouters v Martin County (1993, CA11 Fla) 9 F3d 924, 1 BNA WH Cas 2d 1335, 127 CCH LC P 33043, 27 FR Serv 3d 1317, 7 FLW Fed C 1073, cert den *(1994) 513 US 812, 115 S Ct 65, 130 L Ed 2d 21, 2 BNA WH Cas 2d 544.*

Plaintiffs may be dismissed from action to bar anti-strike injunction where they have not complied with court's discovery order; in absence of any explanation by plaintiffs' counsel as to why plaintiffs have not complied with court order to respond to discovery, plaintiffs" failure to comply is viewed not as result of inability, but as willful disregard of order, and such failure to comply with order indicates that these plaintiffs have lost interest in and have abandoned prosecution of action. Booker v Anderson (1979, ND Miss) 83 FRD 284.

In case in which citizens and domiciliaries of Ecuador sued several companies, alleging physical harm and property damage stemming from companies' contract with United States government to spray pesticides in order to eradicate Colombian cocaine and heroin farms and parties, who disagreed as to whether dismissal should be with or without prejudice, moved to dismiss two specific categories of plaintiffs who had failed to provide complete questionnaire responses to companies as part of their discovery obligations, dismissal would be with prejudice; it had been over two years since plaintiffs were first directed to complete defendants' questionnaires, multiple orders had directed them to respond in full to questionnaires, they had received three extensions of time in which to do so, and their failure to furnish requested information impeded companies' ability to prepare their defense. Arias v Dyncorp Aero. Operations, LLC (2010, DC Dist Col) 677 F Supp 2d 330.

Unpublished Opinions

Unpublished: District court acted well within its discretion when it dismissed three of inmates pursuant to *Fed. R. Civ. P. 37* for refusing to answer questions at their depositions where three inmates willfully violated district court's order requiring that their depositions take place as scheduled and district court properly rejected inmate's argument that they had insufficient time to prepare for their depositions. Moore v Baca (2005, CA9 Cal) 130 Fed Appx 175.

**161. Injunction**

Grant of injunction restraining interference with land survey pursuant to discovery order is improper where Rules 34 and 37 prescribe process of discovery coupled with punishment by contempt. Humble Oil & Refining Co. v Sun Oil Co. (1949, CA5 Tex) 175 F2d 670.

Trial judge does not abuse his discretion in striking defendant's defenses, issuing permanent injunction in favor of plaintiff, and awarding plaintiff $ 1,000 for attorneys' fees incurred in its unsuccessful discovery efforts, where representative designated by defendant under Rule 30(b)(6) failed to appear for deposition and to produce documents and items requested, as ordered by court, and where defendant's supervisory employee also failed to appear at deposition, as ordered by court, and failed to forewarn plaintiff or explain failure to appear. Eastway General Hospital, Ltd. v Eastway Women's Clinic, Inc. (1984, CA5 Tex) 737 F2d 503, 39 FR Serv 2d 917, cert den *(1985) 470 US 1052, 84 L Ed 2d 816, 105 S Ct 1752.*

**162. Monetary fine or sanction**

Penalty of $ 7,114, imposed by trial court for defendants' failure and refusal to deliver certain accountant's records for evaluation, study and analysis by investigators acting for plaintiffs, will be reversed where defendants should have been permitted to cross-examine plaintiff's accountant in connection with his affidavit relating to cost of accountant's work, which in turn largely determined amount of penalty. McFarland v Gregory (1970, CA2 NY) 425 F2d 443, 14 FR Serv 2d 94.

District Court may impose monetary sanctions on party's attorney notwithstanding that underlying action has been settled; furthermore, status of underlying action does not control who may adjudicate allegations of discovery misconduct (federal judge hearing case or special 3 judge panel) or what standards will inform their deliberations (Rule 37 or some local provision). Carlucci v Piper Aircraft Corp. (1985, CA11 Fla) 775 F2d 1440, 3 FR Serv 3d 325.

Fines imposed to reimburse district court for its time were proper under *Fed. R. Civ. P. 37(b)(2)*, because fines were available to remedy harms of discovery violations. Maynard v Nygren (2003, CA7 Ill) 332 F3d 462, 14 AD Cas 777, 55 FR Serv 3d 1184, subsequent app (2004, CA7 Ill) 372 F3d 890, 15 AD Cas 1121, 58 FR Serv 3d 1020, cert den *(2005) 543 US 1049, 125 S Ct 865, 160 L Ed 2d 769.*

Fines imposed against electric blanket manufacturer for discovery violations were criminal in nature and, because fines were imposed without procedural protections of *Fed. R. Civ. P. 37*, they were vacated; fines were made payable to court, rather than homeowners, and amounts were not determined by any losses homeowners suffered. Bradley v Am. Household, Inc. (2004, CA4 W Va) 378 F3d 373, CCH Prod Liab Rep P 17104, 59 FR Serv 3d 269.

Imposition of fine upon counsel may be appropriate sanction for failure, due to fault of counsel, to comply with requirements of Rule 37; court may assess against delinquent counsel, financial sanction equivalent to fees and expenses incurred by opposing party and payable to opposing party. J. M. Cleminshaw Co. v Norwich (1981, DC Conn) 93 FRD 338, 33 FR Serv 2d 554 (criticized in Satcorp Int'l Group v China Nat'l Silk Import & Export Corp. (1996, CA2 NY) 101 F3d 3, 36 FR Serv 3d 463).

In patent infringement action that was before court following jury trial limited to affirmative defense of patent invalidity asserted by defendants, plaintiffs' motion for sanctions was granted; although defendants' violation of prior order was not willful or intended to obstruct or frustrate plaintiffs' efforts to respond to motions for summary judgment, fact remained that defendants' belated production of thousands of documents hampered plaintiffs' efforts to respond to motions in timely manner. Frazier v Layne Christensen Co. (2006, WD Wis) 486 F Supp 2d 831, affd (2007, CA FC) 2007 US App LEXIS 15716.

In suit by shipper and insurer against vessel and others (defendants), seeking recovery for damage to shipment of corn, where defendants failed to produce certain documents pursuant to plaintiffs' requests, and where testimony provided by certain deponent presented by defendants failed to address these requests, although court declined to strike defendants'

answer or impose default judgment under *Fed. R. Civ. P. 37(b)(2)*, but instead imposed monetary sanctions by making defendants liable for plaintiffs' reasonable expenses, including attorney's fees, caused by their failure to respond to this matter. Kyoei Fire & Marine Ins. Co. v M/V Mar. Antalya (2007, SD NY) 248 FRD 126, 2007 AMC 2839.

In civil rights suit, protestors were entitled, pursuant to *Fed. R. Civ. P. 37(b)(2)*, to attorney's fees and costs from District of Columbia (D.C.) because D.C. repeatedly violated court orders requiring production of command center resume from day of protestors' arrest; D.C. knew or should have known that resume existed, as it had been given to District on at least two occasions and easily identified Fed. R. Civ. P. 30(b)(6) deponent who had forwarded resume to D.C. two years earlier; and D.C.'s failure to disclose resume until week before discovery closed, more than three years after discovery began, caused protestors to suffer prejudice because they lost opportunity to conduct discovery on basis of resume. Bolger v District of Columbia (2008, DC Dist Col) 248 FRD 339.

Pursuant to *Fed. R. Civ. P. 37(b)(2)(B)*, plaintiff insured's attorneys were jointly and severally responsible with insured to pay defendant insurer its reasonable expenses because they represented to court that insurer already had all documents, did not require prompt search for and production of hotel room folios, and--once additional folios were found--deliberately and deceptively withheld folios until after close of discovery. Bray & Gillespie Mgmt. LLC v Lexington Ins. Co. (2009, MD Fla) 259 FRD 591.

In mortgagor's fraud suit against defendants, credit management group and lending company, mortgagor was entitled to sanctions under *Fed. R. Civ. P. 37*, in form of related attorneys' fees, where defendants disregarded court order that they present privilege log under *Fed R. Civ. P. 26(b)(5)(A)* and instead produced incomplete privilege log, which failed to even identify general subject matter of documents listed, even after it became clear that some of documents at issue might be privileged under attorney-client privilege; as additional sanction, defendants were required to furnish some of listed documents. Crawford v Franklin Credit Mgmt. Corp. (2009, SD NY) 261 FRD 34.

In Title VII of Civil Rights Act of 1964 action, plaintiff's motion for spoliation sanctions was granted in part and denied in part; based on fact that defendant was negligent in complying with her obligation to preserve her notes, monetary sanction was appropriate. Curcio v Roosevelt Union Free Sch. Dist. (2012, ED NY) 283 FRD 102.

Unpublished Opinions

Unpublished: District court did not abuse its discretion in calculating appropriate sanction (approximately $ 20,000 in attorney's fees), where appellants knowingly and willfully defied protective order. Heavyhitters v Nike, Inc. (2007, CA9 Cal) 2007 US App LEXIS 18855.

Unpublished: In student's § 504 of Rehabilitation Act of 1973, 29 USCS § 794, discrimination case, student's *Fed. R. Civ. P. 37(b)(2)* motion for monetary sanctions, which was based on university's failure to provide complete comparator information during discovery, was properly denied because such information had not been requested by student, and information that

district court compelled university to provide asked for general student course failure information; order could not be construed so as to require university to differentiate between genuine academic failures and technical clinical failures, between which university did not differentiate. Hirsch v Nova Southeastern Univ., Inc. (2008, CA11 Fla) 2008 US App LEXIS 16872.

Unpublished: Based on plaintiffs' total failure to heed court orders and participate in discovery, district court did not abuse its discretion in imposing monetary sanctions upon plaintiffs. Bell v Texaco, Inc. (2012, CA5 Miss) 2012 US App LEXIS 21192.

Unpublished: Where defendant and court had been lenient in allowing debtor, who was proceeding pro se, ample time to comply with discovery requests, requiring multiple extensions of time and of discover period, and debtor had failed to offer any justifiable excuse for her failure to comply, court granted defendant's request for $ 500 fine, as sanction for debtor's failure to comply with court's order on defendant's previous motion to compel. Israel v United States Dep't of Educ. (In re Israel) (2009, BC ND Ga) 2009 Bankr LEXIS 2528.

**163. Pleadings stricken**

Court may properly strike answer and enter default judgment under circumstances where party fails to produce documents as ordered. Norman v Young (1970, CA10 Utah) 422 F2d 470, CCH Fed Secur L Rep P 92633, 13 FR Serv 2d 1004.

Bankruptcy court abused its discretion by dismissing debtor's answer to petition for involuntary bankruptcy as sanction for his conduct during discovery, where, inter alia, first time that court indicated that submissions in response to court's orders were insufficient was when it entered order imposing sanctions, court did not have before it any motions for sanctions or motions to compel when it ordered answer stricken, and court offered no explanation why lesser sanctions would not have been effective. In re Rubin (1985, CA9 Cal) 769 F2d 611, 13 CBC2d 599, 3 FR Serv 3d 968 (criticized in Key Mechanical Inc. v BDC 56 LLC (In re BDC 56 LLC) (2003, CA2 NY) 330 F3d 111, 41 BCD 114, 50 CBC2d 161, CCH Bankr L Rptr P 78850).

Under *Fed. R. Civ. P. 37(b)*, district court did not abuse its discretion by striking grower's pleadings and entering judgment for patent holder on issue of liability in its patent infringement action where lesser sanction, i.e., spoliation instruction, would have covered up fact that grower actually sold or transferred some seed, and patent holder had taken costly steps to uncover information about saved seed that grower was obligated to provide voluntarily. Monsanto Co. v Ralph (2004, CA FC) 382 F3d 1374, 72 USPQ2d 1515, 59 FR Serv 3d 649, reh den, reh, en banc, den (2004, CA FC) 2004 US App LEXIS 27219.

In action by seaman for personal injuries, where defendant-shipowner was ordered to allow plaintiff to inspect and copy any reports made in regular course of business with reference to plaintiff's injuries, plaintiff should be permitted to inspect logbook, failing which, motion to strike portion of answer for failure to comply with order should be granted. Murphy v New York & P. R. S.S. Co. (1939, DC NY) 27 F Supp 878.

Because content of discovery documents at issue did not significantly differ from that of previously discovered evidence and was at least arguably anticipated by parties' agreement to

continue some discovery for insurers to obtain "other Network Agreements and Manuals," motion to strike was denied. Smith v United Healthcare Servs. (2003, DC Minn) 31 EBC 1038.

Court granted motion to strike employees' sixth supplemental disclosures pursuant to *Fed. R. Civ. P. 37(b)(2)(A)* because belated supplementation was without justification under *Fed. R. Civ. P. 26(e)(1)*. Agee v Wayne Farms LLC (2009, SD Miss) 675 F Supp 2d 684.

In patent infringement case, court granted in part defendant's *Fed. R. Civ. P. 37(b)* motion to strike last three sentences of paragraph 5 and paragraphs 11-19 of affidavit of plaintiffs' expert because they stated opinions not contained in original report and, thus, were not supplement under *Fed. R. Civ. P. 26(e)(1)*; court denied motion as it related to remaining portion of paragraph 5 and paragraphs 6-9 because they did not enlarge scope of expert's original report or introduce new opinion as expert merely was attempting to resolve confusion over how many products he tested and how many samples he removed from each product. Baratto v Brushstrokes Fine Art, Inc. (2010, WD Wis) 701 F Supp 2d 1068.

Unpublished Opinions

Unpublished: Plaintiff's complaint alleging false imprisonment and malicious prosecution was properly dismissed under *Fed. R. Civ. P. 37(b)(2)(A)* because record reflected that plaintiff not only frustrated discovery process by his lack of cooperation in scheduling his deposition but that his entire conduct was inappropriate. Hunting v BASF Corp. (2010, CA5 Tex) 2010 US App LEXIS 21469.

**164. --Repeated violations**

District Court did not abuse its discretion by striking defendant's answer and counterclaim and entering judgment for plaintiffs where by November 24, defendant had failed fully to comply with court's June 5 order to compel discovery despite being ordered on July 25 to comply within five days and being further ordered to comply on October 17, notwithstanding defendant's contention that it was unable to comply with plaintiff's request for "ledgers and journals" since its business records were kept on computer and District Court had determined only in November that computerized summary constituted ledger or journal. Emerick v Fenick Industries, Inc. (1976, CA5 Fla) 539 F2d 1379, 22 FR Serv 2d 510.

District Court did not abuse its discretion in striking plaintiff's answer and defenses to defendant's counterclaim where plaintiff repeatedly failed to comply with discovery orders by supplying nonresponsive, evasive, and incomplete answers to interrogatories and requests for admissions and producing documents with critical portions torn off, where lesser sanction of attorneys fees had been previously imposed twice, and where defendant was prejudiced by plaintiff's actions, and plaintiff could not excuse conduct by blaming his former attorney, his health, or his incarceration. Jaffe v Grant (1986, CA11 Fla) 793 F2d 1182, 6 FR Serv 3d 71, reh den, en banc (1986, CA11 Fla) 803 F2d 1185 and cert den *(1987) 480 US 931, 94 L Ed 2d 759, 107 S Ct 1566.*

Federal Court did not abuse its discretion in permitting to stand state court order striking pleadings of party who refused to comply with discovery orders as sanction, on basis of record

developed by state court, where this choice of sanction would not have been abuse of discretion under federal rules. Nissho-Iwai American Corp. v Kline (1988, CA5 Tex) 845 F2d 1300.

District Court's striking of defendant's answer to complaint, but allowing defendant to proceed to disprove plaintiff's shareholders' derivative action suit based on self-dealing, if he desired to, was appropriate sanction for case that had been pending for 7 years and culminated in one-day bench trial, where most of delay was attributed to defendant's repeated failures to respond to discovery requests and orders, at times even hiding from process server. Marquis Theatre Corp. v Condado Mini Cinema (1988, CA1 Puerto Rico) 846 F2d 86, 11 FR Serv 3d 325, reh den (1988, CA1) 1988 US App LEXIS 14286.

Striking defendant's answer in counterclaim as sanction for failure to comply with series of discovery orders was appropriate where defendants had been previously sanctioned 3 times for discovery misconduct and had knowledge of pending sanctions and discovery orders but nonetheless continued to remain intransigent in their defiance of these orders. Comdyne I, Inc. v Corbin (1990, CA3 NJ) 908 F2d 1142, 17 FR Serv 2d 503.

District court did not abuse its discretion in striking defendants' pleadings for repeated discovery abuses in breach of fiduciary duty action by plaintiff against former associates of law firm which had defended plaintiff in products liability action and then represented plaintiffs in class action products liability action against former client; defendants failed to produce large number of documents that were responsive to multiple interrogatories, and answers to interrogatories and document requests and depositions were plainly perjurious and not credible. Chrysler Corp. v Carey (1999, CA8 Mo) 186 F3d 1016, 44 FR Serv 3d 617.

Order striking defendant's answer piercing "corporate veils" of trucking concerns used by defendant to evade liability, and precluding defendant from opposing piercing of corporate veils would be imposed as sanction under Rule 37(b)(2) for disobedience to court orders directing defendant to respond fully to questions and produce documents, repeated perjury, and conduct evincing continuing and absolute disrespect for discovery process. Amway Corp. v Shapiro Express Co. (1984, SD NY) 102 FRD 564.

District Court ordered sanctions pursuant to Rule 37(b) in the form of striking defendants' motion to dismiss for lack of jurisdiction where defendant repeatedly failed to produce numerous documents in violation of 3 court orders, defendant did not deny existence of many unproduced documents, such denials that were made were in many instances proved false, and denials were made by defendants' attorney without any basis in spite of evidence which supported inference that documents did exist. Transatlantic Bulk Shipping, Ltd. v Saudi Chartering S.A. (1986, SD NY) 112 FRD 185, 1987 AMC 908.

Unpublished Opinions

Unpublished: Striking answers and entry of default was proper under Fed. R. Civ. P. 16(f) and *37(b)* because couple's contumacious conduct was established through violations of three court orders: provision of inadequate accounting, failure to participate in drafting joint final

pretrial statement, and absence from final pretrial conference; lesser sanction would not suffice, in view of prejudice to litigants on opposite side. Central Fla. Council BSA, Inc. v Rasmussen (2009, MD Fla) 2009 US Dist LEXIS 77439.

**165. --Tardy compliance**

In action brought by EEOC employee challenging his reassignment, defendant's "Petition for Permission to Process Adverse Action" against plaintiff would be dismissed by District Court for failure to comply with discovery order, notwithstanding defendant's later indication of willingness to comply with order, where (1) such last-minute change of position would be viewed with disfavor, and did not alter fact that defendant willfully failed to comply with order; (2) dismissal was essential to maintain integrity of court's orders; (3) no lesser sanction would be effective remedy for defendant's disregard of order; (4) sanction was appropriate as deterrent; (5) defendant's belated indication that it would comply with order was subsequently modified by request that court impose conditions; (6) sanction was relatively mild in that it entailed neither dismissal of action, nor entry of default judgment, nor taking allegations as established facts; and (7) defendant's refusal to comply with portion of discovery request was compounded by insufficient compliance with other requests. Perry v Golub (1976, ND Ala) 74 FRD 360, 22 FR Serv 2d 1020.

Imposition of extreme sanction of striking plaintiff's pleadings or barring proof on particular claims, which in effect amount to dismissal of remaining claims, is not justified, despite plaintiff's procrastination and delay in complying with discovery order; nevertheless, lesser sanction of award of attorneys' fees is in order as result of plaintiff's obstructive conduct. Valdan Sports-wear v Montgomery Ward & Co. (1984, SD NY) 591 F Supp 1188.

**166. --Willfulness, bad faith or fault**

District court had discretion to strike answer of principal defendant and enter default judgment against him where he had willfully refused to obey discovery order; and since principal defendant was officer, director, or managing agent of other defendants, court also had authority to strike their answers and enter default judgments against them. SEC v Wencke (1978, CA9 Cal) 577 F2d 619, cert den *(1978) 439 US 964, 58 L Ed 2d 422, 99 S Ct 451.*

Striking defendant's answer for police officer's destruction of audio tapes of interview with reporter was too severe a sanction where presumably all damaging information was already public, newspaper held identical recording of interview, and destruction did not appear to have been done in bad faith or willfully. Pressey v Patterson (1990, CA5 Tex) 898 F2d 1018, 16 FR Serv 3d 972, reh den (1990, CA5) 1990 US App LEXIS 10114 and (criticized in Maudsley v State (2003, App Div) 357 NJ Super 560, 816 A2d 189).

District Court did not err in striking party's pleadings as sanction for its failure to answer interrogatories or comply with discovery deadline since court was not obliged to accept party's refusal to consult with his attorney as adequate reason for failing to comply with court orders. Command-Aire Corp. v Ontario Mechanical Sales & Service Inc. (1992, CA5 Tex) 963 F2d 90, 23 FR Serv 3d 379.

In action by pilot, on behalf of class, against airline corporation to recover hazard pay, district court did not abuse its discretion in striking corporation's answer pursuant to *Fed. R. Civ. P. 37(b)(2)(A)(iii)* because corporation violated discovery order willfully and in bad faith, and district court properly considered lesser sanction pointless. Hester v Vision Airlines, Inc. (2012, CA9 Nev) 687 F3d 1162, 162 CCH LC P 10506.

Where Chapter 7 debtor was found to have willfully and intentionally destroyed electronically stored evidence, partial default judgment was entered as sanction and broader default judgment was to be entered if debtor did not comply with certain duties within 10 days. United States v Krause (In re Krause) (2007, BC DC Kan) 367 BR 740, 99 AFTR 2d 3098.

**167. Summary judgment**

District Court's preclusion of plaintiff's evidence and its grant of summary judgment to defendants as result of plaintiff's failure to comply with pre-trial order was in essence dismissal of plaintiff's action, but its propriety is properly assessed under standards of Rule 37(b)(2), rather than Rule 41(b). Rabb v Amatex Corp. (1985, CA4 NC) 769 F2d 996.

In copyright infringement case referred to magistrate for taking evidence regarding damages, magistrate did not abuse discretion in granting plaintiff summary judgment on issue of damages and accepting plaintiff's calculation of its damages where defendants inexcusably failed to provide requested information necessary to calculate damages, magistrate went to great length to give defendants ample time to respond to discovery orders, record was replete with examples of defendants' failure to comply, and defendants were not unfairly surprised by sanctions imposed against them. Update Art, Inc. v Modiin Pub., Ltd. (1988, CA2 NY) 843 F2d 67, 6 USPQ2d 1784, 10 FR Serv 3d 877.

Cases dealing with dismissal as sanction for failing to make discovery are equally applicable to summary judgment request; as general rule, court should not dismiss action for failure to make discovery because dismissal is severe sanction; generally, element of willfulness is required before dismissal will be entered against party. Backos v United States (1979, ED Mich) 82 FRD 743, 79-2 USTC P 16325, 27 FR Serv 2d 1085.

Default and summary judgment in favor of union and against corporation under former *Fed. R. Civ. P. 37(b)(2)(C)*, 16(f), was granted in its suit under Employee Retirement Income Security Act of 1974, 29 USCS §§ 1001 et seq., against business, its owner, and its corporation, as corporation deliberately refused to retain counsel despite court's unambiguous warning and order. Flynn v Thibodeaux Masonry, Inc. (2004, DC Dist Col) 311 F Supp 2d 30.

While District of Columbia's three year delay in providing documents requested by civil rights claimant was unacceptable, its conduct showed that it was guilty of providing overly broad responses and operating with insufficient funding and staffing and did not suggest bad faith so as to require entry of summary judgment against District as to Monell claim as sanction under *Fed. R. Civ. P. 37*; because of prejudice to claimant's ability to make out her Monell claim, she was entitled to fees and possible negative inference instruction for District's noncompliance. *McDowell v Gov't of Dist. of Columbia (2006, DC Dist Col) 233 FRD 192.*

**168. Miscellaneous**

Pro se prisoner who abused his right to proceed in forma pauperis would not be allowed to file further appeals until paying $ 1500 sanction levied upon him. Vinson v Texas Bd. of Corrections (1990, CA5 Tex) 901 F2d 474, reh den, en banc (1990, CA5 Tex) *914 F2d 251.*

District court order prohibiting noncomplying defendant from participating in defense of action until he complied with court's discovery and receivership orders was not abuse of discretion given defendant's clear efforts to evade court's jurisdiction by transferring substantial assets. Citronelle-Mobile Gathering, Inc. v Watkins (1991, CA11 Ala) 943 F2d 1297, 21 FR Serv 3d 1435.

In school desegregation case in which defendants failed to supplement their answers to interrogatories as to fact witnesses until five days before trial, court did not abuse its discretion by continuing trial for one week so that plaintiffs could depose newly disclosed witnesses and imposing costs of those depositions on defendants, since there was ample evidence of defendant's bad faith, presentation of lengthy witness list on eve of trial was prejudicial, noncompliance with court's orders needed to be deterred, and less drastic sanctions would not have been effective. Belk v Charlotte-Mecklenburg Bd. of Educ. (2001, CA4 NC) 269 F3d 305, reh, en banc, den (2001, CA4) 274 F3d 814, cert den *(2002) 535 US 986, 152 L Ed 2d 465, 122 S Ct 1537* and cert den *(2002) 535 US 986, 152 L Ed 2d 465, 122 S Ct 1538.*

District court abused its discretion when it struck defendant's privilege log and ordered defendant to produce 400 documents that were referred to in log because defendant had made good faith effort to identify documents that it reasonably believed to be protected by attorney client privilege, and magistrate's decision was based upon finding that five of 20 documents that plaintiff sought for in camera review were in fact not privileged; global disclosure sanction forced defendant to disclose information that was protected by attorney-client privilege and constituted abuse of discretion. Am. Nat'l Bank & Trust Co. v Equitable Life Assur. Soc'y of the United States (2005, CA7 Ill) 406 F3d 867, 61 FR Serv 3d 521.

Although court would not strike complaint or dismiss action, motion of defendants to impose sanctions on plaintiff pursuant to Rule 37(b)(2) would be granted to extent of requiring plaintiff to provide, within 20 days, specific and detailed responses to interrogatories put forth by defendants, where, with respect to plaintiff's responses to interrogatories of defendants, plaintiff had, among other things, answered interrogatories by making blanket references to numerous documents which in essence told defendants that if they wished, they might hunt through all documents and find information they sought for themselves, and where plaintiff had cited as one document entire trial transcript of criminal case, despite repeated instructions from magistrate that such was not proper document on which to rely and despite fact that many of defendants were not parties to such suit. Harlem River Consumers Cooperative, Inc. v Associated Grocers of Harlem, Inc. (1974, DC NY) 64 FRD 459, 1974-2 CCH Trade Cases P 75305.

Sanction for pro se employment discrimination plaintiff's willful refusal to comply with orders that he not deface deposition transcripts by crossing out all his answers and refusing to sign

them would be to deem plaintiff to have waived signing original transcript and deem 3 volumes of that transcript accurate recital of deposition testimony. Baker v Ace Advertisers' Service, Inc. (1991, SD NY) 134 FRD 65.

Attorney is suspended from practice of law for one year, notwithstanding fact that civil contempt sanctions were imposed against attorney in underlying action, where attorney stymied defense efforts to take his client's deposition and to conduct discovery even after court ordered attorney to stop interfering, where attorney refused to concede his conduct was improper and failed to assure court he could conduct himself in civilized and professional manner in future, because attorney's conduct indicates lack of upright professional character necessary to demonstrate or to maintain his good standing as member of bar of court. Castillo v St. Paul Fire & Marine Ins. Co. (1992, CD Ill) 828 F Supp 594.

Entry of forfeiture decree was appropriate sanction for claimants remaining unavailable--from court, government, and their counsel--for over one year. United States v United States Currency in amount of Twenty-Four Thousand One Hundred Seventy Dollars (1993, ED NY) 147 FRD 18.

Liquidation trustee was subject to sanctions for failing to make reasonable inquiry of witnesses that he listed for trial prior to close of discovery or to make accurate disclosures and to supplement disclosures, which prejudiced opponents; opponents were allowed to depose witnesses that would actually testify at trustee's expense. Sender v Mann (2004, DC Colo) 225 FRD 645, 60 FR Serv 3d 958, motion to strike gr (2005, DC Colo) 2005 US Dist LEXIS 35743.

Sanctions were appropriately imposed by magistrate judge against defendants who had failed to timely comply with discovery order requiring them to produce on rolling basis documents reflecting investigations of defendants by insurance regulators; term "rolling basis" was not ambiguous. Requiring defendants to disclose certain litigation documents to regulators did not violate First Amendment, as defendants were not forced to express views of others. Wachtel v Guardian Life Ins. Co. (2005, DC NJ) 232 FRD 213.

Accident victim was not entitled to new trial because of district court's failure to rule upon discovery matters concerning car manufacturer's continued withholding of evidence because two of victim's motions for sanctions preceded court's sanctions hearing, where court adopted in part magistrate judge's proposed sanction instruction; further, third motion at trial was essentially motion for reconsideration for which court saw no reason to impose sanctions based on argument at that time. Tunnell v Ford Motor Co. (2005, WD Va) 385 F Supp 2d 582.

Where court granted employee's motion for sanctions pursuant to *Fed. R. Civ. P. 37(b)(2)* against employer, court noted that employer continuously failed to meet discovery deadlines despite being warned that failure to timely comply with discovery orders would subject it to severe sanctions; given failure of lesser sanctions to secure employer's compliance with discovery orders, court found that additional sanctions were warranted; imposed sanctions included excluding evidence, ordering immediate production of certain information, awarding employee attorneys' fees, striking answer to employee's amended complaint, and granting default judgment in favor of employee with regard to employer's consultation claims. Hill v Morehouse Med. Assocs. (2006, ND Ga) 236 FRD 590.

In suit by shipper and insurer against vessel and others (defendants), seeking recovery for damage to shipment of corn, where defendants failed to respond to two of plaintiffs' contention interrogatories, and where due to fact that trial was scheduled and there were numerous other discovery violations by defendants such that remedy of additional discovery at defendants' expense was insufficient, under *Fed. R. Civ. P. 37(b)(2)* court prohibited defendants from calling two particular witnesses at trial and from introducing vessel's log book into evidence. Kyoei Fire & Marine Ins. Co. v M/V Mar. Antalya (2007, SD NY) 248 FRD 126, 2007 AMC 2839.

In suit by shipper and insurer against vessel and others (defendants), seeking recovery for damage to shipment of corn, although defendants did not provide viable explanation for failing to comply with order to set forth their damages expert report, and where this testimony was important to defendants, and where its exclusion would prejudice defendants, under *Fed. R. Civ. P. 37(b)(2)* court declined to preclude defendants from submitting expert testimony on plaintiffs' purported failure to mitigate their damages at trial. Kyoei Fire & Marine Ins. Co. v M/V Mar. Antalya (2007, SD NY) 248 FRD 126, 2007 AMC 2839.

In stock analyst's suit against corporation, its officers, and consultant (defendants), alleging defamation related to alleged campaign to discredit him, although analyst was not entitled to adverse inference instruction under *Fed. R. Civ. P. 37(b)* since he failed to demonstrate likelihood that any destroyed evidence would have supported his claims, analyst was entitled to forensic search of certain laptop computer at defendants' expense because he demonstrated that defendants clearly failed to take adequate measures to prevent destruction of certain discoverable electronically stored materials. Treppel v Biovail Corp. (2008, SD NY) 249 FRD 111.

Arrestee did not merely fail to comply with deadlines in court's Scheduling Order; she filed misleading affidavit in effort to avoid consequences of her failure; in those circumstances, to allow case to go forward without further delay and to avoid any benefit to arrestee due to her late and erroneous filings, court granted arrestee's motion to substitute female officer as party defendant, but, by authority granted by *Fed. R. Civ. P. 37(b)*, court entered judgment in favor of female officer once defense counsel confirmed acceptance of service on behalf of female officer. Brazier v Oxford County (2008, DC Me) 575 F Supp 2d 265.

In seller's breach of contract suit, imposition of sanctions under *Fed. R. Civ. P. 37* against wife, who was one of buyers, and her counsel was appropriate because wife spoliated relevant evidence by allowing reinstallation of her computer's operating system; although adverse inference was not appropriate, it was appropriate to allow seller to conduct further discovery, including second deposition of wife, as well as information regarding reinstallation and discovery from anyone who might have knowledge of computer's contents before reinstallation. Green v McClendon (2009, SD NY) 262 FRD 284.

Mother provided court evidence that suggested accidental death and dismemberment claims instructor's guide had been produced without complete table of contents and out-of-order, and insurance company's unsworn statements that guide was produced in proper order were not persuasive in face of evidence to contrary; to extent insurance company may be arguing that it produced guide as it is kept in ordinary course of business, it failed to meet its burden of

demonstrating so, under Fed. R. Civ. P. 34(b)(2)(E)(i); moreover, while watermark that insurance company placed on documents it produced did not obscure text of documents completely, placement of watermark was improper; although placement of watermark was improper and ineffectual, court could not conclude its placement violated judge's order, as that order did not direct insurance company to take any course of action, and thus, since insurance company's conduct did not warrant severe litigation ending sanction, to remedy its production, within 10 days of entry of order, insurance company had to remove its confidential watermark from all documents produced to mother thus far and reproduce them without any watermark. Ulyanenko v Metro. Life Ins. Co. (2011, SD NY) 275 FRD 179.

Bankruptcy court erred in entering order precluding defendants from offering evidence on eight topics noticed for in Fed. R. Civ. P. 30(b)(6) deposition; before entering preclusion order, bankruptcy court was required, pursuant to Second Circuit precedent, to consider on record whether less severe sanctions would have been adequate. In re Sagecrest II, LLC (2011, DC Conn) 444 BR 20.

In Title VII of Civil Rights Act of 1964 action, plaintiff's motion for spoliation sanctions was granted in part and denied in part; sanction in form of adverse inference instruction against defendant was not warranted because there was insufficient evidence to permit reasonable trier of fact to conclude that destroyed notes would have shown unlawful discrimination or would have otherwise been favorable to plaintiff. Curcio v Roosevelt Union Free Sch. Dist. (2012, ED NY) 283 FRD 102.

In false advertising case, plaintiff did not satisfy its burden of demonstrating that its failure to make timely disclosures was harmless because bulk of financial documents were provided after close of fact discovery, which deprived defendant of discovery necessary to challenge summaries, as well as data underlying them; in addition, defendant's damages expert did not have opportunity to review bulk of financial summaries or underlying data prior to preparing his expert report; therefore, continuance was warranted. Lee Valley Tools, Ltd. v Indus. Blade Co. (2013, WD NY) 288 FRD 254, 84 FR Serv 3d 950.

Chapter 11 debtor was entitled to order disallowing pro se creditor's claim under *Fed. R. Civ. P. 37* and Fed. R. Bankr. P. 7037; creditor had made deliberate decision not to comply with discovery order based on her frivolous assertion that court lacked jurisdiction over her claim, and discovery went to heart of creditor's claim. In re US Airways, Inc. (2011, BC ED Va) 54 BCD 227.

Unpublished Opinions

Unpublished: Even if district court erred in sanctioning attorney under *Fed. R. Civ. P. 37* for his refusal to respond to discovery requests, attorney's Fifth Amendment claim failed because he did not identify what evidence he would have presented had he been permitted to introduce evidence in support of defense that he did not purchase, receive, possess, or use pirate access devices. DIRECTV, Inc. v Crespin (2007, CA10 Colo) 2007 US App LEXIS 6279.

### 2. Contempt

#### 169. Generally

Although, on its face, Rule 37 arguably permits District Court both to enter default judgment and to hold party in civil contempt when discovery orders are not obeyed, once default judgment is entered, there is simply no further purpose to be served by imposition of civil contempt sanctions. Danning v Lavine (1978, CA9 Cal) 572 F2d 1386, 4 BCD 400, 17 CBC 369, CCH Bankr L Rptr P 66805, 25 FR Serv 2d 851.

Only judge of court in deposition district can adjudge recalcitrant witness in contempt. In re Corrugated Container Antitrust Litigation (1981, App DC) 213 US App DC 319, 662 F2d 875, 1981-2 CCH Trade Cases P 64272, 32 FR Serv 2d 592.

Civil contempt is characterized by court's desire to compel party's obedience to specific and definite court order after party has failed to take all reasonable steps within party's power to comply; civil contempt is also characterized by court's desire to compensate contemnor's adversary for injuries which result from noncompliance. In re Heritage Bond Litig. (2004, CD Cal) 223 FRD 527 (criticized in UMG Recordings, Inc. v Hummer Winblad Venture Partners (In re Napster, Inc. Copyright Litig.) (2006, ND Cal) 2006-1 CCH Trade Cases P 75205).

Although contempt need not be willful, and there is no good faith exception to requirement of obedience to court order, substantial compliance with court order is defense to civil contempt, and is not vitiated by few technical violations where every reasonable effort has been made to comply; moving party has burden of showing by clear and convincing evidence that contemnors violated specific and definitive order of court, and burden then shifts to contemnors to demonstrate why they were unable to comply. In re Heritage Bond Litig. (2004, CD Cal) 223 FRD 527 (criticized in UMG Recordings, Inc. v Hummer Winblad Venture Partners (In re Napster, Inc. Copyright Litig.) (2006, ND Cal) 2006-1 CCH Trade Cases P 75205).

#### 170. Plaintiff

Fine of $ 100 imposed on bar examinee after being held in criminal contempt was proper where examinee, in action brought against bar association for discriminatory failure of exam, disregarded court's repeated warnings and continued to fail to obey discovery orders to submit to deposition and to produce taped conversation between defendant and former member of Committee on Bar Admissions. Jones v Louisiana State Bar Asso. (1979, CA5 La) 602 F2d 94, 28 FR Serv 2d 162.

Corporation is found to be in both civil and criminal contempt for failing to obey discovery order despite conclusion of criminal case, because criminal and civil cases involving alleged bribery of corporation's officials are so intertwined that criminal case is not truly abated; further, corporation still has opportunity to purge itself of contempt, and compensatory relief is to be remedy, and thus corporation is ordered to pay all costs of contempt proceedings and comply with discovery order or face dismissal of its civil action. United States v Crawford Enterprises, Inc. (1986, SD Tex) 643 F Supp 370, 5 FR Serv 3d 922.

Criminal contempt sanction was recommended for plaintiffs' willful and blatant violation of discovery orders where plaintiffs served additional responses instead of responding to discovery

orders, finally produced documents in numerous installments many months after date for compliance specified in orders, several copies of several documents were not produced because they were deliberately withheld by plaintiffs' counsel in violation of court's orders, in memorandum in opposition to motion seeking compliance with court's order plaintiffs reargued point which had already been specifically overruled, and plaintiffs invoked Rule 33 in further response to interrogatories after it had made no previous objection based on burdensomeness and also improperly invoked it by failing to specify records from which answers could be derived; criminal contempt was recommended also as only sanction available since parties had since reached settlement. Blake Associates, Inc. v Omni Spectra, Inc. (1988, DC Mass) 118 FRD 283, 9 FR Serv 3d 1346.

Patent infringement defendant was not entitled to contempt order and sanctions for plaintiff's expert's alleged failure to testify as to scope of each of claims of patent in suit since deposition notice as to this item could be construed to mean that only criteria employed by plaintiff to determine scope of each patent infringement claim would be inquired into rather than full scope of those claims. Sunbeam Corp. v Black & Decker (U.S.) (1993, DC RI) 151 FRD 11.

Defendants, city and individual, failed to establish that plaintiff and his counsel should have been held in contempt and sanctioned for that contempt, under Fed. R. Civ. P. 16(f) and *37(b)(2)(A)(ii)*-(vii), because confidentiality order fell far short of being clear and unambiguous because confidentiality order was at best sloppily written and could have been read to exclude from protection against disclosure any information available to public regardless of manner in which it became public, and defendants' evidence of noncompliance fell far short of being clear and convincing. Brown v City of Syracuse (2009, ND NY) 623 F Supp 2d 272.

Unpublished Opinions

Unpublished: Pursuant to *Fed. R. Civ. P. 37(b)(2)(A)(vii)*, court found plaintiff in contempt of court because he failed to fully comply with court's order directing him to respond to third-party defendant's discovery requests regarding plaintiff's income and assets; third-party defendant was also entitled to recover reasonable expenses pursuant to R. 37(b)(2)(C). Reiswerg v Great Am. Ins. Co. (2009, SD Ind) 2009 US Dist LEXIS 79588, motion to strike den (2009, SD Ind) 2009 US Dist LEXIS 81927.

Unpublished: Court ordered plaintiff to answer interrogatory that defendants drafted and plaintiff had not shown that his failure to do so was substantially justified; accordingly, defendants' motion for contempt was granted because plaintiff was found in contempt of court's discovery order, and sanctions were appropriate; however, plaintiff was not required to pay defendants' expenses in connection with their underlying motion to compel. Bourne v Arruda (2012, DC NH) 2012 US Dist LEXIS 97987, motion to strike den, costs/fees proceeding, motion gr, request den (2012, DC NH) 2012 US Dist LEXIS 110089.

**171. Defendant**

Where defendant-railroad fails to produce reports and statements of witnesses relative to train-crossing accident as directed by court to do, defendant-railroad is in criminal, not civil,

contempt. Southern R. Co. v Lanham (1968, CA5 Ga) 403 F2d 119, 12 FR Serv 2d 860, 33 ALR3d 427, reh den (1969, CA5 Ga) 408 F2d 348; Lichtenstein v Lichtenstein (1970, CA3 Pa) 425 F2d 1111.

Where defendant refused to comply with discovery order directing him to either answer certain interrogatories or afford Secretary of Labor opportunity to examine payroll records, he was held in contempt under order to pay $ 100 for each day of continued noncompliance with court subsequently ordering accrued sum of $ 3,800 paid, and in addition imposing incarceration for continuing noncompliance. Hodgson v Mahoney (1972, CA1 Mass) 460 F2d 326, 16 FR Serv 2d 306, cert den *(1972) 409 US 1039, 34 L Ed 2d 488, 93 S Ct 519.*

Contempt citation against U.S. corporation for failure to produce documents located in its Canadian offices due to obstruction by Canadian authorities is not justified where lack of good faith by corporation was not shown in record and balancing test therefore was not satisfied. In re Westinghouse Electric Corp. Uranium Contracts Litigation (1977, CA10 Utah) 563 F2d 992, 1977-2 CCH Trade Cases P 61724, 24 FR Serv 2d 477.

District Court order holding U.S. Attorney General in civil contempt for refusing to release files disclosing names of allegedly confidential informants was abuse of discretion for District Court failed to consider reasonable alternative sanctions to contempt under Rule 37(b)(2). Re Atty. Gen. In re Attorney Gen. of United States (1979, CA2 NY) 596 F2d 58, 27 FR Serv 2d 207, cert den *(1979) 444 US 903, 62 L Ed 2d 141, 100 S Ct 217, 28 FR Serv 2d 98* and (criticized in In re Kessler (1996, App DC) 321 US App DC 401, 100 F3d 1015, 36 FR Serv 3d 636).

Contempt order assessing $ 500 per diem sanction until defendant produced documents during pretrial discovery was appropriate but that portion prior to show cause hearing would be vacated since defendant was not given notice that proceeding was criminal one. Lamar Financial Corp. v Adams (1990, CA5 Tex) 918 F2d 564, 18 FR Serv 3d 1095.

China's laws limiting disclosure could not excuse Chinese corporation's failure to comply with District Court's discovery orders, and District Court acted within its discretion in holding corporation in civil contempt where corporation did not make good faith effort to clarify Chinese law or seek waiver of secrecy statutes before refusing to comply with District Court's order. Richmark Corp. v Timber Falling Consultants (1992, CA9 Or) 959 F2d 1468, 92 CDOS 2662, 92 Daily Journal DAR 4234, 22 FR Serv 3d 703, cert dismd *(1992) 506 US 948, 121 L Ed 2d 325, 113 S Ct 454.*

Contempt order rather than default judgment would be appropriate in case to revoke naturalization where defendant refuses order to answer questions on basis of self-incrimination, since effect of default judgment will be to summarily deprive defendant of citizenship without providing him opportunity to open default upon offer to answer. United States v Costello (1954, DC NY) 16 FRD 428, affd (1955, CA2 NY) 222 F2d 656, cert den *(1955) 350 US 847, 100 L Ed 755, 76 S Ct 62.*

Motion to have defendant held in contempt for failing to comply with court order directing it to serve answers to plaintiff's interrogatories would be denied on ground that contempt citation

would be useless act, where defendant could not be served with execution because he had moved and his whereabouts were unknown. United States v Earl Phillips Coal Co. (1975, ED Tenn) 66 FRD 101, 20 FR Serv 2d 722.

Considering that, in failing to comply with discovery order, defendant acted willfully and deliberately for purpose of achieving unfair and prohibited advantage in course of discovery, his conduct caused parties and their counsel to devote significant amounts of unnecessary time and resources to obtain appropriate redress, and its conduct resulted in immense and completely unnecessary burden on time and other resources of court, thus impeding devotion of such resources to adjudication of meritorious claims of other litigants, court would, as sanction under Rule 37, adjudge defendant in contempt of court and order to pay $ 10,000 into registry of court. Xaphes v Merrill Lynch, Pierce, Fenner & Smith, Inc. (1984, DC Me) 102 FRD 545, CCH Fed Secur L Rep P 91545, 39 FR Serv 2d 547.

Tax avoidance consultant was adjudged in civil contempt for failure to comply with preliminary injunction that required him to send letter to certain people regarding fraudulent tax advice and to produce copies of such letter to government, and for failure to comply with discovery order; consultant had knowledge of both orders, as demonstrated by fact that he filed motions to stay and/or suspend both orders pending appeal, and consultant admitted that he had not produced to government any documentation required by both orders. United States v Bell (2003, MD Pa) 92 AFTR 2d 6473.

Where defendants failed to substantially comply with discovery order to provide documents material to plaintiffs' fraudulent transfer claim, in addition to precluding defendants from defending against fraudulent transfer claim, court awarded plaintiffs civil contempt sanction in amount of attorney's fees requested. In re Heritage Bond Litig. (2004, CD Cal) 223 FRD 527 (criticized in UMG Recordings, Inc. v Hummer Winblad Venture Partners (In re Napster, Inc. Copyright Litig.) (2006, ND Cal) 2006-1 CCH Trade Cases P 75205).

Debtor was held in civil confinement for his contempt of discovery order because there was clear and convincing evidence that, when he appeared for court-ordered depositions, he intentionally gave evasive and incomplete testimony regarding his source of financial support, his knowledge of his wife's finances and employment, and existence and whereabouts of documents and his self-servicing, consistent unresponsiveness to post-judgment discovery prejudiced creditors who were deprived of collecting judgment and forced to pay costs for 12 years. Andrews v Holloway (2009, DC NJ) 256 FRD 136.

**172. Attorney**

Attorney may properly be held in contempt for causing noncompliance with court order requiring answers to written interrogatories. Edgar v Slaughter (1977, CA8 Mo) 548 F2d 770, 22 FR Serv 2d 1448.

Attorney may properly be cited for contempt where he refuses to comply with oral court order to submit narrative statement of direct testimony of each prospective witness he intends to call at trial. *Chapman v Pacific Tel. & Tel. Co. (1979, CA9 Cal) 613 F2d 193, 63 ALR Fed 869.*

District Court did not abuse its discretion by holding defendant and defendant's attorneys in contempt and in assessing monetary sanction pursuant to Rule 37 where defendants and defendants' attorneys consistently failed to comply with District Court's discovery orders by failing to produce documents, failing to produce persons for depositions, and preventing various key deponents from responding to legitimate questions during depositions; and defendants argument that they did not own or control documents in question were unconvincing where testimony showed that defendants' attorneys were being paid by rightful owners of documents, that defendants' attorneys already exercised control over documents by removing them from plant where they were stored, and that defendants' attorneys were able to immediately produce documents after order of contempt was entered. Pesaplastic, C.A. v Cincinnati Milacron Co. (1986, CA11 Fla) 799 F2d 1510, 5 FR Serv 3d 1291.

Although it was proper for court to invoke its inherent powers to sanction attorney for judgment debtor for his evasiveness and intransigence in disobeying three separate orders to turn over client's financial records, court abused its discretion in ordering attorney to produce his personal tax returns and schedules and holding him in contempt for failure to do so since judgment creditors had never included attorney's tax returns in their discovery requests, no evidence came to light at sanction hearing that proved particular usefulness of them to indicate client's financial position, and attorney could not have anticipated that his conduct would result in such sanction. Natural Gas Pipeline Co. v Energy Gathering (1993, CA5 Tex) 2 F3d 1397, 26 FR Serv 3d 1312, reh den (1993, CA5 Tex) 1993 US App LEXIS 29013 and cert den *(1994) 510 US 1073, 127 L Ed 2d 77, 114 S Ct 882.*

In civil rights claim arising out of shoplifting charge against plaintiff, plaintiff's counsel was subject to sanctions for violating court's deposition guidelines by repeatedly answering questions for plaintiff and for instructing plaintiff not to answer questions without specifying privilege objection; despite defendants' motion for dismissal of plaintiff's complaint, fining plaintiff's counsel for civil contempt and ordering him to pay defendants' reasonable expenses of conducting deposition were sufficient to deter counsel from similar behavior and avoid any further prejudice to defendants. Jones v J.C. Penney's Dep't Stores, Inc. (2005, WD NY) 228 FRD 190.

Bankruptcy court may punish civil contempt; creditor's lack of diligence and complete failure to comply without explanation to former court order was evidence of willfulness and court would not tolerate such refusal to obey court's order by member of bar. In re Fulghum Constr. Corp. (1982, BC MD Tenn) 20 BR 925.

**173. --Notice of sanction or lack thereof**

Order holding party's attorney in contempt for violating discovery order was in violation of attorney's due process rights where attorney did not have notice that he might be held in contempt and was not even permitted to speak at hearing. Schoenberg v Shapolsky Publishers (1992, CA2 NY) 971 F2d 926, 23 USPQ2d 1831, 23 FR Serv 3d 986, 119 ALR Fed 723, on remand, dismd on other grounds, motion den (1996, SD NY) 916 F Supp 333, 38 USPQ2d 1856 and (ovrld on other grounds as stated in Firoozye v Earthlink Network (2001, ND Cal) 153 F Supp 2d 1115) and (ovrld on other grounds as stated in Hartman v Bago Luma Collections, Inc. (2004, WD Tex) 2004 US Dist LEXIS 2725).

District court did not abuse its discretion in fining attorney for contempt of court for his role in defendant president's failure to appear for his deposition although it only notified him that he faced possible sanctions pursuant to Rule 37(b) and did not notify him he could be sanctioned for contempt of court, since he was fully apprised of court's sanction authority under Rule 37(b) which explicitly permits district court to issue contempt order. Fonar Corp. v Magnetic Resonance Plus (1997, CA2 NY) 128 F3d 99, 44 USPQ2d 1530, 38 FR Serv 3d 1184.

### 174. Miscellaneous

Commitment for contempt of court of party failing to comply with order of federal district court for physical examination made under authority of Rule 35 is reversible error, in view of express exception of such order in provision of Rule 37(b)(2). Sibbach v Wilson & Co. (1941) 312 US 1, 85 L Ed 479, 61 S Ct 422, reh den *(1941) 312 US 713, 85 L Ed 1144.*

Court would not hold party in contempt of sanction under Rule 37 for failure to comply with discovery order when, according to counsel, party was not aware of action or inaction of its counsel. Brown v United States Elevator Corp. (1984, DC Dist Col) 102 FRD 526.

Unpublished Opinions

Unpublished: Although purchasers did not dispute that they complied with bankruptcy court's underlying orders and purged their contempt, even where party had purged its contempt, contempt order continued to be live controversy if that party remained liable for sanctions imposed under order; purchasers' failure to appeal underlying discovery orders and their production of propounded discovery did not render second and third appeals moot because they remained liable for *Fed. R. Civ. P. 37* sanctions issued by bankruptcy court to penalize their noncompliance; therefore, appellate court retained jurisdiction over live controversy. Kismet Acquisition, LLC v Icenhower (2009, SD Cal) 2009 US Dist LEXIS 73102.

Unpublished: Court had authority pursuant to *Fed. R. Civ. P. 37(b)*, upon finding party in contempt, to stay further proceedings until order was obeyed, and for good cause, court may modify pretrial schedule, pursuant to Fed. R. Civ. P. 16; court found good cause to modify pretrial schedule, pursuant to Fed. R. Civ. P. 16(b)(4), because of delays engendered by discovery disputes, and court ordered that trial be continued and that certain deadlines be extended. Bourne v Arruda (2012, DC NH) 2012 US Dist LEXIS 97987, motion to strike den, costs/fees proceeding, motion gr, request den (2012, DC NH) 2012 US Dist LEXIS 110089.

### 3. Default Judgment

### 175. Generally

Court may properly enter default judgment under circumstances where party fails to produce documents as ordered. Norman v Young (1970, CA10 Utah) 422 F2d 470, CCH Fed Secur L Rep P 92633, 13 FR Serv 2d 1004.

No requirement exists as to production of evidence to sustain default judgment entered pursuant to Rule 37(b)(2). Norman v Young (1970, CA10 Utah) 422 F2d 470, CCH Fed Secur L Rep P 92633, 13 FR Serv 2d 1004.

In order to promote disposition of cases on merits, to protect parties and attorneys from possible misuses of inherent power, and to preserve its effectiveness, district court may use its inherent power to enter default judgment only if it finds, first by clear and convincing evidence--preponderance is insufficient--that abusive behavior occurred, and second that lesser sanction would not sufficiently punish and deter abusive conduct while allowing full and fair trial on merits. Shepherd v ABC (1995, App DC) 314 US App DC 137, 62 F3d 1469, 32 FR Serv 3d 688 (criticized in In re Silberkraus (2000, BC CD Cal) 253 BR 890, 36 BCD 233, 47 FR Serv 3d 1368).

Default judgment, which is most severe in spectrum of sanctions provided by statute or rule, must be available to District Court in appropriate cases, not merely to penalize those whose conduct may be deemed to warrant such sanction, but also to deter those who might be tempted to such conduct in absence of such deterrent. Re Uranium Antitrust Litigation (1979, ND Ill) 473 F Supp 382, 1979-1 CCH Trade Cases P 62657, 26 FR Serv 2d 847, remanded on other grounds (1980, CA7 Ill) 617 F2d 1248, 1980-1 CCH Trade Cases P 63183,28 FR Serv 2d 1263 (disagreed with by Industrial Invest. Dev. Corp. v Mitsui & Co. (1982, CA5 Tex) 671 F2d 876, 1982-1 CCH Trade Cases P 64660).

Total noncompliance with discovery rules justifies default judgment. In re Arthur Treacher's Franchisee Litigation (1981, ED Pa) 92 FRD 429, 33 FR Serv 2d 227.

In determining whether default is appropriate sanction under Rule 37 for failure to provide discovery court must consider unsuitability of any other remedy, intransigence of defendants and absence of any excuse. Bryant v Marianna (1982, ND Fla) 532 F Supp 133, 33 FR Serv 2d 896.

In deciding whether to impose default judgment as *FRCP 37(b)* sanction, factors that court must weigh are extent of party's personal responsibility, prejudice to adversary caused by failure to meet scheduling orders and respond to discovery, history of dilatoriness, whether conduct of party or attorney was willful or in bad faith, effectiveness of sanctions other than default, and meritoriousness of claim or defense. Clarke v Whitney (1996, ED Pa) 169 FRD 623, 6 AD Cas 411, 133 CCH LC P 58202, 37 FR Serv 3d 301, judgment entered (1997, ED Pa) 975 F Supp 754, 7 AD Cas 273.

Default judgment should not be entered unless plaintiff's claim is legally sufficient. McCoy v Johnson (1997, ND Ga) 176 FRD 676.

Criteria that must be met when court awards default judgment as sanction pursuant to *Fed. R. Civ. P. 37* are: (1) discovery violation by penalized party must be willful; and (2) lesser sanction would not achieve desired deterrent effect. Sprouse v Rebel Log Homes (In re Sprouse) (2008, BC ND Miss) 391 BR 367.

Rule 37(b)(2), (c) specifically authorizes trial court to render default judgment against disobedient party; it undermines even-handed fairness under discovery rules to hold that trial court may enter default judgment against recalcitrant defendant, thereby finally disposing of his liability defense, yet may not dismiss with prejudice action of plaintiff who refuses to permit discovery, leaving him to refile action and avoid discovery order. Bottinelli v Robinson (1979, Tex Civ App Houston (1st Dist)) 594 SW2d 112.

Unpublished Opinions

Unpublished: Judgment creditor was entitled to judgment on issue of non-dischargeability of individual debt because debtor was collaterally estopped from litigating fraud issue that had been raised in federal district court that resulted in default judgment against debtor as sanction for debtor's obstruction of proceedings, pursuant to Fed. R . Civ. P. 37. Melnor, Inc. v Corey (In re Corey) (2007, BC DC Kan) 2007 Bankr LEXIS 4285.

**176. Constitutional considerations**

No violation of due process or equal protection clauses of Constitution occurs when defendant has suppressed or failed to produce relevant evidence in his possession which he has been ordered to produce, thereby giving rise to presumption as to bad faith and untruth of his answer, justifying striking it from record and rendering judgment as though by default. Hammond Packing Co. v Arkansas (1909) 212 US 322, 53 L Ed 530, 29 S Ct 370.

Due process requires that most severe sanction of default be imposed against United States only if failure to comply is due to willfulness, bad faith, or fault, and not to inability to comply. In re Attorney Gen. of United States (1979, CA2 NY) 596 F2d 58, 27 FR Serv 2d 207, cert den *(1979) 444 US 903, 62 L Ed 2d 141, 100 S Ct 217, 28 FR Serv 2d 98* and (criticized in In re Kessler (1996, App DC) 321 US App DC 401, 100 F3d 1015, 36 FR Serv 3d 636).

**177. Attorney's conduct**

Entry of default judgment is appropriate where conduct of counsel consisted of series of episodes of nonfeasance which amounted to near total dereliction of professional responsibility well beyond ordinary negligence. Affanato v Merrill Bros. (1977, CA1 Mass) 547 F2d 138, 22 FR Serv 2d 1451.

Default judgment for failure to provide discovery, to appear for noticed depositions, and to obey court order to appear for depositions, file pretrial memorandum and pay sanctions, would be reversed and remanded for findings on whether defendants' conduct met appropriate standard where defendants, based in New York, argued that their attorney, based in Wyoming and hired by their New York counsel, rather than they, personally were at fault. M.E.N. Co. v Control Fluidics, Inc. (1987, CA10 Wyo) 834 F2d 869, 10 FR Serv 3d 60.

Default judgment was properly entered against defendant for flagrant disregard of discovery requests and court's orders, notwithstanding party's contention that failure was sole fault of its prior counsel; party is responsible for its counsel's conduct. Comiskey v JFTJ Corp. (1993, CA8 Mo) 989 F2d 1007, 25 FR Serv 3d 761, reh den (1993, CA8) 1993 US App LEXIS 10329.

Sanctions, including entry of default judgment and monetary fine, were imposed against defendants and their counsel for deliberate failure to produce discoverable statements made by witnesses day after accident in issue. Heath v F/V Zolotoi (2004, WD Wash) 221 FRD 545.

**178. Deception**

Pursuant to Rule 37(b)(2), District Court could have entered default judgment against party which suddenly and inexplicably described documents whose production was sought as

nonexistent, after having steadfastly resisted production on grounds of irrelevancy, burdensomeness, and confidentiality, since party's change in position gave rise to permissible adverse inference that long sought documents had been destroyed or that party had otherwise flagrantly misled court or disregarded its orders. Brockton Sav. Bank v Peat, Marwick, Mitchell & Co. (1985, CA1 Mass) 771 F2d 5, 2 FR Serv 3d 1126, cert den *(1986) 475 US 1018, 89 L Ed 2d 317, 106 S Ct 1204.*

Plaintiffs' motion for entry of judgment in their favor and setting of damages for determination by jury will be granted, where defendant, after lapse of more than one year from time plaintiffs filed interrogatories directed to defendant's employee, first asserts that such employee had retired before interrogatories were filed with no explanation given for defendant's failure to raise matter sooner, so that defendant's conduct amounts to deception of court and materially hampers plaintiffs' counsel in preparation of their cases. Shepard v General Motors Corp. (1967, DC NH) 42 FRD 425, 13 FR Serv 2d 1009, later op (CA1 NH) 423 F2d 406.

**179. Delay and dilatory actions**

Where party files interrogatories requesting information necessary to determine unpaid compensation owed but answers given are unresponsive and court orders more complete replies, and where adverse party refuses to comply, default judgment against unresponsive party on basis of failure to sufficiently answer and of dilatory and contumacious conduct will be sustained. Michigan Window Cleaning Co. v Martino (1949, CA6 Mich) 173 F2d 466, 16 CCH LC P 65039.

Entry of default judgment against defendants was not abuse of discretion despite fact that lesser sanctions had not been first tried unsuccessfully where defendants' refusal to comply with discovery orders clearly constituted contumacious conduct which caused 10 months' delay seriously prejudicing plaintiff's trial preparations. United States v Di Mucci (1989, CA7 Ill) 879 F2d 1488, 14 FR Serv 3d 175.

District court did not abuse its discretion when it concluded that claimants' dilatory actions demonstrated by their lengthy delays and their obstructive behavior as exemplified by their evasive and incomplete responses constituted bad faith; therefore, district court was well within its discretion in awarding default judgment as sanction, under *Fed. R. Civ. P. 37*. United States v 49,000 Currency (2003, CA5 Tex) 330 F3d 371, 55 FR Serv 3d 369.

In patent infringement suits joined for multi-district litigation, harsh sanctions of default judgment and dismissal were not warranted under *Fed. R. Civ. P. 37(b)(2)(A)(v)*, (vi), even though plaintiff patent owner failed to comply with several discovery orders, because patent owner met document production deadline, which was extended due to transfer to multi-district litigation, resulting stay, and court's orders, all of which delayed discovery process. In re Papst Licensing GMBH & Co. Kg Litig. (2008, DC Dist Col) 252 FRD 7.

Unpublished Opinions

Unpublished: Under *Fed. R. Civ. P. 37(b)(2)(A)*, court properly imposed sanction of default judgment against defendant because, in part, he repeatedly failed to respond to interrogatories

and produce documents, in violation of district court's orders, and period of noncompliance delayed progress in case for more than two years. Robertson v Dowbenko (2011, CA2 NY) 2011 US App LEXIS 22413.

### 180. Destruction or spoliation of evidence

Default judgment against employer for destruction of personnel documents concerning race discrimination plaintiff and his claims contrary to retention regulations was too harsh in absence of adequate explanation of prejudice to plaintiff and why no other sanction would adequately deter employer from committing similar misconduct in future. Webb v District of Columbia (1998, App DC) 331 US App DC 23, 146 F3d 964, 73 CCH EPD P 45480, 41 FR Serv 3d 120.

Drastic remedy of default judgment is inappropriate as sanction under Rule 37(b)(2) in Title VII employment discrimination action where (1) defendant destroyed evidence relating to relatively small part of litigation, and (2) large numbers of innocent nonparticipants would be directly affected by such judgment. United States v Nassau County (1979, ED NY) 28 FR Serv 2d 165.

### 181. Financial inability

District Court acted within its discretion in entering default judgment against defendant who twice disobeyed explicit court orders to appear for his deposition; defendant's claim that failure to comply with discovery orders resulted from ignorance of proceedings and lack of funds to travel to site of deposition was not plausible, where defendant was notified of hearing on motion to compel and telephoned magistrate only minutes after conclusion of hearing, and defendant owned or operated several businesses. Technical Chemical Co. v IG-LO Products Corp. (1987, CA5 Tex) 812 F2d 222, 1987-1 CCH Trade Cases P 67488, 7 FR Serv 3d 58.

Default judgment for failure to timely file pretrial statement would not be entered where pro se litigants claimed they lacked sufficient funds to hire attorney but court was unable to find that they were insolvent and would suggest they contact lawyer referral service. Peden v Brinker (1990, WD Pa) 132 FRD 31.

Default judgment would be entered where defendant had failed to comply with various discovery orders and order to provide representative with settlement authority at mandatory settlement conference; defendant's claim that it could not participate in action and that it had no assets was insufficient to avoid default. Kiely v Shores Group (1995, DC Kan) 160 FRD 159.

### 182. Inaction

Pursuant to Rule 37(b), trial court properly rendered judgment adverse to defendant in interpleader action, given her repeated, unexplained failures to appear for depositions. Bell & Beckwith v United States, IRS (1985, CA6 Ohio) 766 F2d 910, 85-2 USTC P 9813, 2 FR Serv 3d 96, 56 AFTR 2d 6232 (criticized in CPS Elec., Ltd. v United States (2001, ND NY) 166 F Supp 2d 727, 2001-2 USTC P 50610, 88 AFTR 2d 5747).

Default judgment on liability against corporation was warranted for its repeated failure to appear at scheduled depositions and continuing refusal to comply with court-ordered production of

documents. Adriana Int'l Corp. v Thoeren (1990, CA9 Cal) 913 F2d 1406, 17 FR Serv 3d 1006, motion den, cert den *(1991) 498 US 1109, 112 L Ed 2d 1100, 111 S Ct 1019* and (criticized in Anheuser-Busch, Inc. v Natural Beverage Distribs. (1995, CA9 Cal) 69 F3d 337, 95 CDOS 8383, 95 Daily Journal DAR 14487, 33 FR Serv 3d 266).

It was not abuse of discretion to grant unopposed motion for default judgment seven months after entry of discovery order and six months after circuit court's denial of request for mandamus where defendants received fair opportunity to contest allegations of discovery failures and chose not to do so. IBEW, Local Union No. 545 v Hope Elec. Corp. (2004, CA8 Mo) 380 F3d 1084, 175 BNA LRRM 2641, 150 CCH LC P 10381, reh den, reh, en banc, den (2004, CA8) 2004 US App LEXIS 21434 and (criticized in Barrington v Lockheed Martin (2006, MD Fla) 2006 US Dist LEXIS 1448).

Default sanction pursuant to *Fed. R. Civ. P. 37* as to veil piercing claim by plaintiff that was imposed on defendants based on discovery violations was vacated because sanction was based on single instance of misconduct for which there were significant and legitimate mitigating excuses, and district court did not make sufficient factual findings to support sanction. Companion Health Servs. v Kurtz (2012, CA1 Mass) 675 F3d 75.

Failure of defendant to contact its counsel over six-month period to furnish information required by plaintiff's interrogatories justifies default judgment against defendant. *R. De Bouard & Cie. v S.S. Ionic Coast (1969, DC Tex) 46 FRD 1.*

Motion for default judgment was granted where deadline for response by defendants to discovery order had passed, and no such response had been filed, and where defendant had repeatedly failed to comply with Federal Rules or orders of court, in suit by plaintiff arising out of allegedly unconstitutional sewer assessment levied by defendant. Salisbury v Watertown (1979, DC Conn) 82 FRD 403.

Default judgment pursuant to Rule 37 would be entered against 2 defendants where first defendant failed to answer or otherwise respond to claims for affirmative relief asserted against it, and second defendant repeatedly violated local rules by failing to retain new counsel to represent it, by failing to appear, personally or by a counsel, at hearing on order to show cause relating to substitution of counsel, and by failing to comply with court's order to appear for deposition. Crocker Nat'l Bank v M.F. Sec. (Bahamas), Ltd. (1985, CD Cal) 104 FRD 123.

Plaintiff surety is entitled to default judgment as sanction under Rule 37(b)(2) where defendants failed to timely answer complaint, ignored interrogatories and request for production of documents, and failed to comply with court order directing defendants to answer and respond to discovery or face entry of judgment against them without trial. Buckeye Union Ins. Co. v Boggs (1986, SD W Va) 109 FRD 420.

Defendant's affirmative defenses would be stricken, default judgment would be entered against him, and monetary sanctions against his attorney would be imposed for failure to comply with discovery orders where numerous orders to compel discovery had been ignored and warnings of sanctions had been given. *Marshall v F.W. Woolworth, Inc. (1988, DC Puerto Rico) 122 FRD 117.*

**183. Negligence**

Pregnancy discrimination plaintiff's failure to pay court-ordered sanction for her discovery abuses and absence of any excuse for her unreasonable behavior, although more egregious since she was attorney, did not warrant default judgment since it was not grossly negligence, nor dismissal, since she had not previously been specifically warned of such possibility, but instant order to pay would also serve as warning of dismissal for failure to obey. Sussman v Salem, Saxon & Nielsen, P.A. (1994, MD Fla) 154 FRD 294, 29 FR Serv 3d 529, 8 FLW Fed D 117.

Gross negligence in failing to comply with court's discovery orders may provide basis for holding noncompliant party in default. American Cash Card Corp. v AT&T Corp. (1999, SD NY) 184 FRD 521, 43 FR Serv 3d 412, affd (2000, CA2 NY) *210 F3d 354,* reported in full (2000, CA2 NY) 2000 US App LEXIS 6318.

Given late hour of "implied license" defense and fact that they had to pay for reopened discovery, it was highly unlikely that defendants realized that additional material in 199-page business plan could have endangered that defense, and then purposefully sought to suppress that information for three years in advance in order to assure success of that late defense; instead, all evidence pointed to fact that defendants only thought of "implied license" defense at last minute and, having already produced business plan, were negligent in not providing later iteration despite their continuing duty to produce it; thus, plaintiff had not introduced kind of "clear and convincing evidence" required for default judgment. Atkins v Fischer (2005, DC Dist Col) 232 FRD 116, 63 FR Serv 3d 682.

**184. Obstruction of discovery**

Severe sanction of default judgment was justified by defendants' repeated and inexcusable obstruction of every type of discovery attempted by plaintiffs. Wanderer v Johnston (1990, CA9 Cal) 910 F2d 652, 17 FR Serv 3d 678 (criticized in Anheuser-Busch, Inc. v Natural Beverage Distribs. (1995, CA9 Cal) 69 F3d 337, 95 CDOS 8383, 95 Daily Journal DAR 14487, 33 FR Serv 3d 266).

District Court's decision to strike pleadings and enter default judgment against party was not abuse of discretion; if anything, remedy was tardily applied, where party engaged in repeated, obstructive discovery tactics which had earlier resulted in court placing party's entities in receivership so as to preserve those business records, and as receiver became increasingly involved became convinced that there had been willful document destruction and alteration after beginning of suit and that party had engaged in further obstructive tactics during receiver's 10 year period. Frame v S-H, Inc. (1992, CA5 Tex) 967 F2d 194, 23 FR Serv 3d 280.

District court did not abuse its discretion when it concluded that claimants' dilatory actions demonstrated by their lengthy delays and their obstructive behavior as exemplified by their evasive and incomplete responses constituted bad faith; therefore, district court was well within its discretion in awarding default judgment as sanction, under *Fed. R. Civ. P. 37*. United States v 49,000 Currency (2003, CA5 Tex) 330 F3d 371, 55 FR Serv 3d 369.

In action in which Securities and Exchange Commission was granted order freezing assets of defendant and two nonparties appealed from judgment of contempt of district court for failing to comply with order, district court did not err in defaulting nonparty and in ordering turnover of its assets where (1) it was clear that nonparty, through its officers, directors and shareholders, intentionally and willfully refused to comply with district court's discovery orders; and (2) without compliance with its deposition subpoenas, receiver was denied ability to conduct crucial discovery that went to heart of receiver's petition for appointment as receiver of nonparty. SEC v Homa (2008, CA7 Ill) 514 F3d 661.

Default judgment against municipality and its mayor (defendants) was proper, where district court did not abuse its discretion by entering judgment in response to defendants' repeated failures to respond to discovery; district court's choice of sanctions as well as sternness of its warnings gradually escalated over course of litigation in response to defendants' persistently troublesome conduct. Remexcel Managerial Consultants, Inc. v Arlequin (2009, CA1 Puerto Rico) 583 F3d 45, 158 CCH LC P 60881.

District Court will approve Magistrate's recommendation that court grant default judgments against defendant, strike their counterclaims, and award attorney fees pursuant to Rule 37(b), where (1) defendants failed to provide requested discovery until after discovery cutoff date passed, (2) defendants' violations were willful and result of discovery strategy, (3) plaintiffs' case was thwarted in almost every attempt to secure basic, legitimate discovery and (4) there was no conduct on part of plaintiffs which could be held to excuse defendants' obstructionist tactics. Pauley v United Operating Co. (1985, ED Mich) 606 F Supp 520.

In company's suit accusing defendants of cybersquatting, company's motion for sanction of default judgment under *Fed. R. Civ. P. 37(b)* for one defendant's invocation of his *U.S. Const. amend. V* rights during deposition, in response to question as to how he obtained privileged communications between company and its attorney, was stayed while defendants obtained new counsel, at which time court would determine whether lesser sanctions would suffice. Eagle Hosp. Physicians, LLC v SRG Consulting, Inc. (2007, ND Ga) 509 F Supp 2d 1337, amd (2007, ND Ga) 2007 US Dist LEXIS 46649.

Unpublished Opinions

Unpublished: Entry of default judgment as sanction under *Fed. R. Civ. P. 37* was affirmed because defendant's willful bad faith in thwarting discovery was not contested, insurance companies were prejudiced because they never received requested information and wasted considerable time and money, and defendant received more than adequate warning about possibility of default judgment. Grange Mut. Cas. Co. v Mack (2008, CA6 Ky) 2008 FED App 152N.

**185. Prejudice or lack thereof**

Entry of default judgment on defendants' counterclaim under Rule 37(b)(2) for plaintiff's failure to answer certain interrogatories as ordered by court was improper, where plaintiff had not willfully or in bad faith failed to timely answer interrogatories and defendants never indicated

how plaintiff's delay in answering interrogatories prejudiced preparation of counterclaim. Edgar v Slaughter (1977, CA8 Mo) 548 F2d 770, 22 FR Serv 2d 1448.

It would be unjust to impose partial default judgment on defendant motorcycle distributor in personal injury action where distributor's single willful violation was its failure to supplement response to interrogatory concerning potential witnesses, and nothing in record suggests that such failure adversely affected plaintiffs' ability to establish that motorcycle's lack of conspicuity caused or contributed to accident, or that delay helped to conceal information tending to show invalidity of one or more of distributor's possible defenses. Fjelstad v American Honda Motor Co. (1985, CA9 Mont) 762 F2d 1334, 2 FR Serv 3d 196.

District Court did not err in entering default judgment in excess of $ 8 million against defendants for noncompliance with discovery orders, since bad faith findings were clearly supported by evidence, plaintiff suffered great prejudice because it could not prove its case without discovery materials, and some alternative sanctions had been imposed and others considered. Mutual Federal Sav. & Loan Ass'n v Richards & Assoc., Inc. (1989, CA4 Va) 872 F2d 88, 13 FR Serv 3d 917.

Trial court abused its discretion in entering default judgment as sanction for violation of order regarding discovery schedule where it gave no specific order to compel discovery but had only issued general scheduling orders, had not given defendant advance notice of possibility of default judgment for noncompliance with order, and prejudice to plaintiffs was somewhat limited since they possessed at least some knowledge of allegedly discoverable materials defendant had failed to produce. Hathcock v Navistar Int'l Transp. Corp. (1995, CA4 SC) 53 F3d 36, 31 FR Serv 3d 1212.

Nondisclosure of business plan was negligent, not intentional and did not substantially prejudice copyright infringement plaintiff, graphic designer suing over use of her packaging designs, so her requested sanction of default judgment was not warranted under *Fed. R. Civ. P. 11*, *Fed. R. Civ. P. 26*, or *Fed. R. Civ. P. 37*, 28 USCS § 1927, or court's inherent powers; however, designer's ultimate lack of prejudice, did not excuse defendants' negligent lack of production, so court imposed fine for which defendants and their former counsel were jointly and severally liable. Atkins v Fischer (2005, DC Dist Col) 232 FRD 116, 63 FR Serv 3d 682.

**186. Privileged and confidential matters**

Rendering of default judgment against defendant in case involving transactions in counterfeit rare stamps is proper where defendant refuses to produce records of such transactions; excuse for defendant's failure as being based on violation of right against self-incrimination is unavailing where government already possesses such documents as result of independent mail fraud prosecution. Henry v Sneiders (1974, CA9 Wash) 490 F2d 315, 18 FR Serv 2d 351, cert den *(1974) 419 US 832, 42 L Ed 2d 57, 95 S Ct 55,* reh den (1974) 419 US 1060, 42 L Ed 2d 657, 95 S Ct 644.

Court erred in entering default judgment against two individual defendants who invoked Fifth Amendment privilege against self-incrimination since they had not yet been sentenced on their

convictions and Fifth Amendment self-incrimination rights continue in force until sentencing. Bank One of Cleveland, N.A. v Abbe (1990, CA6 Ohio) 916 F2d 1067, 31 Fed Rules Evid Serv 780, 17 FR Serv 3d 1179.

Default judgment against realtor as sanction for delayed and essentially inadequate responses to discovery orders was proper; in response to 86 interrogatories, defendant asserted Fifth Amendment 71 times and lack of sufficient knowledge 14 times, produced only 8 boxes of documents after representing that 30 boxes would be produced, and did not identify which were produced pursuant to which request for production. Federal Deposit Ins. Corp. v Daily (1992, CA10 Kan) 973 F2d 1525, 23 FR Serv 3d 962.

In initiating and maintaining lawsuit, newsman has duty to conform to Rules of Procedure including disclosure of sources of information where information sought goes to heart of defendants' defense; however, court will not force disclosure of sources, but will give plaintiff choice of answering or suffering default judgment. Anderson v Nixon (1978, DC Dist Col) 444 F Supp 1195, 3 Media L R 1687, 24 FR Serv 2d 1151, later op (DC Dist Col) 3 Media L R 2050, 25 FR Serv 2d 220.

**187. Repeated violations**

District Court's imposition of default sanction under former Rule 37(b)(2)(C) was not abuse of discretion, where district judge had ordered discovery only minimally adequate to meet legitimate needs of appellees, he iterated duty of all parties to abide by court directives, and he gave appellants repeated opportunities to avoid default, and where appellants made clear that under no circumstances would they comply with discovery order. Adolph Coors Co. v Movement against Racism & Klan (1985, CA11 Ala) 777 F2d 1538, 12 Media L R 1514, 3 FR Serv 3d 573.

District Court acted within its discretion in entering default judgment against defendant who twice disobeyed explicit court orders to appear for his deposition; defendant's claim that failure to comply with discovery orders resulted from ignorance of proceedings and lack of funds to travel to site of deposition was not plausible, where defendant was notified of hearing on motion to compel and telephoned magistrate only minutes after conclusion of hearing, and defendant owned or operated several businesses. Technical Chemical Co. v IG-LO Products Corp. (1987, CA5 Tex) 812 F2d 222, 1987-1 CCH Trade Cases P 67488, 7 FR Serv 3d 58.

Sanctions of dismissal of plaintiff contractor's claims against subcontractor's surety and default judgment against plaintiff on claim and counterclaim were not abuse of discretion where there were repeated failures to comply with discovery orders concerning production of documents and depositions for no apparent reason and less harsh sanctions had not worked. Curtis T. Bedwell & Sons, Inc. v International Fidelity Ins. Co. (1988, CA3 Pa) 843 F2d 683.

Default judgment was appropriate where party produced many documents months late and only after repeated prodding, 2 sets of documents were missing under questionable circumstances, party was evasive and at times dishonest in its responses to discovery, and court had previously imposed 4 lesser sanctions and provided clear warning that default was imminent. Profile Gear Corp. v Foundry Allied Industries, Inc. (1991, CA7 Ill) 937 F2d 351, 20 FR Serv 3d 596.

Default judgment against product liability defendants was warranted for repeated, wilful refusals to obey discovery orders relating to rollover accidents, seat-belt failures, design and testing materials on vehicle in question. Malautea v Suzuki Motor Co. (1993, CA11 Ga) 987 F2d 1536, 25 FR Serv 3d 560, 7 FLW Fed C 197, cert den *(1993) 510 US 863, 126 L Ed 2d 140, 114 S Ct 181.*

District court did not abuse its discretion in granting default judgment against foundation in fund-raiser's suit against it since foundation stonewalled on discovery from inception of lawsuit, gave inconsistent answers as to why it missed discovery deadlines, and continued to miss deadlines despite warning from court that failure to comply would result in default judgment. Anderson v Foundation for Advancement, Educ. & Empl. of Am. Indians (1998, CA4 Va) 155 F3d 500, RICO Bus Disp Guide (CCH) P 9564, 41 FR Serv 3d 981.

District court did not abuse its discretion in entering default judgment for housing discrimination defendant's discovery abuses since defendant flouted even basic discovery obligations, often violated court orders, misrepresented to court that documents did not exist although they were in defendant's one-bedroom apartment, discovery abuses prejudiced plaintiff by depriving it of any meaningful opportunity to follow up on time-sensitive information or incorporate it into its litigation strategy, and court considered lesser or alternative sanctions and found them inappropriate because defendant continued to violate court orders despite multiple warnings. Fair Hous. v Combs (2002, CA9 Cal) 285 F3d 899, 2002 CDOS 3050, 2002 Daily Journal DAR 3719, 52 FR Serv 3d 76, cert den *(2002) 537 US 1018, 154 L Ed 2d 425, 123 S Ct 536.*

Default order was properly entered by district court against companies for discovery misconduct under *Fed. R. Civ. P. 37(b)* in action by musicians for violations of collective bargaining agreement because companies' failures to comply with court orders interfered with court's management of its docket and made it impossible for musicians to adequately prepare for trial. Dreith v Nu Image, Inc. (2011, CA9 Cal) 648 F3d 779, 191 BNA LRRM 2365.

Default judgment of trademark cancellation against trademark registrant was warranted since registrant continually failed to comply with orders to provide discovery without explanation over two years of requested discovery. Benedict v Super Bakery, Inc. (2011, CA FC) 665 F3d 1263, 101 USPQ2d 1089.

Sanction of default judgment is extremely harsh and is justified only in situation where party has repeatedly and in bad faith failed to comply with discovery orders. In re Anthracite Coal Antitrust Litigation (1979, MD Pa) 82 FRD 364, 1979-1 CCH Trade Cases P 62511, 27 FR Serv 2d 1079.

Entry of default against party as Rule 37 sanction is warranted when party has consistently disobeyed orders, obstructed discovery, delayed proceedings, and made misrepresentations to court, and has continued same pattern of conduct although such conduct has previously been sanctioned by court. Carlucci v Piper Aircraft Corp. (1984, SD Fla) 102 FRD 472, 38 FR Serv 2d 1654.

Default judgment was entered, as sanction, where defendants repeatedly refused to comply with magistrate judge's discovery-related orders, and refused to participate in action because

of their view that they were not subject to jurisdiction of court. United States v Moser (1996, MD Pa) 168 FRD 171, affd without op (1997, CA3 Pa) *111 F3d 128.*

Unpublished Opinions

Unpublished: Bankruptcy court did not abuse its discretion in granting trustee default judgment as terminating sanction, pursuant to *Fed. R. Civ. P. 37(b)(2)(A)*, because debtor, mother, and daughter failed to appear for examinations noticed pursuant to *Fed. R. Bankr. P. 2004*, refused to participate in *Fed. R. Civ. P. 26(f)* conference and delayed discovery for 4 months, failed to appear for examinations noticed after commencement of adversary proceeding, and failed to make themselves available for deposition. Spirtos v Neilson (In re Spirtos) (2009, CA9 Cal) 2009 US App LEXIS 2032.

Unpublished: It was not abuse of discretion to enter default to sanction disrespectful behavior under Fed. R. Civ. P. 16(f) and *37(b)(2)(A)(vi)*, as nothing suggested lesser sanction would have been adequate, defendant had already been admonished for misconduct, and court had warned him that further misconduct could result in sanctions, including default. Maus v Ennis (2013, CA11 Fla) 2013 US App LEXIS 5468.

**188. Tardy compliance**

Where one of defendants in action for breach of warranty and fraud, disregarding his doctor's advice that he remain in hospital after serious operation, travels from Munich, Germany, to New York City in response to court order that he appear for taking of his deposition, but arrives too late to prevent entry of default judgment, that default judgment will be reversed. Gill v Stolow (1957, CA2 NY) 240 F2d 669.

In action rising out of contract where plaintiff moved, pursuant to former Rule 37(b)(2)(C), for judgment by default, or order under former Rule 37(b)(2)(B) prohibiting defendant from introducing evidence at trial relating to damages alleged in counterclaim because defendant's answers to 12 of 26 interrogatories consisted wholly or partly of statements that information was being complied and would be available at later date, although defendant's answers did not comply with court order that interrogatories be answered by particular date or with requirement of Rule 34 that interrogatories be fully answered, such failure was not sufficient reason for entering default judgment or order excluding evidence in light of fact that defendant filed supplemental answers which had not been objected to by plaintiff. Lakeside Bridge & Steel Co. v Mountain State Constr. Co. (1975, ED Wis) 400 F Supp 273, 21 FR Serv 2d 74, 17 UCCRS 917.

Plaintiff surety is entitled to default judgment as sanction under Rule 37(b)(2) where defendants failed to timely answer complaint, ignored interrogatories and request for production of documents, and failed to comply with court order directing defendants to answer and respond to discovery or face entry of judgment against them without trial. Buckeye Union Ins. Co. v Boggs (1986, SD W Va) 109 FRD 420.

Although corporate defendant in suit arising out of automobile accident had intentionally disregarding scheduling deadlines and failed to cooperate in scheduling depositions prior to

plaintiff's filing motion for default judgment, default judgment would be too severe sanction at this point and would only be imposed if defendant failed to meet additional opportunity to comply. Wauchop v Domino's Pizza, Inc. (1992, ND Ind) 143 FRD 199.

Default judgment on liability issue against product liability defendant would be entered for its tardy and insufficient compliance with discovery since its excuses were highly implausible--misfiling, failure to create files, losing files, communication problems between department heads, memory problems, and claim that legal department was unaware of NHTSA investigation, which is serious matter posing possibility of product recall, bad publicity, etc. Hogue v Fruehauf Corp. (1993, CD Ill) 151 FRD 635, 28 FR Serv 3d 442.

Default judgment would not be entered against defendant store in slip-and-fall case since, although its response to discovery was tardy, it was not willful and in bad faith, and as of date of court's order, both parties had responded to each other's discovery requests. Hickman v Wal-Mart Stores (1993, MD Fla) 152 FRD 216, 7 FLW Fed D 615, affd without op (1995, CA11 Fla) *58 F3d 640.*

Pro se employment discrimination plaintiff's complaint would be dismissed for tardy compliance with discovery requests since his excuse that he was too busy was insufficient justification, he had been warned numerous times that dismissal could result, monetary sanctions were not feasible given plaintiff's numerous references to his financial hardship and ignoring of prior orders. *Martin v Metropolitan Museum of Art (1994, SD NY) 158 FRD 289.*

**189. Willfulness, bad faith or fault**

Sanction of judgment by default for failure to comply with discovery orders is most severe sanction which court may apply, and its use must be tempered by careful exercise of judicial discretion to assure that its imposition is merited; however, where one party has acted in willful and deliberate disregard of reasonable and necessary court orders and efficient administration of justice, application of even so stringent sanction is fully justified. Trans World Airlines, Inc. v Hughes (1964, CA2 NY) 332 F2d 602, 8 FR Serv 2d 37D.32, Case 1, cert dismd (1965) 380 US 248, 85 S Ct 934, 13 L Ed 2d 817, 1965 CCH Trade Cases P 71391 and cert dismd (1965) 380 US 249, 85 S Ct 934, 13 L Ed 2d 818, 1965 CCH Trade Cases P 71392.

Ultimate sanction of default under Rule 37(b)(2) cannot be administered absent some showing of willful failure to disclose. Ohio v Crofters, Inc. (1977, DC Colo) 75 FRD 12, 23 FR Serv 2d 876, affd (1978, CA10) 570 F2d 1370, 24 FR Serv 2d 1139, cert den *(1978) 439 US 833, 58 L Ed 2d 129, 99 S Ct 114.*

Entry of default judgment is appropriate for defendant's willful, deliberate, and flagrant failure to comply with discovery rules. Kozlowski v Sears, Roebuck & Co. (1978, DC Mass) 25 FR Serv 2d 1500.

Sanction of default judgment is extremely harsh and is justified only in situation where party has repeatedly and in bad faith failed to comply with discovery orders. In re Anthracite Coal Antitrust Litigation (1979, MD Pa) 82 FRD 364, 1979-1 CCH Trade Cases P 62511, 27 FR Serv 2d 1079.

*FRCP 37(b)* default judgment is appropriate for cases exhibiting flagrant bad faith and callous disregard. Winters v Textron, Inc. (1999, MD Pa) 187 FRD 518.

Only in case where court imposes most severe sanction under *Fed. R. Civ. P. 37*--default or dismissal--is finding of willfulness or bad faith failure to comply necessary. United States v Batchelor-Robjohns (2005, SD Fla) 96 AFTR 2d 6727, magistrate's recommendation, costs/fees proceeding (2006, SD Fla) 97 AFTR 2d 508.

Where court determines that counsel or party has acted willfully or in bad faith in failing to comply with discovery rules or court orders or in flagrant disregard of same, trial court has discretion per *Fed. R. Civ. P. 37* to dismiss action or to enter judgment by default against responsible party based on finding that such noncompliance was due to willfulness, fault or bad faith. Disobedient conduct not shown to be outside control of litigant is all that is required to demonstrate willfulness, bad faith, or fault; depending on circumstances, single willful violation may suffice. United States v Hempfling (2008, ED Cal) 2008-1 USTC P 50230, 101 AFTR 2d 1372.

**190. --Particular cases**

In private antitrust suit, there is no abuse of discretion in district court's default judgment award against defendant, sole owner of defendant company, for amount of $ 145,500,000, where, after 2 years of complex, elaborate maneuvering by defendant, who was privy to all business transactions between defendant company and plaintiff corporation, and whose pretrial testimony is considered essential, and who deliberately, willfully and knowingly disregards appearance for deposition, and who is aware of sanctions imposable under Rule 37(b) and (d), defendant company files "notice of position," stating it would rest on merit of its position. Trans World Airlines, Inc. v Hughes (1971, CA2 NY) 449 F2d 51, 1971 CCH Trade Cases P 73690, 15 FR Serv 2d 337, revd on other grounds (1973) 409 US 363, 93 S Ct 647, 34 L Ed 2d 577, 1973-1 CCH Trade Cases P 74295, reh den *(1973) 410 US 975, 93 S Ct 1434, 93 S Ct 1435, 35 L Ed 2d 707.*

District Court's entry of default on issue of liability was reasonable sanction for defendant's failure to comply with court order directing defendant to make employment records available, where defendant willfully refused to comply, obstinacy of defendant stretched over period of months, and District Judge demonstrated patience in extending offer, not acted upon, to consider postjudgment motion to vacate. Local Union No. 251 v Town Line Sand & Gravel, Inc. (1975, CA1 RI) 511 F2d 1198, 19 FR Serv 2d 1521.

Defendant who had avoided deposition via continuances for nearly one year, who had been given eight months to find new attorney, and who, upon court order, three years after complaint was filed, refused to give deposition after having avoided several prearranged meetings with plaintiffs' attorney, acted in such bad faith as to permit District Court to enter default judgment in its discretion. Eisler v Stritzler (1976, CA1 Puerto Rico) 535 F2d 148, 21 FR Serv 2d 1380.

District court had discretion to strike answer of principal defendant and enter default judgment against him where he had willfully refused to obey discovery order; and since principal

defendant was officer, director, or managing agent of other defendants, court also had authority to strike their answers and enter default judgments against them. SEC v Wencke (1978, CA9 Cal) 577 F2d 619, cert den *(1978) 439 US 964, 58 L Ed 2d 422, 99 S Ct 451.*

Court does not err in entering default judgment under former Rule 37(b)(2)(C) against defendants who willfully and deliberately disobey discovery order, willfully conceal evidence, and attempt fabrication of false evidence, nor in dismissing complaint in second action when plaintiff in that action is bound by acts of defendants in first action. Shearson Loeb Rhoades, Inc. v Quinard (1985, CA9 Cal) 751 F2d 1102, 40 FR Serv 2d 1426.

Default judgment and dismissal of counterclaim with prejudice were not abuse of discretion where court had previously lifted 3 entries of default, imposed 4 orders for money sanctions against defendant for failure to comply with discovery requests and court orders, and held numerous hearings on motions to comply with discovery requests, yet defendants failed to follow court's order requiring them to submit fully responsive answers and to identify documents requested, since defendants followed deliberate, willful, studied course of frustrating plaintiff's attempts at discovery, complicating proceedings, and ignoring court orders. Nilsson, Robbins, Dalgarn, Berliner, Carson & Wurst v Louisiana Hydrolec (1988, CA9 Cal) 854 F2d 1538, 11 FR Serv 3d 1219.

District Court did not abuse its discretion in declining to order requested sanctions of issue preclusion and entry of default judgment for alleged discovery of violations in bellwether products liability litigation since imposition of extreme sanctions is appropriate only where noncompliance has been willful or in bad faith and plaintiffs failed to show that defendant's conduct warranted such sanctions. Scott v Monsanto Co. (1989, CA5 Tex) 868 F2d 786, 13 FR Serv 3d 650.

District Court did not abuse its discretion in entering default judgment against defendants where defendants were aware and consciously absented themselves from scheduled depositions, failed to appear when court ordered them to appear, and defendants again defied order to appear even after judge imposed soft sanction. Sieck v Russo (1989, CA2 NY) 869 F2d 131, 13 FR Serv 3d 67.

Default judgment was appropriate sanction for party's failure to participate in discovery after his motion for transfer case was denied; court gave party opportunity to conform, held hearing on party's motion to set aside default judgment, and found that party lied on stand about not receiving interrogatories. Rose v Franchetti (1992, CA7 Ill) 979 F2d 81, 23 FR Serv 3d 1047.

Default judgment was appropriate sanction for pro se defendants' failure to obey court orders where communications with court made clear that they understood those orders and chose to defy them, parties were given numerous opportunities to correct their sanctionable conduct and comply with discovery rules and court orders, but refused to take advantage of those opportunities. Downs v Westphal (1996, CA7 Ind) 78 F3d 1252, 34 FR Serv 3d 1302, mod, reh, en banc, den (1996, CA7 Ind) 87 F3d 202.

Bankruptcy court's implied finding of willfulness, bad faith, or fault was not clearly erroneous and it did not abuse its discretion in imposing severe sanction of default where defendant, after

five years of refusing to produce requested documents, tendered admittedly deficient discovery responses by court ordered deadline. Wellness Int'l Network, Ltd. v Sharif (2013, CA7 Ill) 727 F3d 751, 58 BCD 116.

In products liability action where defendant manufacturer's refusal to produce documents constituted willful and deliberate failure to comply with order, court would enter default judgment and further require defendant to pay reasonable expenses, including attorney fees, caused by defendant's failure to obey court order to produce. Kozlowski v Sears, Roebuck & Co. (1976, DC Mass) 71 FRD 594, 21 FR Serv 2d 1372.

Defendant's third party complaint is dismissed with prejudice, default judgment is entered against defendant under Rule 37(b)(2), and attorneys' fees are awarded to government because of defendant's consistent failure to cooperate in litigation in good faith and obey discovery order of which it had proper notice. *Altschuler v Samsonite Corp. (1986, ED NY) 109 FRD 353.*

Although defendant's failure to provide discovery was willful, default judgment would be vacated since he had subsequently complied with discovery, established that he had meritorious defenses, and plaintiff did not contend it would be prejudiced if judgment were vacated. SEC v Hasho (1991, SD NY) 134 FRD 74, CCH Fed Secur L Rep P 95791.

Plaintiffs bore personal responsibility for history of wilful dilatoriness in discovery that prejudiced defendants and dismissal would be ordered where no alternative sanctions would be effective to cure problems; three of four deponents at issue were officers and directors of corporate plaintiff and fourth was sole corporate designee of two other plaintiffs, thus their failure to cooperate in their depositions was act of plaintiffs since corporation acts through its agents, fact that they were now willing--after at least 15 "no shows" among them--to be deposed was not persuasive, and plaintiff's first counsel explained that he withdrew from representation because of ethical differences with client on issue relating to cooperation. *Great W. Funding v Mendelson (1994, ED Pa) 158 FRD 339,* subsequent app (1995, CA3 Pa) *68 F3d 456.*

In action for breach of contract and misappropriation of computer-based trade secrets, *FRCP 37* sanctions are not imposed against defendant for failure to produce documents in violation of discovery orders, because there was no clear evidence of willful or bad-faith disregard for prior discovery orders, so sanction of default is not warranted. TDS Healthcare Sys. Corp. v Humana Hosp. Ill. (1995, ND Ga) 880 F Supp 1572.

Default judgment was entered as sanction under former *Fed. R. Civ. P. 37(b)(2)(C)* for failure to comply with discovery order in suit by shareholder against trust, corporation, and its controlling shareholder for wrongfully realizing short-swing profits in violation of federal law; defendants were culpable for noncompliance due to their continued willful and bad faith actions, which prejudiced shareholder and interfered with judicial process, and lesser sanction would not have cured shareholder's prejudice or deterred additional misconduct. EBI Sec. Corp. v Hamouth (2004, DC Colo) 219 FRD 642.

In case brought under Fair Labor Standards Act, 29 USCS §§ 201 et seq., and District of Columbia law, in which employees filed *Fed. R. Civ. P. 37* motion for sanctions, seeking entry

of default judgment against employer and his company, default judgment was appropriate because employer and his company had willfully failed to respond to written discovery requests propounded by employees, employer failed to appear for his deposition, and, since employer and his company had not participated in litigation for past three months, lesser sanction would be futile. Perez v Berhanu (2008, DC Dist Col) 583 F Supp 2d 87.

Defendant's failure to appear at mediation conference was willful, plaintiffs were prejudiced because of time and money wasted as result of delay, court had warned defendant about consequences of failing to comply with its orders on several occasions, and lesser sanctions would have been ineffective; thus, awarding plaintiffs default judgment was appropriate sanction for defendant's conduct. General Conf. Corp. of Seventh-Day Adventists v McGill (2009, WD Tenn) 91 USPQ2d 1843, magistrate's recommendation (2009, WD Tenn) 2009 US Dist LEXIS 122155, adopted, costs/fees proceeding, injunction gr (2010, WD Tenn) 2010 US Dist LEXIS 752.

Default judgment pursuant to *Fed. R. Civ. P. 37(b)(2)(A)(vi)* was warranted against taxpayers who exhibited dilatory and contemptuous conduct with respect to discovery requested by United States in tax assessment matter, as their conduct caused significant prejudice to United States. United States v Zimmerman (2011, ED Pa) 107 AFTR 2d 1887.

Creditors who sought to enforce state court judgment for treble damages against debtor, contractor who had breached construction contract with creditors, won default judgment pursuant Fed. R. Civ. P. 55 classifying underlying debt as nondischargeable per *11 USCS § 523(a)(2)(A)* as sanction on their cognate *Fed. R. Civ. P. 37* discovery motion because debtor's discovery violation was willful and because lesser sanction would not achieve desired deterrent effect, as witnessed by fact that debtor had admitted that he possessed documents that creditors had requested and had persisted in his refusal to produce them for two years. Sprouse v Rebel Log Homes (In re Sprouse) (2008, BC ND Miss) 391 BR 367.

Creditor won default judgment on nondischargeability complaint under *11 USCS § 523(a)* against Chapter 7 debtor who had dishonestly justified his ongoing failure to comply with discovery requests and orders on claim that federal law enforcement authorities had seized his computers and related equipment after it was discovered that equipment had remained in debtor's possession at all times because debtor had intentionally withheld relevant admissible evidence and was properly subjected to most severe sanction available under *Fed. R. Civ. P. 37*, made applicable to adversary proceeding by Fed. R. Bankr. P. 7037. Chrysler Fin. Servs. Americas LLC v Hecker (In re Hecker) (2010, BC DC Minn) 430 BR 189, 53 BCD 76.

Entry of default judgment is proper against corporate defendant under applicable state rule because of failure of four of defendant's officers to appear for taking of depositions as ordered by court where (1) defendant has opposed taking of depositions on ground that three of officers were residents of another state, but no objection was made as to taking deposition of fourth officer, (2) defendant has wilfully and persistently evaded all plaintiff's efforts under discovery procedures, and (3) officers' failure to appear cannot be considered other than wilful. Riverside Casino Corp. v J. W. Brewer Co. (1964) 80 Nev 153, 390 P2d 232, 6 ALR3d 708.

Unpublished Opinions

Unpublished: District court did not abuse its discretion in striking property owner's claim of interest and entering default judgment of forfeiture of property as sanction, pursuant to *Fed. R. Civ. P. 37*, because owner violated discovery orders, government was significantly prejudiced by owner's lack of compliance, owner was expressly warned that he risked entry of default judgment, and owner acted with willfulness, bad faith, or fault in that he did not demonstrate that compliance with court's discovery order or government's repeated requests for discovery would have not been feasible or would have subjected him to civil or criminal sanctions. United States v Am. Black Bears (2007, CA9 Wash) 2007 US App LEXIS 19102.

Unpublished: Default judgment was properly entered under *Fed. R. Civ. P. 37(b)(2)* on claim under Worker Adjustment and Retraining Notification Act (WARN Act), 29 USCS §§ 2101 et seq., against individual based on alleged closing of factory without notice required under 29 USCS § 2102(a); individual willfully violated court order by leaving deposition after only two hours where 12 hours were scheduled, and individual could be held indirectly liable for WARN Act damages under alter ego theory. Plasticsource Workers Comm. v Coburn (2008, CA5 Tex) 2008 US App LEXIS 2440.

Unpublished: In suit alleging class-of-one equal protection violation by banning appellant from town social functions due to her allegedly provocative dress and dancing style, although one of town's witnesses retracted his statements, which had averred that appellant had danced provocatively, sanction under *Fed. R. Civ. P. 37(b)* of default judgment against town was properly denied because there was no showing that town's initial reliance on this witness' statements was done in bad faith. Willis v Town of Marshall (2008, CA4 NC) 2008 US App LEXIS 9442.

Unpublished: District court did not commit abuse of discretion in sanctioning appellant couple with entry of default judgment, pursuant to Fed. R. Civ. P. 16(7) and *Fed. R. Civ. P. 37(b)(2)(A)(vi)*; twin findings--willful bad faith conduct (violations of three court orders, namely, failure to provide adequate accounting, failure to participate in drafting of joint final pretrial stipulation, and failure to attend final pretrial conference) that could not have been deterred by lesser sanctions--were sufficient under Eleventh Circuit precedent to support entry of default judgment. Rasmussen v Cent. Fla. Council BSA, Inc. (2011, CA11 Fla) 2011 US App LEXIS 2135.

Unpublished: District court did not abuse its discretion by entering default judgment pursuant to *Fed. R. Civ. P. 37* against pro se defendant whose repeated failure to comply with discovery orders supported drastic sanction of default judgment. United States v Varnado (2011, CA11 Fla) 2011 US App LEXIS 22246.

Unpublished: In case in which district court imposed default judgment on alleged infringers pursuant to Fed. R. Civ. P. 16(f) and *Fed. R. Civ. P. 37(b)(2)(A)(vi)* based primarily on their failure to participate in pretrial process, alleged infringers unsuccessfully argued that district court abuse its discretion because it did not properly apply four Wilson factors and did not warn them that it was considering entering default judgment; record reflected pattern of noncompliance suggesting bad faith, there was prejudice, their behavior could only be described as ignoring court's orders, and, as they showed no interest in taking steps necessary to defend case, there was no effective lesser sanction; additionally, they surely had constructive

notice that district court might impose sanction. Young Again Prods. v Acord (2011, CA4 Md) 2011 US App LEXIS 25713.

**191. Other particular cases**

Entry of default judgment under Rule 37 is too drastic where defendant's good-faith efforts to make discovery fail. Read v Ulmer (1962, CA5 La) 308 F2d 915, 6 FR Serv 2d 766; International Asso. of Machinists v United Aircraft Corp. (1963, DC Conn) 220 F Supp 19, 53 BNA LRRM 2904, 47 CCH LC P 18417, 7 FR Serv 2d 769, affd (1964, CA2 Conn) 337 F2d 5, 57 BNA LRRM 2245, 50 CCH LC P 19247, cert den *(1965) 380 US 908, 85 S Ct 893, 13 L Ed 2d 797, 58 BNA LRRM 2496, 51 CCH LC P 19525;* Southard v Pennsylvania R. Co. (1959, ED Pa) 24 FRD 456, 2 FR Serv 2d 553.

Default judgment entered after defendant had given his deposition as ordered is not proper where it appears to have been imposed as punitive measure because of defendant's refusal to pay $ 790 in costs as ordered pursuant to former Rule 37(a)(4). SEC v Seaboard Corp. (1982, CA9) 666 F2d 414, 33 FR Serv 2d 692 (disagreed with by HMG Property Investors, Inc. v Parque Industrial Rio Canas, Inc. (CA1 Puerto Rico) 847 F2d 908, 11 FR Serv 3d 655).

Judgment of default awarding cash damages cannot properly be entered without hearing unless amount claimed is liquidated sum or one capable of mathematical calculation; District Court's award of damages of $ 10,001 following entry of default judgment as sanction under Rule 37 was improper, where sole justification offered for damage figure was that it would act as sanction for defendants' demonstrated bad faith and callous disregard of their responsibilities. Adolph Coors Co. v Movement against Racism & Klan (1985, CA11 Ala) 777 F2d 1538, 12 Media L R 1514, 3 FR Serv 3d 573.

In private antitrust suit District Court was justified in entering default judgment against defendant as sanction for discovery abuses where defendant complied only partially with production order without credible justification, lesser sanctions were tried unsuccessfully, and defendant was warned that further sanctions would follow if noncompliance continued. Sciambra v Graham News Co. (1988, CA5 La) 841 F2d 651, 1988-1 CCH Trade Cases P 67955, 10 FR Serv 3d 1173, reh den, en banc (1988, CA5 La) *847 F2d 840* and cert den *(1988) 488 US 855, 109 S Ct 143, 102 L Ed 2d 115.*

Where defendant opposed discovery for over one year based upon same objections that magistrate had specifically found insufficient and violated court order which expressly warned that failure to comply with it would result in sanctions, entry of default judgment was appropriate. McLeod, Alexander, Powel & Apffel, P.C. v Quarles (1990, CA5 Tex) 894 F2d 1482, 15 FR Serv 3d 1222.

Default judgment for party's discovery abuses was erroneous where majority of party's misconduct was due to court's utter failure to exercise its discretion in managing case; it never ruled on party's motion to dismiss or offered any indication that it had given motion serious consideration. Chudasama v Mazda Motor Corp. (1997, CA11 Ga) 123 F3d 1353, 38 FR Serv 3d 1494, 11 FLW Fed C 609.

District court did not abuse its discretion in imposing default judgment on corporation's affiliate companies and parent company (veil-piercing defendants) by deeming facts of alter ego allegations to be established against veil-piercing defendants when they failed to comply with discovery orders related to allegations; doing so ended case against veil-piercing defendants because all matters of liability and damages had already been resolved. Southern New Eng. Tel. Co. v Global NAPs Inc. (2010, CA2 Conn) 624 F3d 123.

Plaintiff's objection to magistrate judge's denial of motion for sanctions was overruled; ruling was not only supported by law and facts, but it was within judge's discretion to decline awarding severe sanction of default sought by plaintiff for defendants' alleged failure to timely and properly respond to discovery requests; magistrate judge found that answers provided were sufficient and that no grounds for sanctions existed, as failure of defendants to provide supplemental answers was reasonable error, unknown to defendants at time, and there was no clear error in magistrate's finding. Berman v Cong. Towers Ltd. P'ship (2004, DC Md) 325 F Supp 2d 590.

Default judgment for refusal of defendant to obey summons to produce documents may be entered without requiring plaintiff to prove his case where statute authorizes court, upon disobedience of summons by party, to "set aside plea of such person, and give judgment against him by default." Bova v Roanoke Oil Co. (1942) 180 Va 332, 23 SE2d 347, 144 ALR 364.

Unpublished Opinions

Unpublished: District court abused its discretion in granting *Fed. R. Civ. P. 37* discovery sanctions that were equivalent to grant of default judgment against attorney and accountant in civil conspiracy action involving alleged fraudulent transfer; attorney was never served with interrogatories, and less drastic sanctions could have been imposed against accountant. Peltz v Moretti (2008, CA6 Ohio) 2008 FED App 557N.

**192. --Aliens and immigration**

Imposition of default judgment in denaturalization proceeding for violation of discovery orders by defendant's invocation of Fifth Amendment constituted abuse of discretion as matter of law since denaturalization proceeding has penal effect; government must prove its case by clear and convincing evidence and defendant has right to present defense. United States v Klimavicius (1988, CA1 Me) 847 F2d 28, 11 FR Serv 3d 332.

Rule 37 limits court's discretion to "such orders. . . as are just" so that in case to revoke naturalization where defendant refuses order to answer questions on basis of self-incrimination, plaintiff-United States' motion for judgment by default will be denied as not being "just" when effect will be to summarily deprive defendant of citizenship without providing him opportunity to open default upon offer to answer; finding defendant in contempt and imposing $ 500 fine with imposition to be suspended pending diligently prosecuted appeal would be appropriate. United States v Costello (1954, DC NY) 16 FRD 428, affd (1955, CA2 NY) 222 F2d 656, cert den *(1955) 350 US 847, 100 L Ed 755, 76 S Ct 62.*

**193. --Bankruptcy**

Default provisions of Rule 37 for failure to comply with order compelling discovery apply in bankruptcy. In re Visioneering Constr. (1981, CA9 Ariz) 661 F2d 119, 8 BCD 593, 32 FR Serv 2d 1062.

Default judgment against debtor was only adequate sanction for debtor's repeated failure to obey discovery orders despite warning that judgment might be entered denying him discharge; when debtor in bankruptcy refuses to be completely forthright with information regarding his financial dealings and resources, bankruptcy court is left with little recourse but to enter default judgment against debtor. Golant v Levy (In re Golant) (2001, CA7 Ill) 239 F3d 931, 37 BCD 106, 48 FR Serv 3d 1116.

Bankruptcy court did not abuse its discretion in entering default judgment against debtor as terminating sanction under *Fed. R. Civ. P. 37(b)(2)* for debtor's discovery abuses in adversary action that sought avoidance of two alleged fraudulent transfers of condominium; sanction of default judgment was within acceptable range of sanctions for debtor's discovery misconduct. Lebbos v Schuette (In re Lebbos) (2009, ED Cal) 422 BR 235, affd, request gr, request den (2010, CA9 Cal) 2010 US App LEXIS 1482.

Debtor's affiliate's answer was properly stricken and default entered against affiliate in bankruptcy trustee's fraudulent transfer action for contumacious and continuing discovery abuse under Rule 37(b)(2), and Fed. R. Bankr. P. 7037(b)(2); where debtor's business was found to have been fraudulently transferred to affiliate, entry of judgment rendered affiliate liable for all of allowable claims that were asserted against bankruptcy estate. Dobin v Taiwan Mach. Trade Ctr. Corp. (In re Victor Int'l, Inc.) (2002, BC DC NJ) 278 BR 67.

Fed. R. Bankr. P. 7037 and *9014(c)* invoke requirements of *Fed. R. Civ. P. 37* in adversary proceedings and contested matters and provide for cost-shifting in context of discovery disputes. In re Ambotiene (2004, BC ED NY) 316 BR 25.

Debtor had unvarying history of dilatory behavior and willful misconduct, where: she failed to fully comply with unambiguous Amended Discovery Order, which unequivocally provided debtor fair warning of potential default judgment in event of her noncompliance, and what information she did disclose was provided twenty-five days beyond deadline, and without even effort to obtain extension of deadline; she forfeited her right to defense; default judgment was entered against her in discharge litigation and, consequently, she was denied her discharge pursuant to *11 USCS § 727(a)(2)*, (3), (4). Int'l Enter. v Eddy (In re Eddy) (2006, BC DC Mass) 339 BR 8, 46 BCD 60.

Entry of order for relief against involuntary bankruptcy debtor by default was warranted as sanction for discovery misconduct, since debtor's refusal to cooperate in preparing discovery plan as ordered by bankruptcy court on several occasions, despite warning that order for relief would enter, was dilatory tactic to delay proceedings and constituted flagrant disobedience of court's orders. In re Colon (2009, BC DC Puerto Rico) 62 CBC2d 1479.

In adversary proceeding to declare judgment debt nondischargeable under *11 USCS § 523(a)(2)(B)*, bankruptcy court did not abuse its discretion by striking debtor's answer and

entering default judgment against him as sanctions under *Fed. R. Civ. P. 37(b)(2)(A)* and Fed. R. Bankr. P. 7037 where debtor willfully violated discovery orders to prejudice of creditor and where his conduct in avoiding discovery was in bad faith; although debtor was pro se, he was required to comply with rules, and bankruptcy court repeatedly advised him that his lack of cooperation could lead to sanctions, but despite numerous extensions of time, postponements of trial, and express warnings, debtor never meaningfully complied with discovery requests and court orders. Harmon Autoglass Intellectual Prop., LLC v Leiferman (In re Leiferman) (2010, BAP8) 428 BR 850, 53 BCD 12.

Unpublished Opinions

Unpublished: Default judgments declaring family trusts to be nominees of bankruptcy debtor subject to federal tax lien were proper under *Fed. R. Civ. P. 37(b)(2)(C)*, since debtor's erasure of material computer data prior to producing computer as ordered by court warranted sanction, debtor was repeatedly warned of possibility of default, and monetary sanction was not realistic alternative. United States v Krause (In re Krause) (2007, BC DC Kan) 2007 Bankr LEXIS 2797.

Unpublished: Bankruptcy court did not abuse its discretion when it struck debtor's answer and entered default judgment denying discharge, pursuant to authority granted under *Fed. R. Civ. P. 37(b)(2)(C)*, because debtor repeatedly and purposefully flouted his discovery obligations and violated court orders; bankruptcy court had patiently taken less drastic intermediate steps that proved ineffective. Ball v Birdsell (In re Ball) (2007, BAP9) 2007 Bankr LEXIS 4835.

Unpublished: Chapter 7 trustee's motion to strike debtor's answer to adversary proceeding and enter default as terminating sanction, pursuant to *Fed. R. Civ. P. 37(b)(2)(C)*, was granted because debtor's behavior in continuously engaging in gamesmanship and deceit in effort to frustrate proper administration of bankruptcy and adversary and control information trustee received made it unlikely that parties or court would have access to true facts; for example, debtor failed to appear at deposition or produce documents, deliberately clogged docket with duplicative motions, unilaterally excused herself from attending continued meeting of creditors and stretched its continuation to 19 months, and never sought permission to amend answer she filed and all of her conduct was traceable solely to her determination to prevent disclosure of information legitimately sought by trustee. Schuette v Lebbos (In re Lebbos) (2008, BC ED Cal) 2008 Bankr LEXIS 413.

Unpublished: Sons of debtor's deceased husband were entitled to default judgment under *Fed. R. Civ. P. 37(b)* after debtor intentionally and willfully abused judicial process by refusing to comply with discovery rules and court orders; debtor was responsible for her actions; sons were prejudiced by significant time and costs expended to attempt to secure discovery responses; and their claim under *11 USCS § 523(a)(4)* was meritorious because although state court judge imposed constructive trust on certain life insurance proceeds, debtor transferred substantial amounts to undisclosed locations. Brown v Brown (In re Brown) (2013, BC DC NJ) 2013 Bankr LEXIS 642.

**194. --Copyrights**

In copyright infringement action, trial court, upon defendant's failure to answer interrogatories and to comply with court's order to answer interrogatories concerning damages, properly

renders default judgment on that issue. Monogram Models v Industro Motive Corp. (1974, CA6 Mich) 492 F2d 1281, 181 USPQ 425, 18 FR Serv 2d 1400, cert den *(1974) 419 US 843, 42 L Ed 2d 71, 95 S Ct 76, 183 USPQ 321* and (criticized in Cass County Music Co. v C.H.L.R., Inc. (1996, CA8 Ark) 88 F3d 635, 39 USPQ2d 1429) and (criticized in Kohus v Mariol (2003, CA6 Ohio) 328 F3d 848, 66 USPQ2d 1845, 2003 FED App 150P).

Nondisclosure of business plan was negligent, not intentional and did not substantially prejudice copyright infringement plaintiff, graphic designer suing over use of her packaging designs, so her requested sanction of default judgment was not warranted under *Fed. R. Civ. P. 11*, *Fed. R. Civ. P. 26*, or *Fed. R. Civ. P. 37*, 28 USCS § 1927, or court's inherent powers; however, designer's ultimate lack of prejudice, did not excuse defendants' negligent lack of production, so court imposed fine for which defendants and their former counsel were jointly and severally liable. Atkins v Fischer (2005, DC Dist Col) 232 FRD 116, 63 FR Serv 3d 682.

**195. --Forfeiture actions**

Default judgment in civil forfeiture action was abuse of discretion where there had been no court order compelling discovery. United States v Certain Real Prop. Located at Route 1 (1997, CA11 Ala) 126 F3d 1314, 39 FR Serv 3d 94, 11 FLW Fed C 650.

In government's in rem forfeiture proceeding district court had authority under former *Fed. R. Civ. P. 37(b)(2)(C)* to strike out pleadings or render judgment by default when party failed to obey order to provide or permit discovery. United States v $ 49,000 in United States Currency (2001, ED Tex) 194 F Supp 2d 576, affd (2003, CA5 Tex) 330 F3d 371, 55 FR Serv 3d 369.

**196. --Labor and employment**

Court's rendering of "partial default judgment" enjoining defendant from violating Fair Labor Standards Act [29 USCS § 215] is not overly harsh where defendant has refused to comply with discovery order directing him to either answer interrogatories or afford Secretary of Labor opportunity to examine payroll records. Hodgson v Mahoney (1972, CA1 Mass) 460 F2d 326, 16 FR Serv 2d 306, cert den *(1972) 409 US 1039, 34 L Ed 2d 488, 93 S Ct 519.*

Default judgment against employer for destruction of personnel documents concerning race discrimination plaintiff and his claims contrary to retention regulations was too harsh in absence of adequate explanation of prejudice to plaintiff and why no other sanction would adequately deter employer from committing similar misconduct in future. Webb v District of Columbia (1998, App DC) 331 US App DC 23, 146 F3d 964, 73 CCH EPD P 45480, 41 FR Serv 3d 120.

Drastic remedy of default judgment is inappropriate as sanction under Rule 37(b)(2) in Title VII employment discrimination action where (1) defendant destroyed evidence relating to relatively small part of litigation, and (2) large numbers of innocent nonparticipants would be directly affected by such judgment. United States v Nassau County (1979, ED NY) 28 FR Serv 2d 165.

Age discrimination plaintiff was entitled to default judgment since defendant continued to claim that its discovery responses were adequate where they clearly were not since they were insufficient in content and had not been signed or sworn. Monroe v Ridley (1990, DC Dist Col) 135 FRD 1, 54 BNA FEP Cas 657.

Where sanctions against employer were appropriate because employer did not produce performance evaluations when ordered and produced them only after employee filed motion for default judgment and employee's motion for default judgment was too severe, magistrate judge ordered that: (1) employer had to pay employee's costs, including attorney's fees, incurred in having to file motion; (2) employer was precluded from introducing into evidence any of documents it disclosed late; (3) discovery be re-opened for employee for limited purpose of deposing his supervisor with reference to any statements she or anyone else made in recently disclosed performance evaluations; and (4) jury would be permitted to conclude that employer's inability to find missing performance evaluations should be construed against it. Zenian v District of Columbia (2003, DC Dist Col) 283 F Supp 2d 36.

Former employee was not entitled to sanction of default judgment under *Fed. R. Civ. P. 37* in employee's Title VII discrimination case because employer's designated deponents took part in depositions, adequately responded to inquiry under Fed. R. Civ. P. 30(b)(6), and did not engage in "bandying" behavior; deponents were not required to investigate employee's case for him, and employee was not entitled to documents used by deponents to refresh recollection under Fed. R. Evid. 612 when he did not subpoena documents prior to deposition. Banks v Office of Senate Sergeant-At-Arms (2007, DC Dist Col) 241 FRD 370.

**197. --Trademarks**

Default judgment against trademark infringement defendants was proper where they ignored discovery order for five months, offered no reason for their failure to seek relief from it, had engaged in full year of delays and obstructions previously, and admitted that documents requested were never produced. Bambu Sales v Ozak Trading (1995, CA2 NY) 58 F3d 849, 35 USPQ2d 1425, 32 FR Serv 3d 761.

Default judgment against defendant for failure to comply with discovery orders in trademark infringement suit was not abuse of discretion since defendant's failures were willful and deliberate, expeditious resolution of litigation, docket management and prejudice weighed in favor of dismissal, and district court expressly warned defendant and considered availability and efficacy of less drastic sanctions before entering default judgment. Rio Props., Inc. v Rio Int'l Interlink (2002, CA9 Nev) 284 F3d 1007, 2002 CDOS 2511, 2002 Daily Journal DAR 3092, 62 USPQ2d 1161, 52 FR Serv 3d 239.

Where basis for objections to questions propounded in course of oral deposition is groundless and refusal by defendant's counsel to come to courthouse to secure prompt ruling by ex parte judge is inexcusable resulting in imposition of unnecessary and unreasonable expense upon examining party and unnecessary delay in proceedings, defendant's counsel personally is ordered to pay examining party's reasonable expenses and attorney's fees incurred in obtaining order directing answers to questions. Braziller v Lind (1963, SD NY) 32 FRD 367, 7 FR Serv 2d 762.

**4. Dismissal of Action**

**a. In General**

**198. Generally**

Before dismissal for failure to comply with discovery orders of trial court may be ordered, prior order must be issued. Laclede Gas Co. v G. W. Warnecke Corp. (1979, CA8 Mo) 604 F2d 561, 27 FR Serv 2d 1409.

Dismissal is proper only in situations where deterrent value of Rule 37 cannot be substantially achieved by use of less drastic sanctions; other considerations include whether other party's preparation for trial was substantially prejudiced, whether neglect is plainly attributable to attorney rather than to blameless client, and whether party's simple negligence is grounded in confusion or sincere misunderstanding of court's orders. Batson v Neal Spelce Associates, Inc. (1985, CA5 Tex) 765 F2d 511, 38 BNA FEP Cas 867, 38 CCH EPD P 35563, 2 FR Serv 3d 828 (criticized in Auscape Int'l v Nat'l Geographic Soc'y (2003, SD NY) 2003 US Dist LEXIS 13846).

In absence of valid underlying discovery order or where litigant on whom sanction will be imposed has not displayed unusual intransigence, dismissal is not proper. Black Panther Party v Smith (1981, App DC) 213 US App DC 67, 661 F2d 1243, 8 Fed Rules Evid Serv 1155, 32 FR Serv 2d 1, vacated on other grounds, remanded *(1982) 458 US 1118, 73 L Ed 2d 1381, 102 S Ct 3505.*

Dismissal constitutes denial of access to justice and therefore should be resorted to only to minimum extent necessary to induce future compliance and preserve integrity of judicial system. Litton Systems, Inc. v American Tel. & Tel. Co. (1981, SD NY) 91 FRD 574, 1981-2 CCH Trade Cases P 64306, 32 FR Serv 2d 950, affd (1983, CA2 NY) 700 F2d 785, 1982-83 CCH Trade Cases P 65194, 12 Fed Rules Evid Serv 1426, cert den *(1984) 464 US 1073, 104 S Ct 984, 79 L Ed 2d 220.*

To determine whether to impose severe sanction of dismissal or default in connection with motion under *Fed. R. Civ. P. 37(b)(2)*, court considers: (1) public's interest in expeditious resolution of litigation, (2) court's need to manage its docket, (3) risk of prejudice to party seeking sanctions, (4) public policy favoring disposition of cases on their merits, and (5) availability of less drastic sanctions. What is most critical for determination of whether case-dispositive sanction is properly imposed is whether underlying discovery violations threaten to interfere with rightful decision of case, delay in making discovery alone does not warrant terminating sanction. United States v Hempfling (2008, ED Cal) 2008-1 USTC P 50230, 101 AFTR 2d 1372.

Unpublished Opinions

Unpublished: Because dismissal with prejudice is extreme sanction, court ordinarily must consider number of factors before imposing it, including: (1) degree of actual prejudice to defendant; (2) amount of interference with judicial process; (3) culpability of litigant; (4) whether court warned party in advance that dismissal of action would be likely sanction for

noncompliance; and (5) efficacy of lesser sanctions; those factors are not rigid test; rather, they serve as useful guidance for district court's exercise of discretion. Taylor v Safeway, Inc. (2004, CA10 Colo) 116 Fed Appx 976.

Unpublished: Since dismissal is harsh sanction, district judge in considering dismissal must be guided by norm of proportionality; but as soon as pattern of noncompliance with court's discovery orders emerges, judge is entitled to act with swift decision. Oliva v Trans Union, LLC (2005, CA7 Ill) 123 Fed Appx 725, reh den (2005, CA7 Ill) 2005 US App LEXIS 3992.

**199. Due process**

Due process clause of Fifth Amendment limits power of courts to dismiss action without affording party the opportunity for hearing on merits of his cause; when disobedient party is plaintiff, dismissal with prejudice is sanction of last resort, applicable only in extreme circumstances; when disobedient party shows that his recalcitrance was based on factors beyond his control or on his exercise of constitutional privilege, reviewing court is justified in terming dismissal an abuse of discretion. Emerick v Fenick Industries, Inc. (1976, CA5 Fla) 539 F2d 1379, 22 FR Serv 2d 510.

Due process requires that most severe sanction of dismissal be imposed against United States only if failure to comply is due to willfulness, bad faith, or fault, and not to inability to comply. In re Attorney Gen. of United States (1979, CA2 NY) 596 F2d 58, 27 FR Serv 2d 207, cert den *(1979) 444 US 903, 62 L Ed 2d 141, 100 S Ct 217, 28 FR Serv 2d 98* and (criticized in In re Kessler (1996, App DC) 321 US App DC 401, 100 F3d 1015, 36 FR Serv 3d 636).

**200. Discretion of court**

Although district court has wide latitude in framing discovery orders and in penalizing failure to comply, that discretion has its limits. Griffin v Aluminum Co. of America (1977, CA5 Tex) 564 F2d 1171, 15 CCH EPD P 8007, 24 FR Serv 2d 918.

Sanctions available to trial court are discretionary and will not be reversed unless there has been abuse of discretion; however, where drastic sanctions of dismissal or default are imposed, range of discretion is narrower and losing party's noncompliance must be due to willfulness or bad faith. Savola v Webster (1981, CA8 Minn) 644 F2d 743, 31 FR Serv 2d 410.

District court's discretion to use extreme sanction of dismissal for failure of counsel to respond properly to discovery orders or to fail to appear at scheduled conferences or hearings must be upheld unless abused. Corchado v Puerto Rico Marine Management, Inc. (1981, CA1 Puerto Rico) 665 F2d 410, 33 FR Serv 2d 111, cert den *(1982) 459 US 826, 74 L Ed 2d 63, 103 S Ct 60.*

Because plaintiffs, disregarding explicit warnings, failed to comply with succession of court orders to answer interrogatories and produce documents by date certain, other time parameters were pushed back as district court waited in vain for plaintiffs to comply, and defendants' trial preparations were stalled, dismissal was condign sanction. Mulero-Abreu v P.R. Police Dep't (2012, CA1 Puerto Rico) 675 F3d 88, CCH Unemployment Ins Rep P 44456.

Fact that plaintiffs met other deadlines in course of case did not inoculate them against sanction of dismissal; their failure to provide required responses to both interrogatories and requests for production was in flagrant disregard of multiple court orders. Mulero-Abreu v P.R. Police Dep't (2012, CA1 Puerto Rico) 675 F3d 88, CCH Unemployment Ins Rep P 44456.

Court need not find that failure to comply with orders was motivated by desire to impede administration of justice in order to exercise its discretion to dismiss. Damiani v Rhode Island Hospital (1982, DC RI) 93 FRD 848, 1982-2 CCH Trade Cases P 64790, 34 FR Serv 2d 1358, affd (1983, CA1 RI) 704 F2d 12, 1983-1 CCH Trade Cases P 65297, 36 FR Serv 2d 40.

Imposition of sanctions pursuant to *Fed. R. Civ. P. 37*, including without limitation dismissal, in connection with party's failure to comply with discovery orders, is firmly within discretion of district court. Zouarhi v Colin Serv. Sys. (2004, SD NY) 223 FRD 315.

Unpublished Opinions

Unpublished: District court did not abuse its discretion by dismissing employee's employment discrimination and retaliation complaint with prejudice for failure to prosecute and to comply with court orders; employee repeatedly refused to submit to oral deposition in contravention of explicit court orders and magistrate judge twice warned employee in court orders that he would recommend dismissing his action with prejudice if he failed to appear for his deposition. Manigaulte v C.W. Post of Long Island Univ. (2013, CA2 NY) 2013 US App LEXIS 14096.

**201. Articulation in record**

Dismissal of complaint with prejudice as Rule 37 sanction must be accompanied by some articulation on record of court's resolution of factual, legal, and discretionary issues presented. Quality Prefabrication, Inc. v Daniel J. Keating Co. (1982, CA3 Pa) 675 F2d 77, 33 FR Serv 2d 1280.

Dismissal of complaint with prejudice as sanction for failure to cooperate in discovery must be accompanied by some articulation on record of court's resolution of factual, legal, and discretionary issues presented. Patton v Aerojet Ordnance Co. (1985, CA6 Tenn) 765 F2d 604, 2 FR Serv 3d 900.

Three-part analysis determines whether court, in connection with motion under *Fed. R. Civ. P. 37(b)(2)*, properly considered adequacy of less drastic sanctions: (1) did court explicitly discuss feasibility of less drastic sanctions and explain why alternative sanctions would be inappropriate? (2) did court implement alternative sanctions before ordering dismissal? (3) did court warn party of possibility of dismissal before actually ordering dismissal? Nonetheless, it is not always necessary for court to impose less serious sanctions first or to give any explicit warning. United States v Hempfling (2008, ED Cal) 2008-1 USTC P 50230, 101 AFTR 2d 1372.

Unpublished Opinions

Unpublished: District court's order dismissing *42 USCS § 1983* action under *Fed. R. Civ. P. 37(b)* was reversed where appellate court could not discern from record whether district court

had considered lesser sanctions or whether it had found that plaintiff acted willfully and in bad faith in not complying with discovery order. Gleghorn v Melton (2006, CA8 Ark) 195 Fed Appx 535.

**202. Both parties disobedient**

Having lost all patience with both counsel, court, on plaintiff's motion for sanctions for defendant's failure to comply with discovery orders (including not attending noticed depositions), court ordered both counsel to show cause why each of them, personally, should not be sanctioned for their behavior during discovery. Caldwell v Ctr. for Corr. Health (2005, DC Dist Col) 228 FRD 40.

Rule 37(b)(2), (c) specifically authorizes trial court to render default judgment against disobedient party; it undermines fairness under discovery rules to hold that trial court may enter default judgment against recalcitrant defendant, thereby finally disposing of his liability defense, yet may not dismiss with prejudice action of plaintiff who refuses to permit discovery, leaving him to refile action and avoid discovery order. Bottinelli v Robinson (1979, Tex Civ App Houston (1st Dist)) 594 SW2d 112.

**203. Deception**

Court acts within its discretion where it dismisses action against defendant with prejudice and orders plaintiffs to pay defendant's expenses to defendants, including attorneys fees, because of plaintiffs' failure to timely file answers to defendant's interrogatories in obedience to court's order entered after repeated directions to answer interrogatories which had been outstanding for many months, and because of false statements and false testimony given by plaintiffs' attorney and officer of plaintiff to deceive counsel for defendant and court regarding timeliness of service of plaintiffs' answers. Independent Investor Protective League v Touche Ross & Co. (1978, CA2 NY) 607 F2d 530, 25 FR Serv 2d 222, cert den *(1978) 439 US 895, 58 L Ed 2d 241, 99 S Ct 254,* reh den *(1978) 439 US 998, 58 L Ed 2d 673, 99 S Ct 604.*

Dismissal of railroad worker's personal injury complaint under FELA was warranted for her willfully providing false and misleading answers about prior back problems throughout discovery process. Archibeque v Atchison, T. & S.F. Ry. (1995, CA10 NM) 70 F3d 1172, 33 FR Serv 3d 832.

Dismissal of plaintiff's entire case with prejudice was too severe sanction for plaintiff's fabricating evidence during discovery since many of available possible sanctions would have had same or similar practical effect, and court requires that least onerous sanction which will address offensive conduct be used. Gonzalez v Trinity Marine Group (1997, CA5 La) 117 F3d 894, 71 CCH EPD P 44860, 38 FR Serv 3d 545.

Defendants in patent case are not entitled to dismissal of plaintiff's case with prejudice, even though plaintiff produced patent application, through discovery, that he represented to be copy of one filed with patent office, but which actually contained substantial discrepancies, because record does not establish necessary prejudice to defendants' case to support such dispositive

sanction, but does warrant lesser sanctions to address delay and mounting attorney's fees. Thompson v Haynes (1999, ND Okla) 36 F Supp 2d 936, findings of fact/conclusions of law (1999, ND Okla) 1999 US Dist LEXIS 23212.

**204. Delay and dilatory actions**

Dismissal of pro se plaintiff's action is not justified on ground that plaintiff was guilty of dilatory or obstructionist practices where there is no evidence that plaintiff acted in bad faith in refusing to pay sanction of $ 750 for failure to appear at deposition, plaintiff immediately advised court that he did not have ability to pay such amount and plaintiff complied with court's order to co-operate with defense discovery efforts. Thomas v Gerber Productions (1983, CA9 Cal) 703 F2d 353, 35 FR Serv 2d 1216.

Plaintiff's conduct evidenced deliberate pattern of delay and disregard for court procedures that was sufficiently egregious to warrant dismissal, even though he had made some documents available and listed documents withheld on basis of privilege, since assertion of privilege was untimely, ran counter to court's prior waiver order, and was totally uninformative and thus gave appearance of further stalling tactic rather than good faith effort to comply with rules and court's order. Marx v Kelly, Hart & Hallman, P.C. (1991, CA1 Mass) 929 F2d 8, 19 FR Serv 3d 166.

Dismissal for plaintiffs' repeated dilatory and evasive responses to discovery was appropriate; plaintiffs had been forewarned after repeated discovery violations that any further evasive conduct would result in dismissal. Govas v Chalmers (1992, CA7 Ill) 965 F2d 298, CCH Fed Secur L Rep P 96852, 22 FR Serv 3d 729, reh den (1992, CA7) 1992 US App LEXIS 25146.

Given plaintiff's record of dilatory responses, his noncompliance with unambiguous court order, and his blatant misrepresentation of status of his discovery responses, there was no way for reviewing court to find abuse of discretion in district court's forewarned decision to dismiss action with prejudice under former *Fed. R. Civ. P. 37(b)(2)(C)*. Torres-Vargas v Pereira (2005, CA1 Puerto Rico) 431 F3d 389.

Court may dismiss action upon plaintiff's refusal to comply with order for production of documents where record is full of plaintiff's evasive and dilatory tactics, and documents requested are relevant to facts at issue. CTS Corp. v Piher International Corp. (1973, ND Ill) 59 FRD 394, 178 USPQ 64, 17 FR Serv 2d 233.

Court granted federal government's motion to dismiss claim opposing its in rem forfeiture action, pursuant to *Fed. R. Civ. P. 37(b)(2)(c)*, where claimant's repeated failure to comply with magistrate's discovery orders despite numerous extensions and stays granted indicated element of willfulness or conscious disregard for discovery process such that dismissal was warranted. United States v United States Currency in Amount of Six Hundred Thousand Three Hundred & Forty One Dollars & No Cents ($ 600,341.00) (2007, ED NY) 240 FRD 59.

Unpublished Opinions

Unpublished: District court did not abuse its discretion by dismissing insured's claims because (1) ample evidence supported district court's conclusion that insured's failure to cooperate in

discovery was in bad faith; (2) district court did not err by determining that insurer was prejudiced by insured's failure to cooperate in discovery; (3) insured was warned that further failure to cooperate could lead to dismissal; and (4) $ 1000 fine was imposed on insured for not complying with order granting insurer's motion to compel; sanction was never paid, and it did not prevent insured from presenting yet another set of incomplete responses. Smith v Nationwide Mut. Fire Ins. Co. (2010, CA6 Mich) 2010 FED App 758N.

Unpublished: Order dismissing plaintiff's amended First Amendment retaliation complaint with prejudice, and adhering to prior order imposing monetary sanctions on plaintiff, pursuant to *Fed. R. Civ. P. 37*, was vacated and remanded, so that district court could consider Agiwal test factors, which required consideration of willfulness of non-compliant party or reason for noncompliance, efficacy of lesser sanctions, duration of period of noncompliance, and whether non-compliant party had been warned of consequences of noncompliance. Charette v Dep't of Soc. Servs. (2009, CA2 Conn) 2009 US App LEXIS 11362.

Unpublished: Plaintiff's second employment discrimination suit against same defendants was dismissed with prejudice under *Fed. R. Civ. P. 37(b)(2)*, *37(d)*, and 41(b) because: (1) he failed to complete his deposition for second time, thereby prejudicing defendants; (2) his refusal was willful, since he provided no medical excuse; (3) he had history of dilatoriness; and (4) no other sanction would be effective. Elmorsy v Ramanand (2005, DC NJ) 2005 US Dist LEXIS 30191, affd, adopted, complaint dismd (2005, DC NJ) 2005 US Dist LEXIS 30172.

Unpublished: Inmate's pro se civil rights suit was dismissed pursuant to *Fed. R. Civ. P. 37* as sanction for his failure to comply with his discovery obligations and magistrate's orders since (1) inmate was personally responsible for noncompliance because he was proceeding pro se; (2) inmate's failure to notify district court of his change of address, as required by D.N.J., Civ. R. 10.1, was part of history of dilatoriness exhibited by inmate in suit; (3) sued parties were prejudiced by inmate's conduct because they were prevented from properly serving inmate with pleadings and motions and from fully defending themselves against his claims; and (4) because district court did not know inmate's current address, dismissal was only possible sanction that district court could impose. Joseph v Lopez (2007, DC NJ) 2007 US Dist LEXIS 27879.

### 205. Evasive tactics

Dismissal for plaintiffs' repeated dilatory and evasive responses to discovery was appropriate; plaintiffs had been forewarned after repeated discovery violations that any further evasive conduct would result in dismissal. Govas v Chalmers (1992, CA7 Ill) 965 F2d 298, CCH Fed Secur L Rep P 96852, 22 FR Serv 3d 729, reh den (1992, CA7) 1992 US App LEXIS 25146.

Court may dismiss action upon plaintiff's refusal to comply with order for production of documents where record is full of plaintiff's evasive and dilatory tactics, and documents requested are relevant to facts at issue. CTS Corp. v Piher International Corp. (1973, ND Ill) 59 FRD 394, 178 USPQ 64, 17 FR Serv 2d 233.

### 206. Good faith effort to comply

Dismissal under Rule 37 because of plaintiff's noncompliance with order of district court requiring him to produce documents of Swiss banking firm, of action for recovery of assets

seized by government under Trading with the Enemy Act, is not justified where it has been established that failure to comply was due to plaintiff's inability to overcome objections of Swiss authorities under Swiss law prohibiting disclosure of documents of banking firm, that plaintiff was not in collusion with Swiss authorities to block inspection of documents, and that he in good faith made diligent efforts to execute production order. Societe Internationale Pour Participations Industrielles et Commerciales, S. A. v Rogers (1958) 357 US 197, 2 L Ed 2d 1255, 78 S Ct 1087.

Party's good faith efforts to comply make it improper to impose Rule 37 sanction of dismissing complaint for that party's failure to make discovery. Von Der Heydt v Kennedy (1962, App DC) 112 US App DC 78, 299 F2d 459, 5 FR Serv 2d 607, cert den *(1962) 370 US 916, 8 L Ed 2d 498, 82 S Ct 1554;* Haskell v Philadelphia Transp. Co. (1956, DC Pa) 19 FRD 356; Independent Productions Corp. v Loew's, Inc. (1962, SD NY) 30 FRD 377, 5 FR Serv 2d 438.

Court will not order dismissal of action on failure of plaintiff to produce certain documents where plaintiff, in opposition to defendant's motion, states that she has searched diligently for documents but has been unable to locate them, and files affidavit to that effect, adding that they will be produced immediately if located. Haskell v Philadelphia Transp. Co. (1956, DC Pa) 19 FRD 356.

Dismissal for contractor's failure to comply fully with discovery requests was too severe since defendant did not dispute that it had copy of invoices before lawsuit was filed, contractor asserted that it delayed responding to discovery requests because it wanted to address discrepancies in invoices which defendant identified during settlement negotiations for present dispute, requested document with regard to one invoice was provided, and it appeared that contractor could produce requested documentation for other invoice within 10 days. United States ex rel. P.W. Berry Co. v General Elec. Co. (1994, DC Or) 158 FRD 161.

Court exercised its discretion and dismissed claims against deputies without prejudice for failure to serve process because counsel's bare assertion, in declaration under 28 USCS § 1746, that some of sheriff's department's daily activity logs were missing was insufficient to establish good cause for failing to timely serve unknown deputies under *Fed. R. Civ. P. 4(m)* where record contained no evidence that plaintiffs attempted to confer with defendants regarding any missing daily activity logs, as required by *Fed. R. Civ. P. 37(a)(2)(B)* and state rule. Moore v Bd. of County Comm'rs of Leavenworth (2007, DC Kan) 470 F Supp 2d 1237.

**207. Inability to comply**

District court abused its discretion in dismissing complaint where record revealed that failure to comply was result of inability to respond rather than willfulness or bad faith; such inability is problem relating to adequacy of proof, and is not willful or bad faith abuse of discovery process which should preclude individual from reaching merits of claim. Kropp v Ziebarth (1977, CA8 ND) 557 F2d 142, 23 FR Serv 2d 830, later app (CA8 ND) 601 F2d 1348.

Dismissal with prejudice, "sanction of last resort," will not be upheld if noncompliance, even if repetitive, is due to inability rather than to willfulness, bad faith, or disregard of party's

responsibilities; in reviewing District Court's exercise of discretion in dismissing complaint as sanction for failure to submit to discovery, one concern is whether less drastic, but equally effective remedy could have been fashioned; in civil rights action, bar examinee's complaint was dismissed for continued failure to submit to deposition, and failure to produce recording and notes of telephone conversation examinee had with member of Committee on Bar Admissions after she received notice of her failure. Jones v Louisiana State Bar Asso. (1979, CA5 La) 602 F2d 94, 28 FR Serv 2d 162.

Although imposition of sanctions and security requirement for costs potentially recoverable under Copyright Act was not abuse of discretion for discovery abuses, dismissing action without giving weight to plaintiff's asserted inability to comply with those orders was abuse of discretion; imposition of security requirement may not be used as means to dismiss suits of questionable merit filed by plaintiffs with few resources. Selletti v Carey (1999, CA2 NY) 173 F3d 104, 43 FR Serv 3d 608.

Because defendant, who had moved to set aside guilty plea to drug charges and forfeiture order, failed to meet burden of showing that his failure to comply with requests for production of documents was due to inability, not willfulness or bad faith, it was presumed that district court's dismissal of case was not abuse of discretion, and defendant did not proffer anything to overcome that presumption. United States v Reyes (2002, CA6 Mich) 307 F3d 451, 54 FR Serv 3d 227, 2002 FED App 351P.

Default judgment dismissing individual's complaint under *Fed. R. Civ. P. 37(b)* due to individual's failure to produce documents under Fed. R. Civ. P. 34(a) was vacated and case was remanded to explore Russian law and, if necessary, individual's control of company because (1) individual claimed that his minority status as shareholder in company and Russian law posed insurmountable barriers to his obtaining documents from company; (2) contrary to district court's view, Russian law was relevant to issues and posed no threat to sovereignty of U.S.; (3) district court did not consider efficacy of lesser sanctions; (4) findings of bad faith and consideration of lesser sanctions were necessary because district court repeatedly stated that failure to produce documents would inevitably alienate jury, suggesting that defendants, business and its lawyer, would not have been prejudiced by absence of documents and, while documents in question appeared to relate only to defendants' conversion counterclaim, district court dismissed individual's complaint as well, again without findings or other explanation; and (5) entering default judgment without explanation that supported dismissal and default judgment was abuse of discretion. Shcherbakovskiy v Da Capo Al Fine, Ltd. (2007, CA2 NY) 490 F3d 130.

### 208. Inadequate compliance

Defendant's motion for dismissal under Rule 37 was not granted where possible shortcomings in plaintiff's responses to defendant's interrogatories were not serious enough to warrant imposition of such drastic sanction and where failure to adhere to court's prior order to answer interrogatories could not characterized as willfulness on part of plaintiff. Stanziale v First Nat'l City Bank (1977, SD NY) 74 FRD 557, 23 FR Serv 2d 598, 24 FR Serv 2d 169.

Court will dismiss action by truck seller against finance company for negligence in arranging financing for seller's customers resulting in large number of repossessions where, in response

to order to answer interrogatories and to produce documents, plaintiffs answered interrogatories by stating that all claims against defendant were based on oral conversations with defendant's employees, listing dates of various alleged conversations without identifying any as relating to their claims, and plaintiffs answered requests for documents by offering to make available their undifferentiated records consisting of 47 feet of files which included documentation for some 4000 sales of vehicles not segregated as to vehicles for which defendant was supposed to have arranged financing; responses gave no clue as to basis for plaintiffs' claims that defendant was negligent, breached its fiduciary duty to plaintiff, or made false representations to it. Consolidated Equipment Corp. v Associates Commercial Corp. (1985, DC Mass) 104 FRD 101, 40 FR Serv 2d 1432, 4 FR Serv 3d 909.

Dismissal of car rental customer's complaint alleging negligence in defendant's leasing him defective vehicle was too harsh for plaintiff's incomplete responses to discovery requests; failures were not willful or arrogant, and plaintiff did belatedly contend he was financially unable to comply. Morris v Snappy Car Rental (1993, DC RI) 151 FRD 17.

Dismissal of patent infringement action against 118 defendants for inadequate compliance with discovery order intended to establish with particularity as to each defendant and each product basis for its infringement allegations was not erroneous where response was not directed to any specific defendant or product, failed to identify elements of specific products corresponding with patent claim elements, failed to include any analysis of 2 patents in suit, and was based on admittedly erroneous assertion that any product infringed certain patent; magistrate considered less drastic sanctions but chose dismissal in light of plaintiff's refusal to co-operate in face of magistrate's previous warnings and sanctions. Refac Int'l, Ltd. v Hitachi, Ltd. (1990, CA) 921 F2d 1247, 16 USPQ2d 1347.

Unpublished Opinions

Unpublished: Judgment dismissing appellant's employment discrimination suit against appellant's former employer under *Fed. R. Civ. P. 37(b)(2)* based on appellant's failure to obey multiple discovery orders was proper, as appellant and counsel conducted themselves in wholly inappropriate and unprofessional manner, and former employer was substantially prejudiced; appellant ignored numerous out-of-court demands from former employer's counsel. Worrell v Houston Can! Acad. (2011, CA5 Tex) 2011 US App LEXIS 9299.

Unpublished: It could not be said that district court abused its discretion in concluding that on balance, dismissal was warranted as sanction under *Fed. R. Civ. P. 37* given presence of factors, such as prejudice to defendant university and plaintiff doctoral candidate's willful noncompliance with deadlines and discovery requests, which weighed in favor of dismissal in case. Pik v Univ. of Pa. (2012, CA3 Pa) 2012 US App LEXIS 482.

**209. Irrelevant or cumulative information**

Court of Appeals would reverse District Court's dismissal of complaint, pursuant to Rule 37(b), ordered upon defendant's motion to dismiss for plaintiff's failure to comply with court order compelling answers to interrogatories, where information requested was not sufficiently relevant

to subject of action to come within parameters of Rule 26(b). Dunbar v United States (1974, CA5 Fla) 502 F2d 506, 74-2 USTC P 9744, 19 FR Serv 2d 359.

Dismissal of action for failure to comply with discovery order is abuse of discretion where disputed information is not properly discoverable; information is not properly discoverable in counterclaim for malicious prosecution against EEOC because Federal Tort Claims Act expressly excepts such claims from waiver of immunity. EEOC v First Nat'l Bank (1980, CA5 Miss) 614 F2d 1004, 22 BNA FEP Cas 706, 22 CCH EPD P 30808, 29 FR Serv 2d 545, cert den *(1981) 450 US 917, 101 S Ct 1361, 67 L Ed 2d 342, 24 BNA FEP Cas 1827, 25 CCH EPD P 31523.*

District Court did not err in forfeiting defendant $ 239,500 to Government upon dismissal of claimants' claims from forfeiture proceeding, where District Court had ordered each claimant to appear for deposition with admonition that claims would be stricken if claimants failed to appear, but claimants nevertheless failed to appear; claimants' contention that judgment should be reversed because government would have never prevailed in action is without merit, since probable merit of government's case is irrelevant to controversy. United States v $ 239,500 in U.S. Currency (1985, CA11 Fla) 764 F2d 771, 2 FR Serv 3d 1309.

Dismissal of midshipman's constructive discharge action based on his failure to answer any deposition questions about his homosexual conduct was erroneous since midshipman was challenging Navy's administrative determination that he was unfit for continued service because he stated that he was homosexual, not because he engaged in homosexual activities. Steffan v Cheney (1990, App DC) 287 US App DC 143, 920 F2d 74, 18 FR Serv 3d 498.

**210. Justification or excuse for noncompliance lacking**

Trial court does not abuse its discretion in dismissing complaint without conducting hearing, where plaintiff has repeatedly failed to appear and give deposition testimony in defiance of proper notices, confirmed agreements, and court orders, and where court conducted earlier hearing, at which time plaintiff stated he would appear for scheduled deposition, but he did not appear and did not adequately explain reasons for his absence. Hashemi v Campaigner Publications, Inc. (1984, CA11 Ga) 737 F2d 1538, 10 Media L R 2256, 39 FR Serv 2d 983.

Court's dismissal of complaint for securities fraud plaintiff's failure to attend scheduled deposition after court had ordered it and warned plaintiff that complaint would be dismissed if he did not comply was appropriate where plaintiff nonetheless offered no justification for his nonattendance. Ehrenhaus v Reynolds (1992, CA10 Colo) 965 F2d 916, 22 FR Serv 3d 1214.

District court did not abuse its discretion in dismissing employees' political discrimination claim for failure to comply with order requiring them to answer interrogatories; 12 of 13 plaintiffs failed to even submit answers, without justification, and 13th's answers were incomplete, and plaintiffs had been warned that failure to comply would result in dismissal of claims and/or sanctions against counsel. Angulo-Alvarez v Aponte de La Torre (1999, CA1 Puerto Rico) 170 F3d 246, 43 FR Serv 3d 330, cert den *(1999) 528 US 819, 145 L Ed 2d 52, 120 S Ct 60.*

Plaintiff's refusal to comply with discovery request regarding facts surrounding his claim of diversity jurisdiction, without claimed limitation to very day suit was filed, was unjustified and

warranted dismissal of action with prejudice. *Perry v Pogemiller (1993, ND Ill) 146 FRD 164,* motion to dismiss app den, affd (1993, CA7 Ill) 16 F3d 138, 28 FR Serv 3d 211.

Sanction of dismissal of action was warranted where plaintiff largely failed to comply with discovery requests and orders for two years, for no valid reason. Abreu v City of New York (2002, SD NY) 208 FRD 526, 53 FR Serv 3d 394.

District court granted motion to dismiss complaint with prejudice for repeated violations of deadlines, rules, and court orders concerning discovery without any legitimate justification or excuse. Ortiz-Rivera v Mun. Gov't of Toa Alta (2003, DC Puerto Rico) 214 FRD 51, 55 FR Serv 3d 772.

Unpublished Opinions

Unpublished: District court properly granted government title to residence and dismissed claimant's claim to that property because claimant willfully and repeatedly failed to comply with its discovery obligations, and claimant's noncompliance stemmed from claimant itself. United States v Med. Group Research Assocs. (2014, CA2 NY) 586 Fed Appx 823.

Unpublished: Because plaintiff former police officer failed to produce discovery responses to defendant city after two-and-a-half months of court's order to compel, and failed to give compelling reasons other than encountering "road blocks," further sanctions would not have successfully compelled production and dismissal under *Fed. R. Civ. P. 37(b)(2)(A)* had been proper. Shortz v City of Tuskegee (2009, CA11 Ala) 2009 US App LEXIS 24725.

Unpublished: Inmate's disregard for discovery process and complete failure to respond to or comply with court's order compelling discovery, pursuant to *Fed. R. Civ. P. 37(b)*, along with inmate's lack of objection to defendants' motion to dismiss and general failure to prosecute case, justified dismissal with prejudice. Walden v City of Nashua (2007, DC NH) 2007 DNH 50.

Unpublished: After conducting de novo review of magistrate's report and considering Poulis factors, district court adopted magistrate's recommendation and dismissed civilly committed sexual predator's pro se *42 USCS § 1983* suit pursuant to Fed. R. Civ. P. 16, *37*; dismissal was appropriate sanction for predator's noncompliance with several pretrial orders, including one requiring him to submit written narrative statement and to provide lists of his proposed exhibits and witnesses and summary of witnesses' anticipated testimony, because (1) predator was solely responsible for noncompliance; (2) despite being granted several extensions of time and being warned of consequences of failing to comply, predator had not explained his noncompliance with pretrial orders; and (3) corrections officer sued in suit was prejudiced because he had expended unnecessary resources as result of predator's noncompliance. Rivera v Marcoantonio (2007, DC NJ) 2007 US Dist LEXIS 29264.

**211. Lesser or alternative sanctions considered**

Court abused its discretion in dismissing case for refusal to comply with discovery orders and/or failure to prosecute where court made no finding of bad faith resistance by plaintiffs to any discovery orders or of any other subordinate behavior by them, record did not indicate that court

considered any less drastic sanctions, and given plaintiffs' lack of fruitful communications with attorney who subsequently withdrew, it was not clear that plaintiffs' behavior could be characterized as more than negligent. Beavers v American Cast Iron Pipe Co. (1988, CA11 Ala) 852 F2d 527, 47 BNA FEP Cas 925, 47 CCH EPD P 38198, 11 FR Serv 3d 1572.

District court abused its discretion when it dismissed contractor's claim against company after contractor asserted his Fifth Amendment privilege and refused to answer some of company's discovery requests, because district court did not consider alternative proposal suggested by both contractor and company that matter could be stayed pending resolution of related criminal action that was basis for assertion of Fifth Amendment privilege. McMullen v Bay Ship Mgmt. (2003, CA3 Pa) 335 F3d 215, 55 FR Serv 3d 1193.

Where district court dismissed plaintiff's claims under § 43(a) of Lanham Act, *15 USCS § 1125(a)*, as sanction for failing to produce certain data after having been ordered to do so, which data was not retained by plaintiff because it proved to be not useful in plaintiff's assessment of damages, district court erred because there was no indication in district court's order of dismissal that it gave any consideration to lesser sanctions. P&G v Haugen (2005, CA10 Utah) 427 F3d 727, 77 USPQ2d 1029, 2005-2 CCH Trade Cases P 74976, 68 Fed Rules Evid Serv 715, 63 FR Serv 3d 303.

In plaintiff's action against law firm and one of its attorneys, district court improperly denied law firm's motion for sanctions for plaintiff's failure to appear at her deposition, after informing parties in court that it would award such sanctions, because district court failed to explain why it refused to award expenses to law firm as sanction against plaintiff, pursuant to *Fed. R. Civ. P. 37(b)(2)*, plaintiff's consent to dismissal with prejudice in lieu of any other sanctions was not sufficient basis for such denial, and fact that district court denied law firm's motion with respect to expenses suggested that it found that at least one of two exceptions under *Fed. R. Civ. P. 37(b)(2)*, special circumstances or substantial justification, applied. Novak v Wolpoff & Abramson LLP (2008, CA2 Conn) 536 F3d 175.

In dismissing as sanction plaintiffs' motion for writ of execution, although district court had more than adequate basis to sanction plaintiffs' counsel and accorded required procedural safeguards, further findings were needed to support sanction that fell entirely on plaintiffs rather than principally on counsel. Mitchell v Lyons Prof'l Servs. (2013, CA2 NY) 708 F3d 463, 117 BNA FEP Cas 770.

District Court, after several delays in complying with discovery requests, dismissed plaintiffs' inverse condemnation case under former Rule 37(b)(2)(C) after plaintiffs' failure to comply with court's discovery order, since another continuance would be sanction against court due to disruptive effects on calendar, and imposing fine would introduce sporting chance theories encouraging parties to withhold vital information only resulting in fines. G-K Properties v Redevelopment Agency of San Jose (1976, ND Cal) 409 F Supp 955, 22 FR Serv 2d 716, affd (1978, CA9 Cal) 577 F2d 645, 25 FR Serv 2d 1497.

Dismissal of plaintiff's action was warranted where she twice refused to obey order to submit to medical examination and court could perceive no appropriate alternative sanction. Sloane v Thompson (1989, DC Mass) 128 FRD 13, 15 FR Serv 3d 593.

Unpublished Opinions

Unpublished: In context of Rule 37(b)(2), dismissal is drastic remedy that should be imposed only in extreme circumstances, usually after consideration of alternative, less drastic sanctions, but dismissal sanction is proper where party fails to comply with court orders willfully, in bad faith, or through fault. Carter v Jablonsky (2005, CA2 NY) 121 Fed Appx 888.

Unpublished: Appellant's claim on funds that U.S. sought in civil forfeiture proceeding was properly dismissed pursuant to Fugitive Disentitlement Act, 28 USCS § 2466, where civil forfeiture case and pending criminal case against appellant were sufficiently related to invoke authority to dismiss under § 2466; appellant had notice of criminal charges against him; appellant declined to reenter U.S. to defend against civil forfeiture; appellant was not held in custody in any other jurisdiction for commission of criminal conduct in that jurisdiction; appellant engaged in campaign to avoid complying with discovery and to delay litigation by ignoring court orders to appear for deposition; and appellant's request for lesser sanctions under *Fed. R. Civ. P. 37* was considered but it was determined that lesser sanctions would be ineffective in this case. United States v $ 343,726.60 in United States Currency (2008, CA11 Fla) 2008 US App LEXIS 7228.

Unpublished: District court's dismissal of prisoner's *42 USCS § 1983* complaint was not supported by findings or analysis required by precedent; first, record did not support finding that he willfully or in bad faith refused to comply with discovery order in question; second, magistrate judge's report and recommendation, adopted by district court, appeared to have omitted any consideration of whether, had his conduct been willful, lesser sanctions would have sufficed to achieve goals of *Fed. R. Civ. P. 37*, 41. Doye v Colvin (2010, CA11 Ga) 2010 US App LEXIS 9389.

**212. Lesser or alternative sanctions ineffective**

Sanctions of dismissal of plaintiff contractor's claims against subcontractor's surety and default judgment against plaintiff on claim and counterclaim were not abuse of discretion where there were repeated failures to comply with discovery orders concerning production of documents and depositions for no apparent reason and less harsh sanctions had not worked. Curtis T. Bedwell & Sons, Inc. v International Fidelity Ins. Co. (1988, CA3 Pa) 843 F2d 683.

Dismissal was warranted where appellants continuously refused to respond to discovery requests even after court ordered responses, delays were long and unjustified, and less drastic sanctions had been unsuccessful. Toth v Trans World Airlines, Inc. (1988, CA9 Cal) 862 F2d 1381, 12 FR Serv 3d 286.

Dismissal of action for discovery abuses was proper where nearly 650 entries in case docket sheet pertained to contested discovery activities and court orders in response, magistrate judge to whom discovery had been referred had found probable grounds for expense-shifting sanctions against plaintiffs at least 13 times, but lesser sanctions had been ineffective, plaintiffs were warned that they risked incurring sanction of dismissal, and abuse of discovery process showed no signs of abating. *Friends of Animals v United States Surgical Corp. (1997, CA2*

*Conn) 131 F3d 332, 39 FR Serv 3d 550,* corrected (1997, CA2 Conn) 1997 US App LEXIS 40505.

District Court did not abuse its discretion by dismissing lawsuit against foreclosing bank where lesser sanctions, including warnings and appointment of special master, had proven futile in stopping discovery misconduct. Good Stewardship Christian Ctr. v Empire Bank (2003, CA8 Mo) 341 F3d 794, 56 FR Serv 3d 441.

Since plaintiff has failed to prosecute his action with any diligence whatsoever, has frustrated very purpose of pretrial discovery procedures mandated by Federal Rules of Civil Procedure by speciously objecting on ground of relevance to clearly relevant document requests and questions put to him at his deposition and has failed to comply in any manner with court's order, court is confronted with extreme situation in which harsh remedy of dismissal of plaintiff's action with prejudice is warranted; lesser sanction is inadequate. Chira v Lockheed Aircraft Corp. (1980, SD NY) 85 FRD 93, 28 FR Serv 2d 1255, affd (1980, CA2 NY) 634 F2d 664, 30 FR Serv 2d 576.

Before dismissing petition due to party's failure to comply with discovery, court must find that lesser sanction would not be effective. United States v BCCI Holdings (Lux.), S.A. (1996, DC Dist Col) 169 FRD 220, 36 FR Serv 3d 1256.

Employee's discrimination claim was dismissed as sanction for employee's failure to comply with discovery orders on at least six different occasions over period of at least nine months; employee refused, in disregard to advice from counsel to disclose post-termination employment activity and actively avoided completion of deposition, and review by court of lesser sanctions that could be imposed revealed that none would be effective. *Handwerker v AT&T Corp. (2002, SD NY) 211 FRD 203,* affd (2004, CA2 NY) 93 Fed Appx 328.

Dismissal of Chapter 13 debtor's adversary complaint pursuant to *Fed. R. Civ. P. 37* for failure to comply with bankruptcy court's discovery order was proper because debtor willfully disregarded discovery deadlines and rules to prejudice of defendant and alternative sanctions would have been ineffective. Bushay v McDonnell (In re Bushay) (2005, BAP1) 327 BR 695, affd (2006, CA1) 187 Fed Appx 17.

Unpublished Opinions

Unpublished: District court did not abuse its discretion in dismissal of appellant's action under *Fed. R. Civ. P. 37(b)(2)* because (1) after being warned that she had to provide complete *Fed. R. Civ. P. 26(a)* disclosures relating to her damages or suffer dismissal, appellant never responded with additional information about her damages and maintained at her deposition that she had provided enough information about her damages; (2) appellant's actions prejudiced appellee's ability to prepare summary judgment motion or for trial; and (3) lesser sanctions would have proven futile given appellant's deposition testimony that she would continue to withhold evidence until trial. Hudson v Pinnacle Teleservices (2006, CA8 Iowa) 2006 US App LEXIS 14714.

Unpublished: In light of plaintiff's willful violation of district court orders, and combined impact of plaintiff's violations and clear pattern of discovery malfeasance demonstrated by plaintiff in

case, court concluded that record supported district court's conclusion less severe sanction would not have remedied plaintiff's discovery violations; therefore, decision to dismiss with prejudice was not abuse of discretion. Schubert v Pfizer, Inc. (2012, CA8 Iowa) 2012 US App LEXIS 1922.

**213. Notice lacking**

Inability to comply with court order because of lack of notice is proper ground for vacating Rule 37 dismissal order. De Vincent v United States (1980, CA1 Mass) 632 F2d 145, cert den *(1980) 449 US 1038, 66 L Ed 2d 501, 101 S Ct 618.*

Trial judge does not abuse discretion in dismissing taxpayers' action for refund of taxes paid for failure to appear at court-ordered depositions when only explanation presented by counsel was that taxpayers must not have received notice of deposition because letter containing notice was returned unclaimed, and record shows that plaintiffs, in midst of litigation, failed to contact their attorney for a period of about 60 days. Gates v United States (1985, CA10 Colo) 752 F2d 516, 85-1 USTC P 9198, 1 FR Serv 3d 889, 55 AFTR 2d 666.

In forfeiture action against property on basis that it was purchased with drug trafficking proceeds, District Court erred in dismissing real party in interest's claim to property for his failure to appear at his own deposition, since willfulness to appear was not supported in record, where real party in interest left jurisdiction long before action was initiated, leaving his mother power of attorney, and there was no indication he was still alive or knew anything about litigation, and there was no showing that government needed deposition. United States v Pole No. 3172 (1988, CA1 RI) 852 F2d 636, 11 FR Serv 3d 999 (superseded by statute on other grounds as stated in United States v Mondragon (2002, CA4 Md) 313 F3d 862).

Dismissal based squarely on Rule 37(b) for deponent's failure to answer certain questions could not stand since no order to compel answers to such questions existed and such directions could not be implied from general directive language of scheduling order. R.W. Int'l Corp. v Welch Foods, Inc. (1991, CA1 Puerto Rico) 937 F2d 11, 19 FR Serv 3d 1353, summary judgment gr, dismd on other grounds, on remand (1993, DC Puerto Rico) 1993-2 CCH Trade Cases P 70433, affd in part and vacated in part on other grounds, remanded, in part (1994, CA1 Puerto Rico) 13 F3d 478, 1994-1 CCH Trade Cases P 70488, subsequent app (1996, CA1 Puerto Rico) 88 F3d 49 and (criticized in Black Horse Lane Assoc., L.P. v Dow Chem. Corp. (2000, CA3 NJ) 228 F3d 275, 51 Envt Rep Cas 1289, 47 FR Serv 3d 842, 31 ELR 20148) and (criticized in Ferko v NASCAR (2003, ED Tex) 218 FRD 125).

Dismissal was inappropriate sanction for patentee's failure to disclose and produce certain documents to supplement discovery until ordered to do so in International Trade Commission proceeding which it had initiated seeking investigation based on alleged infringements of four of its patents, since outstanding discovery rules did not put party on specific notice that its conduct was deficient, and when it was ordered to produce, it did so immediately. Genentech, Inc. v United States ITC (1997, CA FC) 122 F3d 1409, 19 BNA Intl Trade Rep 1451, 43 USPQ2d 1722, 38 FR Serv 3d 592 (criticized in In re Natural Gas Commodity Litig. (2005, SD NY) 2005 US Dist LEXIS 11950).

**214. Obstruction of discovery**

Dismissal of pro se plaintiff's action is not justified on ground that plaintiff was guilty of dilatory or obstructionist practices where there is no evidence that plaintiff acted in bad faith in refusing to pay sanction of $ 750 for failure to appear at deposition, plaintiff immediately advised court that he did not have ability to pay such amount and plaintiff complied with court's order to co-operate with defense discovery efforts. Thomas v Gerber Productions (1983, CA9 Cal) 703 F2d 353, 35 FR Serv 2d 1216.

Party's persistent refusal, in face of warnings by court and his corporation's attorney, to answer any questions at duly scheduled deposition indicated willful attempt to obstruct course of discovery and District Court was fully justified in imposing harsh sanction of dismissal. Jones v Niagara Frontier Transp. Auth. (1987, CA2 NY) 836 F2d 731, 9 FR Serv 3d 1371, cert den *(1988) 488 US 825, 102 L Ed 2d 50, 109 S Ct 74.*

District court properly dismissed railroad worker's action against railroad under *Fed. R. Civ. P. 37(b)(2)(A)(v)* because worker had intentionally flouted discovery deadlines, hidden and tampered with evidence, and lied in his deposition, and worker's misconduct related to most important issues of case, namely, how badly he was injured and whether he was able to work. Negrete v AMTRAK (2008, CA7 Ill) 547 F3d 721.

**215. Prejudice or lack thereof**

District court did not err in dismissing plaintiffs' claims against defendant and codefendant for failure to comply with court's orders concerning discovery, even though codefendant did not initiate discovery motion which led to dismissal and did not specifically attack any discovery matters as to its interest in litigation, since codefendant did bring its own successful motion to compel early in discovery, cooperated in defendant's later efforts to secure adequate responses and joined in defendant's motion to dismiss, so that district court could reasonably conclude that plaintiffs' failure to comply with court orders prejudiced both defendants. *Payne v Exxon Corp. (1997, CA9 Alaska) 121 F3d 503, 97 CDOS 6249, 97 Daily Journal DAR 10232, 1997 AMC 2730, 38 FR Serv 3d 309.*

Where district court dismissed plaintiff's claims under § 43(a) of Lanham Act, *15 USCS § 1125(a)*, as sanction for failing to produce certain data after having been ordered to do so, which data was not retained by plaintiff because it proved to be not useful in plaintiff's assessment of damages, district court's finding of prejudice, unsupported by any detailed explanation, was clearly erroneous. P&G v Haugen (2005, CA10 Utah) 427 F3d 727, 77 USPQ2d 1029, 2005-2 CCH Trade Cases P 74976, 68 Fed Rules Evid Serv 715, 63 FR Serv 3d 303.

Dismissal without prejudice under Rule 37(b)(2) of government's antitrust actions filed against defendant television networks would be appropriate, where court was faced with clear violation of its orders by government, but defendants were not prejudiced by plaintiff's failure to comply with orders. United States v National Broadcasting Co. (1974, CD Cal) 65 FRD 415, 1974-2 CCH Trade Cases P 75396, 19 FR Serv 2d 737, app dismd *(1975) 421 US 940, 95 S Ct 1668, 44 L Ed 2d 97.*

Although refusal of government to submit to any pre-hearing discovery was improper, court could not see how respondents were prejudiced by such refusal and found no just cause to

require dismissal of petition pursuant to Rule 37 as requested, where government produced witnesses at hearing who answered all questions put to them and disclosed everything which would have been discovered prior to hearing, and where government's file was produced for in camera inspection and court found nothing in it which was not produced at hearing and which might have led to material evidence. United States v Duke (1974, ND Ill) 379 F Supp 545, 74-1 USTC P 9475, 34 AFTR 2d 5059.

In granting plaintiff's motion for sanctions for defendant's failure to comply with discovery orders, court found that plaintiff was not so severely prejudiced by defendants' actions as to warrant dismissal; first, discovery deadline had since been extended and, therefore, delay plaintiff encountered in getting answers to interrogatories did not prejudice him; second, burden placed on court in having to resolve that portion of motion dealing with interrogatories did not rise to level of being intolerable; and third, court expected that sanction it was imposing (award of attorneys fees) would act as sufficient deterrent against similar behavior in future. Caldwell v Ctr. for Corr. Health (2005, DC Dist Col) 228 FRD 40.

**216. Prior dismissal**

District Court does not abuse its discretion when it dismisses complaint with prejudice for failure to obey order regarding discovery, where plaintiff ignored defendant's interrogatories and court order for 4 months, and where District Court dismissed plaintiff's 2 previous suits in same matter for incomplete answers to interrogatories. Anderson v Home Ins. Co. (1983, CA8 Mo) 724 F2d 82, 38 FR Serv 2d 1619 (criticized in Sprint Spectrum L.P. v AT&T Communs., Inc. (2001, WD Mo) 2001 US Dist LEXIS 25620).

Court would dismiss action with prejudice as sanction under Rule 37 for failure to comply with discovery order where plaintiffs had consistently, over period of almost 3 years since case was first filed, flaunted discovery rules, making no or inadequate, evasive, or illegible responses, and case had already been dismissed once without prejudice for failure to comply with discovery orders. Burris v Sun Refining & Marketing Co. (1984, ED Ark) 103 FRD 586.

**217. Privileged and confidential matters**

Government has not abused claim of privilege when it refused to answer interrogatories seeking names of informers in proceeding under 29 USCS §§ 206, 207, so that trial court errs in dismissing complaint for failure to comply with order to answer. Mitchell v Roma (1959, CA3 Pa) 265 F2d 633, 36 CCH LC P 65361, 2 FR Serv 2d 513.

District Court's dismissal sanction under Rule 37(b) was appropriate where freight forwarder suing carriers and insurer of cargo failed to comply with discovery order to reveal identity of its undisclosed principal; party may not be allowed to defeat discovery order by simply stating that it had contracted not to reveal certain information. Sig M. Glukstad, Inc. v Lineas Aereas Nacional-Chile (1981, CA5 Fla) 656 F2d 976, 32 FR Serv 2d 1481.

District Court erred in dismissing Labor Secretary's FLSA action against employer for refusal to comply with order to furnish employer with interview statements taken during investigation of employees who withheld their consent to be identified, since defense theory that any

noncompliance with FLSA resulted from failure of identified employees to perform fiduciary duties of corporation did not override qualified privilege provided to protect employees who cooperate with Labor Department investigations. *Brock v Gingerbread House, Inc. (1989, CA10 Colo) 907 F2d 115, 29 BNA WH Cas 1440.*

Plaintiff's conduct evidenced deliberate pattern of delay and disregard for court procedures that was sufficiently egregious to warrant dismissal, even though he had made some documents available and listed documents withheld on basis of privilege, since assertion of privilege was untimely, ran counter to court's prior waiver order, and was totally uninformative and thus gave appearance of further stalling tactic rather than good faith effort to comply with rules and court's order. Marx v Kelly, Hart & Hallman, P.C. (1991, CA1 Mass) 929 F2d 8, 19 FR Serv 3d 166.

**218. --Self-incrimination**

Federal District Court erred in dismissing action of taxpayer to collect taxes allegedly due on gambling earnings on ground of taxpayer's failure to furnish information sought by deposition as ordered by District Court where taxpayer asserted self-incrimination as basis for refusing to answer; court, instead, should have required government to obtain use immunity for taxpayer, after which, if taxpayer refused to testify, appropriate relief pursuant to Rule 37, including dismissal, could have been granted. Shaffer v United States (1975, CA4 W Va) 528 F2d 920, 76-1 USTC P 16209, 20 FR Serv 2d 1428, 37 AFTR 2d 349.

Action against buyers of goods by assignor of claim for such goods will not be dismissed because assignee of claim, seller of goods, refuses to answer questions on deposition under protection of Fifth Amendment where such assignee is not party to action; to dismiss in such circumstances would be unjust. Foreign Credit Corp. v Aetna Casualty & Surety Co. (1967, SD NY) 276 F Supp 791, 12 FR Serv 2d 905.

Since plaintiff, while being deposed in course of pretrial discovery, refused to answer questions relevant to action on 50 different occasions by claiming constitutional privilege against self-incrimination, plaintiff's complaint would be dismissed with prejudice unless plaintiff answered interrogatories in question. Penn Communications Specialties, Inc. v Hess (1975, ED Pa) 65 FRD 510, 20 FR Serv 2d 235.

In libel action against publisher, failure of plaintiff, who is subject to criminal proceeding, to comply with discovery by reason of assertion of Fifth Amendment privilege against self-incrimination does not warrant sanction of dismissal of libel action. MacDonald v Time, Inc. (1983, DC NJ) 554 F Supp 1053, 9 Media L R 1025, 36 FR Serv 2d 134.

**219. Pro se litigants**

Although pro se litigant is not held to same high standards as member of bar his refusal to co-operate in discovery can result in dismissal under Rule 37. Pack v South Carolina Wildlife & Marine Resources Dep't (1981, DC SC) 92 FRD 22, 33 FR Serv 2d 1040.

Plaintiff's pro se status entitles him to "one more chance" to comply with lawful discovery order before his action is dismissed for his obstinate and bad-faith efforts to resist giving defendant information to which defendant is entitled. Wheeler v England (1982, ED Tenn) 96 FRD 546.

All litigants, including those proceeding pro se, have obligation to comply with court orders, and when they flout that obligation, they, like all litigants, must suffer consequences of their actions. Baba v Japan Travel Bureau Int'l (1996, SD NY) 165 FRD 398, 34 FR Serv 3d 1521, affd (1997, CA2 NY) 111 F3d 2, 74 BNA FEP Cas 864, 70 CCH EPD P 44592.

Because pro se litigants are generally unfamiliar with procedures and practices of courts, court may not dismiss pro se litigant's claim for failure to comply with discovery orders without first warning litigant of consequences of noncompliance. Quiles v Beth Isr. Medical Ctr. (1996, SD NY) 168 FRD 15, 71 BNA FEP Cas 733, 69 CCH EPD P 44358, 36 FR Serv 3d 1385.

Fact that plaintiff is proceeding pro se is not enough to spare her case from discovery sanctions, including dismissal; all litigants, including those proceeding pro se, have obligation to comply with court orders, and when they flout that obligation they, like all litigants, must suffer consequences of their actions. Mathews v U.S. Shoe Corp. (1997, WD NY) 176 FRD 442.

Pro se litigant's conduct during discovery did not warrant dismissal of his claims since he ultimately obeyed magistrate judge's order to appear for his deposition, and while he did not respond to discovery requests as ordered, he made effort to explain that he believed himself incapable of responding, thereby evincing lack of bad faith; furthermore, his conduct did not appear to have been sort of tactical litigation delays or other misconduct for which sanction of dismissal had been customarily deemed appropriate. Ghaly v USDA (2010, ED NY) 739 F Supp 2d 185.

Unpublished Opinions

Unpublished: In case with pro se litigant, court uses extra care when deciding whether to order *Fed. R. Civ. P. 37(b)(2)* dismissal as sanction; nevertheless, pro se litigant is subject to same procedural rules as everyone else. Taylor v Safeway, Inc. (2004, CA10 Colo) 116 Fed Appx 976.

Unpublished: In case in which individual, resident of England, appealed district court's dismissal of his complaint for his failure to comply with discovery order pursuant to *Fed. R. Civ. P. 37(b)(2)(A)*, his challenge was without merit; before granting dismissal, even district judge afforded individual one final chance to appear for deposition in New York on date certain, requiring advance confirmation of intended attendance in writing; only when he failed to signal obedience to that fifth instruction in six months requiring attendance at deposition was judgment of dismissal entered. Brown v Astoria Fed. S&L Ass'n (2011, CA2 NY) 2011 US App LEXIS 25994.

**220. --Civil rights**

Pro se complainant's civil rights complaint was properly dismissed for failure to obey discovery order despite complainant's refusal to be deposed without counsel, where court had previously postponed deposition to give complainant time to contact attorney, there was no evidence complainant contacted any attorneys on list provided by court, and court's order specifically preserved complainant's rights to object to testimony at later time and warned complainant that failure to comply with order could result in serious sanctions such as dismissal. McDonald v Head Criminal Court Supervisor Officer (1988, CA2 NY) 850 F2d 121, 11 FR Serv 3d 602.

District court did not abuse its discretion in dismissing pro se civil rights plaintiff's suit for his intentional failure to respond to defendant's interrogatories as response to his difficulties with defendant's counsel in other cases. Lindstedt v City of Granby (2000, CA8 Mo) 238 F3d 933, 48 FR Serv 3d 554, reh den (2000, CA8 Mo) 2000 US App LEXIS 33566.

Civil rights action of pro se prisoner would be dismissed if after one final chance to comply with discovery order prisoner failed to do so, where he had repeatedly failed to comply with defendant's discovery requests and court's discovery orders, indicating deliberate attempt to frustrate litigation. Rivera v Simmons (1987, SD NY) 116 FRD 593.

Although dismissal for § 1983 litigant's previous noncompliance with discovery requests and court orders compelling discovery would not be appropriate given his pro se status and ultimate compliance with court's order to answer "plain language" interrogatories, dismissal would be ordered for his failure to comply with trial preparation order where court could only conclude that it was willful in light of litigant's insistence that he "don't need to file nothing" and continued failure to file anything following denial of his appeal on that ground. Tyler v Iowa State Trooper Badge No. 297 (1994, ND Iowa) 158 FRD 632, 31 FR Serv 3d 642.

Not only were sued former prison warden and sued prison medical services company entitled to summary judgment as to *U.S. Const. amend. VIII* deliberate indifference to medical needs claims asserted by former inmate in pro se *42 USCS § 1983* suit, they were also entitled to prevail on their *Fed. R. Civ. P. 37* sanction motion; dismissal with prejudice was appropriate under Poulis because (1) inmate had repeatedly failed to cooperate with discovery and had walked out of his deposition before it was concluded; (2) given that he was proceeding pro se, inmate was solely responsible for discovery misconduct; (3) warden and company were prejudiced by misconduct as it prevented them from completing inmate's deposition and from fully preparing for trial; (4) it was doubtful that monetary sanctions would be effective given inmate's in forma pauperis status; and (5) based on record, inmate's claims were not meritorious. Collins v Williams (2008, DC Del) 575 F Supp 2d 610.

In case in which pro se individual sued housing authority and its board of commissioners, alleging violations of Fair Housing Act, 42 USCS §§ 3601-3631, 42 USCS § 2000d, and Fifth and *Fourteenth Amendments to U.S. Constitution* and authority and board moved to dismiss because of individual's failure to cooperate with discovery, first through fifth Poulis factors favored dismissal; individual acknowledged that he had not responded to defendants' discovery but provided no reason for his failure, defendants were prejudiced by individual's complete failure to respond to discovery requests and to appear for his deposition, individual's failure to respond to discovery and appear for his scheduled depositions and his failure to pursue any relief or protection from district court established pattern of dilatory conduct, individual's disregard of discovery process appeared to be willful or in bad faith, and there were no alternative sanctions court could effectively impose. Thorpe v Wilmington Hous. Auth. (2009, DC Del) 262 FRD 421.

**221. --Other particular cases**

Dismissal of pro se plaintiff's action is not justified on ground that plaintiff was guilty of dilatory or obstructionist practices where there is no evidence that plaintiff acted in bad faith in refusing

to pay sanction of $ 750 for failure to appear at deposition, plaintiff immediately advised court that he did not have ability to pay such amount and plaintiff complied with court's order to co-operate with defense discovery efforts. Thomas v Gerber Productions (1983, CA9 Cal) 703 F2d 353, 35 FR Serv 2d 1216.

Trial court properly dismissed pro se plaintiff's 2 lawsuits under Rule 37(b) where plaintiff defied numerous court orders and was warned on 3 separate occasions that dismissal could follow noncompliance with discovery, plaintiff abused court personnel and directed calumnies at judges, law clerks, administrators, and litigants, and court concludes that plaintiff's refusal to comply with discovery orders was willful and in bad faith. Day v Allstate Ins. Co. (1986, CA5 Tex) 788 F2d 1110, 5 FR Serv 3d 503.

District Court did not abuse its discretion in dismissing pro se litigants' claims where District Court gave them meaningful notice of what was expected of them during course of discovery, initially imposed less stringent sanctions when they failed to corroborate, and warned them that failure to comply with subsequent orders would result in dismissal. Farnsworth v Kansas City (1988, CA8 Mo) 863 F2d 33, 12 FR Serv 3d 1179, cert den *(1989) 493 US 820, 107 L Ed 2d 43, 110 S Ct 77.*

Dismissal of pro se plaintiff's proceeding in forma pauperis for failure to pay costs assessed for unreasonable refusal to obey discovery order was permissible and appropriate where litigant had been forewarned, made no attempt to comply with sanction order, or to ask court to devise way for him to partially comply, but instead continued to challenge sanction on grounds that he acted correctly. Moon v Newsome (1989, CA11 Ga) 863 F2d 835, 13 FR Serv 3d 359, reh den, en banc (1989, CA11 Ga) *874 F2d 821* and cert den *(1989) 493 US 863, 107 L Ed 2d 135, 110 S Ct 180,* reh den *(1989) 493 US 960, 107 L Ed 2d 364, 110 S Ct 380.*

Trial court did not err in dismissing pro se plaintiff's complaint for failure to comply with discovery orders where plaintiff failed to heed discovery orders on at least four separate occasions, thus delaying case nearly 2 years, and District Court explored numerous options before ordering dismissal, such as repeatedly allowing plaintiff additional time to comply with orders, informing him of actions he must take in order to comply, and warning him about threat of dismissal. Minotti v Lensink (1990, CA2 Conn) 895 F2d 100, 15 FR Serv 3d 1042.

Dismissal of pro se, former state prisoner's action for failure to fully comply with discovery was abuse of discretion where litigant, who was homeless, indigent, and severely handicapped, attempted to comply with massive discovery requests and his failure to fully comply did not rise to level of bad faith; district court should have imposed sanction less drastic by allowing litigant opportunity to comply with discovery requests with assistance of counsel, whom he obtained after magistrate recommended dismissal. Porter v Martinez (1991, CA9 Cal) 941 F2d 732, 91 Daily Journal DAR 9825, 134 ALR Fed 677.

Dismissal of legal malpractice suit with prejudice was appropriate sanction where pro se plaintiffs failed to attend pretrial conferences, to submit proposed pretrial order, and to appear at their depositions, thereby prejudicing defendants and hindering court's management of its docket, plaintiffs had ample time to find new counsel after former counsels' requests to

withdraw for nonpayment of expenses had been granted, even when plaintiffs had counsel they stalled and missed numerous discovery deadlines, court warned them of possibility of dismissal as sanction, and even with that threat they failed to pay attorney's fees and expenses or produce pretrial order. Jones v Thompson (1993, CA10 Kan) 996 F2d 261, 26 FR Serv 3d 239.

Pro se plaintiff's suit for wrongful discharge and breach of collective bargaining agreement is properly dismissed due to his failure to fully comply with defendants' discovery requests and court's discovery orders, where, inter alia, plaintiff failed to credibly account for walking out on his deposition and it appears that he has engaged in thinly veiled attempt to obstruct and delay his deposition in defiance of court's order, and where defendants' interests in expeditious and fair resolution of lawsuit and court's interest in efficient administration of justice might be substantially prejudiced if plaintiff were allowed to proceed on his claims. Kostyshyn v Du Pont-Newport Union Local No. 9 (1984, DC Del) 39 FR Serv 2d 1103.

Pro se plaintiff's case would be dismissed without prejudice for failure to follow directions and orders of magistrate, including meeting of discovery deadlines, where plaintiff had been warned of possibility of dismissal, in hopes that, should plaintiff choose to refile, he will take directions of court with greater seriousness. Dukes v New York City Police Comm'r Ward (1990, SD NY) 129 FRD 478.

Dismissal with prejudice of pro se plaintiff's action for failure to comply with discovery orders was warranted where unresponsiveness increased defendant's costs, and challenged court's authority, plaintiff was culpable and had notice of possible dismissal, and lesser sanctions had not worked. Witherspoon v Roadway Express (1992, DC Kan) 142 FRD 492.

Dismissal of pro se plaintiff's action was warranted for failure to produce relevant documents, to appear for deposition, and her complete and repeated failure to participate in proceedings. Stone v Jefferson Hosp. (1995, ED Pa) 164 FRD 37.

Unpublished Opinions

Unpublished: District court properly dismissed plaintiff's action under *Fed. R. Civ. P. 37(b)(2)* and 41(b) because: (1) on at least five separate occasions, plaintiff failed to comply with orders directing him to participate in discovery; (2) magistrate judge warned plaintiff that his pro se status did not excuse noncompliance and that failure to comply could result in dismissal of action; and (3) prior to dismissal of action, magistrate ordered plaintiff to show cause why sanctions should not be imposed for his failure to participate in discovery, but plaintiff failed to show cause as magistrate judge ordered, indicating that lesser sanctions would not have sufficed. Welch v Comcar Indus. (2005, CA11 Ala) 139 Fed Appx 138, reported at (2005, CA11 Ala) 2005 US App LEXIS 25539.

Unpublished: District court did not abuse its discretion in ultimately dismissing employee's case under *Fed. R. Civ. P. 37(b)(2)* for failure to comply with district court's scheduling and discovery orders because (1) employee had history of noncompliance and had ample opportunities provided to her by district court to rectify her behavior, (2) any delay or failure to follow district court's orders was directly attributable to employee as she was representing herself pro se, (3)

defendants, employer and others, had been prejudiced by employee's delay and her failure to comply with district court's discovery and scheduling orders, (4) employee's refusal to turn over her notes precluded defendants from completing her deposition or fully preparing for trial, (5) district court noted that employee's refusal to participate in discovery and to follow court orders was ongoing, and (6) while district court did not make explicit findings on whether employee's conduct was willful or in bad faith, whether alternative sanctions would have been effective, or whether her underlying claims were meritorious, district court did indicate that it considered all of relevant factors and that they supported dismissal. Wallace v Graphic Mgmt. Assocs. (2006, CA3 Pa) 197 Fed Appx 138, cert den (2007, US) *127 S Ct 1128, 166 L Ed 2d 892.*

Unpublished: Former employee's discrimination lawsuit against his former employer was erroneously dismissed under *Fed. R. Civ. P 37(b)(2)(C)* for failure to timely comply with discovery order and scheduling order because employee filed response asserting that he believed that he was exempt from *Fed. R. Civ. P. 26(a)(1)* disclosure requirement since he was pro se petitioner, and it was unlikely district court considered this document in dismissing case since document was returned to employee and was not part of district court's record, and since district court's order provided no reasoning, it was unclear whether all relevant filings and factors were considered. Malhotra v KCI Techs., Inc. (2007, CA4 Md) 2007 US App LEXIS 16544.

**222. Religious grounds for noncompliance**

District Court erred in dismissing action with prejudice as result of plaintiff's failure to comply with order directing him to take oath or use word "affirmation" before testifying at deposition, where plaintiff held sincere religious objections to using words "swear" or "affirm" and where District Court failed to explore less restrictive means of assuring truthful deposition testimony. Gordon v Idaho (1985, CA9 Idaho) 778 F2d 1397, 19 Fed Rules Evid Serv 1076, 3 FR Serv 3d 1077.

Court did not abuse its discretion in dismissing plaintiff's complaint against individual defendants for willful disregard of court's order to comply with discovery, despite party's assertion that court's failure to give her additional time to comply violated her constitutional right because time to comply occurred near Jewish high holy days, since party was free to budget her time to complete her responsibility to court in less then maximum allotted time and before first day of her religious observance. Willner v University of Kansas (1988, CA10 Kan) 848 F2d 1023, 52 BNA FEP Cas 515, 46 CCH EPD P 38016, 11 FR Serv 3d 556, cert den *(1989) 488 US 1031, 109 S Ct 840, 102 L Ed 2d 972, 53 BNA FEP Cas 160, 48 CCH EPD P 38575* and (criticized in In re Owens Corning (2004, DC Del) 305 BR 175).

**223. Repeated violations or persistent refusal to comply**

District Court did not abuse its discretion in dismissing, with prejudice, mortgage assignee's foreclosure suit, striking assignee's answer to government's supplemental complaint in government's foreclosure action, declaring that assignee's note and mortgage on property are unenforceable, canceling assignee's tax sale certificate on property and declaring that any judicial foreclosure sale of property be made free and clear of any interest held by assignee, as

sanction for failing to comply with discovery order since evidence shows that assignee repeatedly failed to provide witnesses at depositions and hearings and incompletely replied to interrogatories. Properties International, Ltd. v Turner (1983, CA11 Fla) 706 F2d 308, 36 FR Serv 2d 725.

District Court did not abuse its discretion in dismissing action with prejudice as result of plaintiff's failure to comply with order compelling answers to interrogatories, where (1) plaintiff's former counsel was unable to comply with discovery requests in part because of his inability to communicate with plaintiff due to plaintiff's travel schedule, plaintiff has not claimed that his former counsel did not attempt to contact him and has not shown that he had advised his counsel of his whereabouts so that he could be reached on reasonable notice, (2) failure of plaintiff's former counsel to seek more than 5 days to secure additional answers did not cause dismissal because, due to plaintiff's travels, answers would not have been forthcoming even if counsel had requested several weeks to respond, and (3) plaintiff failed to timely produce any documents, including documents requested in interrogatories to which it did not object, and its conduct therefore involved much more than single violation. United Artists Corp. v La Cage Aux Folles, Inc. (1985, CA9 Cal) 771 F2d 1265, 2 FR Serv 3d 769.

District Court did not err in ordering dismissal of plaintiff's civil rights action under Rule 37 where plaintiff had persistently refused to produce documents properly requested by defendant and failed to comply with court order that documents be produced, even though plaintiff offered to produce all previously withheld discovery material after case was dismissed, because, based on plaintiff's prior record of known production, District Court could properly conclude that plaintiff's latest promise provided no assurance that she would comply with discovery orders. Batson v Neal Spelce Associates, Inc. (1986, CA5 Tex) 805 F2d 546, 42 BNA FEP Cas 817, 42 CCH EPD P 36800, 6 FR Serv 3d 818.

Dismissal of complaint for repeated failure to comply with discovery orders was appropriate where plaintiffs merely alleged that requested documents were wholly unrelated to action, thus substituting their judgment for court's. Farm Constr. Services, Inc. v Fudge (1987, CA1 Mass) 831 F2d 18, 9 FR Serv 3d 329.

Court did not abuse its discretion in dismissing complaint where plaintiff repeatedly failed to appear for depositions and failed to conduct any discovery. Sere v Board of Trustees (1988, CA7 Ill) 852 F2d 285, 47 BNA FEP Cas 563, 47 CCH EPD P 38190, 11 FR Serv 3d 881.

Dismissal with prejudice was appropriate sanction for party's refusal to obey discovery orders and to pay earlier attorney's fee award since party's handling of litigation amply indicated bad faith and pattern of contumacious conduct which prevented his opponent's timely and appropriate preparation for trial. Coane v Ferrara Pan Candy Co. (1990, CA5 Tex) 898 F2d 1030, 16 FR Serv 3d 1001.

Dismissal of psychiatrist's § 1983 action which he instituted after his contract was not renewed was not abuse of discretion where plaintiff repeatedly abused discovery process and violated court's clearly articulated orders by communicating directly with court, failing to timely produce discoverable documents, inaccurately verifying that his document production was complete

and thereafter using undisclosed documents as exhibits in deposition, improperly threatening to bring criminal charges against defendants if his settlement demands were not met, and attempting to directly contact defendants in violation of court's order. Ladien v Astrachan (1997, CA7 Ill) 128 F3d 1051, 38 FR Serv 3d 1264.

In case in which medical services provider appealed district court's dismissal of its complaint against insurance company as sanction for its willful and repeated violations of district court's discovery orders, all four of factors that the Sixth Circuit used to determine if record demonstrated delay or contumacious conduct were present; provider's conduct violated Federal Rules of Civil Procedure and common courtesy alike. Universal Health Group v Allstate Ins. Co. (2013, CA6 Mich) 703 F3d 953, 2013 FED App 2P.

In proceeding by regional director of NLRB under § 10 *(l)* of National Labor Relations Act [*29 USCS § 160 (l)],* seeking injunction against union, cause will be dismissed for failure of regional director to comply with order of court, where director refuses to answer questions upon deposition limited to issues raised by petition for injunction, although so ordered to answer by court on two separate occasions. Madden on behalf of NLRB v Milk Wagon Drivers Union Local 753, etc. (1964, ND Ill) 229 F Supp 490, 56 BNA LRRM 2301, 49 CCH LC P 19008, 8 FR Serv 2d 1.51, Case 1.

Complaint was dismissed due to plaintiff's failure to respond to government notice for production of documents, refusal to answer questions at deposition, failure to supplement answers to interrogatories, and failure to return deposition transcripts despite written agreement to do so. Szilvassy v United States (1979, SD NY) 82 FRD 752, 27 FR Serv 2d 1404.

Dismissal is proper where plaintiff persists over several years in making it impossible to seasonably and reasonably try 3 income tax refund cases where she refuses to answer interrogatories despite court order and refuses to give her deposition upon proper notice. Gorod v United States (1980, DC Mass) 86 FRD 225.

Plaintiff's Title VII action is properly dismissed pursuant to Rule 37, where over 10 months have passed since defendant's initial discovery request was filed, court has issued 2 orders to compel plaintiff's compliance, plaintiff has neither answered nor objected to discovery requests, and plaintiff's counsel's failure to respond was not due to inability fostered by circumstances beyond his control. Butler v Donovan (1984, DC Dist Col) 103 FRD 456, 40 FR Serv 2d 678.

Defendant's motion for dismissal and reasonable expenses, including attorney fees, is granted under Rule 37 where defendant disregarded notices and discovery procedures, failed to comply with court order compelling discovery, and court characterizes defendants' actions as repeated and flagrant disregard for orderly administration of justice, for court orders, and for requirements of discovery process. Chapman v Schnorf, Schnorf & Schnorf (1984, ND Ohio) 109 FRD 253.

Plaintiff's lawsuit should be dismissed with prejudice where he has made no good faith effort to make discovery, has failed to respond to defendants' discovery requests, and has failed to comply with direct orders of this court. Urban Electrical Supply & Equipment Corp. v New York Convention Center Dev. Corp. (1985, ED NY) 105 FRD 92, 1985-1 CCH Trade Cases P 66595.

Dismissal of beautician's personal injury action against hair dye manufacturer, seeking damages for lost earnings and reduction in earning capacity, was appropriate sanction for beautician's failure to respond to interrogatories concerning her income and professional training and failure to comply with several court orders compelling discovery, where failure was fault of beautician rather than her counsel, manufacturer was prevented from preparing adequate defense, and beautician's responses to questions at hearing on motion for sanctions did not indicate inability to comply. Grant v Clairol, Inc. (1986, ED Pa) 113 FRD 574.

Dismissal of plaintiff's complaint was appropriate sanction for his persistent refusal to appear for his scheduled deposition and statement that he did not intend to notify defendant that he would not be appearing for third scheduled deposition. Robinson v Yellow Freight Sys. (1990, WD NC) 132 FRD 424, affd (1991, CA4 NC) *923 F2d 849,* reported in full (1991, CA4 NC) 1991 US App LEXIS 1042 and cert den *(1991) 502 US 831, 116 L Ed 2d 76, 112 S Ct 106.*

Where taxpayer who sued U.S. to set aside determination by Internal Revenue Service failed to comply with several court orders, including show cause order, and to respond to U.S.' discovery requests and summary judgment motion, court dismissed lawsuit with prejudice as sanction pursuant to *Fed. R. Civ. P. 37*. Sutton v United States (2002, MD Ga) 90 AFTR 2d 7130.

Racial discrimination case was dismissed with prejudice and plaintiff was ordered to pay sanctions where plaintiff repeatedly missed discovery deadlines and was given extensions, directly disobeyed court orders, including an order to appear for a deposition, and changed the course of discovery at the last minute. Antalan v Degussa-Huls Corp. (2002, SD Ala) 202 F Supp 2d 1331, 53 FR Serv 3d 27.

Action was dismissed because plaintiffs' continued defiance of court-imposed discovery deadlines justified dismissal, and factors pertinent to deciding whether to dismiss case weighed in favor of dismissal. Carter v IPC Int'l Corp. (2002, DC Kan) 208 FRD 320.

Employee's discrimination claim was dismissed as sanction for employee's failure to comply with discovery orders on at least six different occasions over period of at least nine months; employee refused, in disregard to advice from counsel to disclose post-termination employment activity and actively avoided completion of deposition, and review by court of lesser sanctions that could be imposed revealed that none would be effective. *Handwerker v AT&T Corp. (2002, SD NY) 211 FRD 203,* affd (2004, CA2 NY) 93 Fed Appx 328.

Although sanctions were warranted where plaintiff failed to appear for original deposition, failed to comply with order compelling his deposition, failed to comply with revised scheduling order and local rules, and failed to demonstrate his ability to pursue his action, and magistrate judge would have been amply justified if he recommended dismissal, court could not conclude that he abused his discretion by failing to do so. Carmona v Wright (2006, ND NY) 233 FRD 270.

In discrimination suit, where former employee failed to provide medical records over one year after employer requested them, dismissal with prejudice under *Fed. R. Civ. P. 37(b)* and 41(b) was appropriate because, inter alia, (1) employer suffered prejudice in preparing for trial, (2)

employee willfully disobeyed court orders, (3) employee was placed on notice that action could be dismissed, and (4) no other sanction would be effective. Gross v GMC (2008, DC Kan) 252 FRD 693.

Unpublished Opinions

Unpublished: Since debtor did not attend deposition twice ordered by district court, which court considered central to resolution of debtor's Fair Credit Reporting Act case, and district court reasonably concluded that it was clear that debtor would continue to defy its orders, district's court's *Fed. R. Civ. P. 37(b)(2)* dismissal of case was affirmed on appeal. Oliva v Trans Union, LLC (2005, CA7 Ill) 123 Fed Appx 725, reh den (2005, CA7 Ill) 2005 US App LEXIS 3992.

Unpublished: It was not abuse of discretion to dismiss complaint for failure of plaintiff to appear for her deposition where plaintiff demonstrated consistent attitude that no determination of magistrate judge or district court was decisive or binding, that every issue in case was open to continual review on same repeated grounds, and that plaintiff was entitled to suspend discovery orders simply by appealing them repeatedly. Musgrave v Wolf (2005, CA2 NY) 136 Fed Appx 422, cert den *(2006) 546 US 1172, 126 S Ct 1335, 164 L Ed 2d 51.*

Unpublished: Dismissal of *42 USCS § 1983* action for failure to comply with discovery orders was affirmed where (1) reopening discovery after ruling in favor of individual on liability was not abuse of discretion, (2) city's second set of interrogatories was not untimely since service by mail was complete on mailing under Fed. R. Civ. P. 5(b)(2)(B), (3) city's second set of discovery requests, which focused upon whether individual had applied for and taken any bar exam and details of his attempts to find employment as attorney, were pertinent and relevant to his claims for damages due to his alleged inability to earn income as lawyer, (4) individual waived any privilege attached to records concerning his application to take state bar exam by bringing lawsuit in which his employability as attorney was central to determination of damages, and (5) city did not violate its obligation to meet and confer under former *Fed. R. Civ. P. 37(a)(2)(A)*. Whatcott v City of Provo (2006, CA10 Utah) 171 Fed Appx 733.

Unpublished: In Title VII of Civil Rights Act of 1964 case, district court did not abuse its discretion in dismissing case as sanction pursuant to *Fed. R. Civ. P 37(b)(2)(A)(v)* and 41(b); pro se former employee had engaged in clear pattern of contumacious conduct by repeatedly refusing to provide discoverable information, contravening clear court orders, deceitfully denying receipt of court order, and regularly rehashing already-decided issues; district court also specifically found that given her continued obstreperousness in face of lesser sanctions, imposing lesser sanctions would be exercise in futility. Crystal Commodore Pippen v Georgia -Pacific Gypsum, LLC (2011, CA11 Ga) 2011 US App LEXIS 840.

Unpublished: District court did not abuse its discretion when it dismissed plaintiff's action as sanction under *Fed. R. Civ. P. 37(b)* for its contumacious failure to make available for deposition plaintiff's chief executive because (1) not only were two orders issued against executive, but district court found plaintiff's proffered medical excuse utterly incredible, fact that showed further disrespect for district court; (2) prior notice was hardly necessary because defendant's motion and briefing clearly requested dismissal of claims against defendant, and plaintiff had

ample opportunity to defend its misconduct; (3) as for lesser sanctions, district court was offered alternative of excluding executive's (or any other corporate representative's) testimony, but district court understood correctly that such testimony was key to plaintiffs case; and (4) plaintiff's refusal to produce its "star" witness inflicted severe prejudice on defendants' preparation. SPSL Opobo Liberia, Inc. v Marine Worldwide Servs. (2011, CA5 La) 2011 US App LEXIS 24915.

Unpublished: In case in which individual appealed district court's order dismissing her complaint against car company and tire company as sanction for her failure to comply with court orders, each of relevant factors weighed in favor of dismissal; (1) her failure to disclose experts and provide damages analysis prejudiced companies by preventing them from preparing defense to her claims; (2) her noncompliance with tailored scheduling order was not inadvertent; (3) she had been in noncompliance for year, despite reminders that her disclosures were overdue; and (4) her counsel was warned by court six months earlier that continued noncompliance could result in dismissal. Murray v Mitsubishi Motors of N. Am., Inc. (2012, CA2 Conn) 2012 US App LEXIS 3113.

Unpublished: In case in which individual appealed district court's order dismissing her complaint against car company and tire company as sanction for her failure to comply with court orders, each of relevant factors weighed in favor of dismissal; (1) her failure to disclose experts and provide damages analysis prejudiced companies by preventing them from preparing defense to her claims; (2) her noncompliance with tailored scheduling order was not inadvertent; (3) she had been in noncompliance for year, despite reminders that her disclosures were overdue; and (4) her counsel was warned by court six months earlier that continued noncompliance could result in dismissal. Murray v Mitsubishi Motors of N. Am., Inc. (2012, CA2 Conn) 2012 US App LEXIS 3113.

Unpublished: Debtor's action against creditors alleging violations of Fair Credit Reporting Act was dismissed as sanction under *Fed. R. Civ. P. 37(b)(2)* because debtor flagrantly and repeatedly disregarded court's authority by failing to provide discovery to creditors which was essential to prove creditors' defenses to action and lesser sanctions would be ineffective. Grismore v Capital One F.S.B. (2008, DC Ariz) 2008 US Dist LEXIS 109710, affd, in part, dismd, in part (2009, CA9 Ariz) 348 Fed Appx 274.

**224. Warning by court**

Dismissal of action under Rule 37 met "just" requirements where District Court gave fair warning of consequences of refusal to obey discovery order and later dismissal without prejudice afforded another opportunity to reconsider and obey within 10 days. Romari Corp. v United States (1976, CA5 Fla) 531 F2d 296, 76-2 USTC P 9542, 21 FR Serv 2d 1115, 37 AFTR 2d 1445.

Court did not abuse its discretion in dismissing plaintiff's complaint against individual defendants for refusal to comply with discovery where she had been warned that failure to comply would result in such dismissal and had had over 6 months to comply. Willner v University of Kansas (1988, CA10 Kan) 848 F2d 1023, 52 BNA FEP Cas 515, 46 CCH EPD P 38016, 11 FR Serv 3d

556, cert den *(1989) 488 US 1031, 109 S Ct 840, 102 L Ed 2d 972, 53 BNA FEP Cas 160, 48 CCH EPD P 38575* and (criticized in In re Owens Corning (2004, DC Del) 305 BR 175).

Where district court dismissed plaintiff's claims under § 43(a) of Lanham Act, *15 USCS § 1125(a)*, as sanction for failing to produce certain data after having been ordered to do so, which data was not retained by plaintiff because it proved to be not useful in plaintiff's assessment of damages, district court erred because there was no indication in record that district court ever warned plaintiff that its suit was subject to dismissal if data was not made available to defendants. P&G v Haugen (2005, CA10 Utah) 427 F3d 727, 77 USPQ2d 1029, 2005-2 CCH Trade Cases P 74976, 68 Fed Rules Evid Serv 715, 63 FR Serv 3d 303.

Pro se plaintiff's case would be dismissed without prejudice for failure to follow directions and orders of magistrate, including meeting of discovery deadlines, where plaintiff had been warned of possibility of dismissal, in hopes that, should plaintiff choose to refile, he will take directions of court with greater seriousness. Dukes v New York City Police Comm'r Ward (1990, SD NY) 129 FRD 478.

Dismissal with prejudice was appropriate sanction for plaintiff's willful refusal to comply with court order to turn over tape recordings, since refusal caused obvious prejudice to defendant because defendant would not be able to examine tape recordings prior to trial and court had already provided plaintiff with additional time to produce recordings. Betts v Agri-Tech Services, Inc. (1990, DC Kan) 130 FRD 143, 16 FR Serv 3d 33.

Pregnancy discrimination plaintiff's failure to pay court-ordered sanction for her discovery abuses and absence of any excuse for her unreasonable behavior, although more egregious since she was attorney, did not warrant default judgment since it was not grossly negligence, nor dismissal, since she had not previously been specifically warned of such possibility, but instant order to pay would also serve as warning of dismissal for failure to obey. Sussman v Salem, Saxon & Nielsen, P.A. (1994, MD Fla) 154 FRD 294, 29 FR Serv 3d 529, 8 FLW Fed D 117.

Because pro se litigants are generally unfamiliar with procedures and practices of courts, court may not dismiss pro se litigant's claim for failure to comply with discovery orders without first warning litigant of consequences of noncompliance. Quiles v Beth Isr. Medical Ctr. (1996, SD NY) 168 FRD 15, 71 BNA FEP Cas 733, 69 CCH EPD P 44358, 36 FR Serv 3d 1385.

Recognizing that dismissal was most severe sanction available, and that plaintiff should have warning of that consequence, court gave plaintiff one more opportunity to comply with her discovery obligations. Gardner v AMF Bowling Ctrs., Inc. (2003, DC Md) 271 F Supp 2d 732.

Court granted defendant's motion to dismiss plaintiff's action under *Fed. R. Civ. P. 37(b)(2)*, (d) and Fed. R. Civ. P. 41(b) as sanction for failure to comply with defendant's discovery requests because court had ordered plaintiff to appear at next scheduled deposition and had warned plaintiff that action would be dismissed if she failed to do so. Zouarhi v Colin Serv. Sys. (2004, SD NY) 223 FRD 315.

Plaintiff's motion under *Fed. R. Civ. P. 59(e)* for reconsideration of order extending discovery deadline was denied because defendant claimed that plaintiff failed to appear for second

noticed deposition, and district court would not tolerate any more needless prolonging of litigation on account of plaintiff's failure to comply with her discovery obligations; if plaintiff failed to comply with any of district court's future orders regarding discovery, district court would promptly dismiss case under *Fed. R. Civ. P. 37*. Akers v Liberty Mut. Group (2011, DC Dist Col) 274 FRD 346.

Unpublished Opinions

Unpublished: Where entry of default judgment against defendant pursuant to *Fed. R. Civ. P. 37(d)* was warranted because defendant's conduct was deliberate, willful, and in bad faith, although there was no warning specifically directed to defendant that his failure to comply with discovery requests might result in striking of his answer and entering of his default, warnings given to his co-defendant for similar conduct were sufficient to put defendant on notice of possibility of sanctions against him. Schuette v Lebbos (In re Lebbos) (2008, BC ED Cal) 2008 Bankr LEXIS 471.

**225. With prejudice dismissal and reinstatement of action**

Dismissal with prejudice, "sanction of last resort," will not be upheld if noncompliance, even if repetitive, is due to inability rather than to willfulness, bad faith, or disregard of party's responsibilities; in reviewing District Court's exercise of discretion in dismissing complaint as sanction for failure to submit to discovery, one concern is whether less drastic, but equally effective remedy could have been fashioned; in civil rights action, bar examinee's complaint was dismissed for continued failure to submit to deposition, and failure to produce recording and notes of telephone conversation examinee had with member of Committee on Bar Admissions after she received notice of her failure. Jones v Louisiana State Bar Asso. (1979, CA5 La) 602 F2d 94, 28 FR Serv 2d 162.

Court of appeals reversed district court's dismissal of case for repeated failure to meet deadlines that only extended discovery by few months, where dismissals with prejudice are reserved for delays measured in years. Malot v Dorado Beach Cottages Assocs. S. En C. Por A (2007, CA1 Puerto Rico) 478 F3d 40.

Patent infringement action is subject to dismissal without prejudice for failure to answer interrogatories, with leave to reinstate action at such time as answers are provided, notwithstanding that information is possessed by French companies which control plaintiff and which are subject to French law forbidding French citizens and corporations from communicating information on technical matters to foreign public authorities, where plaintiff has not demanded that French companies attempt to secure waiver from French government and has not independently sought such waiver. Soletanche & Rodio, Inc. v Brown & Lambrecht Earth Movers, Inc. (1983, ND Ill) 99 FRD 269, 39 FR Serv 2d 682.

Unpublished Opinions

Unpublished: District court did not abuse its discretion in declining to dismiss plaintiff's case with prejudice as sanction for failing to meet her discovery obligations, under Fed. R. Civ. P. 16(f) and *37(b)*, because magistrate judge weighed facts before it and ultimately concluded

that, because plaintiff had been diligent litigant when she had counsel of choice, it was unfair to dismiss case with prejudice, and magistrate judge correctly identified multi-factored test for whether dismissal with prejudice was appropriate, and applied that test to plaintiff's situation. Kronberg v LaRouche (2012, CA4 Va) 2012 US App LEXIS 330.

**226. Other particular cases**

In suit by unincorporated association involved in boycott of schools which challenged constitutionality of Texas statute requiring organization to disclose identity of membership, trial court abused its discretion in dismissing action for failure to comply with discovery order compelling answers to interrogatories requiring same information as statute in that its sanction of dismissal far outweighed any burdens attendant on failure to comply with prior discovery order, especially since amended complaint withdrew class action and claim for damages to class thereby dissipating any interest of defendants in identity of membership of association. Familias Unidas v Briscoe (1976, CA5 Tex) 544 F2d 182.

Dismissal of plaintiff's complaint under Rule 37(b)(2) for failure to comply with order requiring answers to interrogatories was improper where plaintiff had not willfully or in bad faith failed to timely answer interrogatories. Edgar v Slaughter (1977, CA8 Mo) 548 F2d 770, 22 FR Serv 2d 1448.

Where plaintiff's single default in failing to appear for deposition did not arise from flagrant bad faith or callous disregard of obligations fully understood, district court abused its discretion in dismissing his complaint. Griffin v Aluminum Co. of America (1977, CA5 Tex) 564 F2d 1171, 15 CCH EPD P 8007, 24 FR Serv 2d 918.

Although plaintiff did not even attempt to commence discovery until long past time contemplated by District Court's order, and her lawyer gave no reason approaching good cause for his lack of diligence when he moved for extension of already-expired discovery deadline, circumstances did not warrant extreme sanction of dismissal with prejudice; normal sanction for such failure is to disallow any further discovery and to put plaintiff to her proof without aid of whatever evidence such discovery might have produced. Givens v A.H. Robins Co. (1984, CA8 Neb) 751 F2d 261, CCH Prod Liab Rep P 10338, 40 FR Serv 2d 1168.

Dismissal of action for violations of scheduling and discovery orders in separate, related case was not justified by either Rules of Civil Procedure or district court's inherent power. Atchison, T. & S.F. Ry. v Hercules Inc. (1998, CA9 Cal) 146 F3d 1071, 98 CDOS 4769, 98 Daily Journal DAR 6757, 47 Envt Rep Cas 1061, 40 FR Serv 3d 1251.

Plaintiffs' toxic tort was not, as plaintiffs asserted, dismissed based on involuntary sanction dismissal under Fed. R. Civ. P. 16(f), *37(b)*, and 41(b), where trial court specifically stated that it was granting defendants' motion for summary judgment and that it was unnecessary to consider companies' alternative motion to dismiss for failure to comply with trial court's scheduling order. Templet v Hydrochem Inc. (2004, CA5 La) 367 F3d 473, cert den *(2004) 543 US 976, 125 S Ct 411, 160 L Ed 2d 352,* reh den *(2005) 543 US 1085, 125 S Ct 958, 160 L Ed 2d 840.*

Dismissal of plaintiffs' claims (state-law claims including claims of fraud and breach of contract and federal claim under Petroleum Marketing Practices Act, 15 USCS §§ 2801 et seq.) was vacated where sanction of dismissal rested upon cumulative findings of several alleged abuses, one of which was clearly erroneous, and several of which involved court's resolution of close questions. Sentis Group, Inc. v Shell Oil Co. (2009, CA8 Mo) 559 F3d 888.

Where insured sued insurer for benefits under disability policy, severe sanction of dismissal was warranted because, inter alia, (1) ample evidence supported conclusion that insured intentionally fabricated four documents submitted during discovery, (2) dismissal warning was not prerequisite to dismissal, and (3) submission of falsified evidence substantially prejudiced insurer. Garcia v Berkshire Life Ins. Co. of Am. (2009, CA10 Colo) 569 F3d 1174.

In antitrust action by certain homeowners against manufacturers of plumbing fixtures, plaintiffs' refusal to adequately answer certain written interrogatories justifies sanction of dismissal of their action, where, even by applying weaker sanction of presuming that answers to interrogatories which plaintiffs failed to answer would be adverse to their interests, applicable substantive law requires dismissal of their claims. Philadelphia Housing Authority v American Radiator & Standard Sanitary Corp. (1970, ED Pa) 50 FRD 13, 1970 CCH Trade Cases P 73168, 14 FR Serv 2d 97, affd (1971, CA3 Pa) 438 F2d 1187, 1971 CCH Trade Cases P 73477, 14 FR Serv 2d 1298 (criticized in Bunker's Glass Co. v Pilkington PLC (2002, App) 202 Ariz 481, 47 P3d 1119, 377 Ariz Adv Rep 19, 2002-1 CCH Trade Cases P 73634).

Claims of owner of boat that was destroyed by fire while contractor was testing engine modifications, against boat manufacturer, are dismissed, where manufacturer did not know of accident until after remains of boat had been destroyed, because manufacturer is protected by spoliation defense from any cause of action by owner since manufacturer was never afforded opportunity to inspect boat and would be greatly frustrated in its ability to defend claims of owner, who was plainly at fault for allowing boat to be placed in landfill. Thiele v Oddy's Auto & Marine (1995, WD NY) 906 F Supp 158.

Dismissal was not warranted for government's alleged failure to comply with rules regarding procedures to be followed in advance of Fed. R. Civ. P. 16(b) scheduling conference because dismissal was not warranted as permitted sanction under *Fed. R. Civ. P. 37*, and in any event, it was impossible for parties to confer at least 21 days prior to scheduling conference, there was no showing that taxpayer met his obligation to contact government within required time period, and government did not file required settlement proposal because it had represented that no settlement had been authorized. United States v Levine (2012, DC Mass) 109 AFTR 2d 2011.

Unpublished Opinions

Unpublished: District court did not abuse its discretion in dismissing plaintiff's case pursuant to *Fed. R. Civ. P. 37*, but it expressly chose not to rely on plaintiffs' failure to submit medical information as part of their initial disclosure pursuant to D. N.M. R. 26.3(d). Drain v Accredited Home Lenders, Inc. (2007, CA10 NM) 2007 US App LEXIS 6070.

Unpublished: District court did not abuse its discretion when it dismissed a plaintiff's case with prejudice because plaintiff had continually refused to comply with discovery requests and the

district court's orders compelling discovery. Smith v Atlanta Postal Credit Union (2009, CA11 Ga) 2009 US App LEXIS 21381.

**227. --Bankruptcy**

District Court did not err in dismissing trustee's antitrust action for failure to co-operate in discovery even though trustee claims that he was neither negligent nor willful, since trustee in bankruptcy is subject to sanctions to same extent as bankrupt's corporation. Wyle v R.J. Reynolds Industries, Inc. (1983, CA9 Cal) 709 F2d 585, 36 FR Serv 2d 1539.

Bankruptcy court abused its discretion by dismissing debtor's answer to petition for involuntary bankruptcy as sanction for his conduct during discovery, where, inter alia, first time that court indicated that submissions in response to court's orders were insufficient was when it entered order imposing sanctions, court did not have before it any motions for sanctions or motions to compel when it ordered answer stricken, and court offered no explanation why lesser sanctions would not have been effective. In re Rubin (1985, CA9 Cal) 769 F2d 611, 13 CBC2d 599, 3 FR Serv 3d 968 (criticized in Key Mechanical Inc. v BDC 56 LLC (In re BDC 56 LLC) (2003, CA2 NY) 330 F3d 111, 41 BCD 114, 50 CBC2d 161, CCH Bankr L Rptr P 78850).

Bankruptcy court did not abuse its discretion in granting *Fed. R. Civ. P. 37* motion to dismiss objection of debtor's business manager to debtor's discharge in bankruptcy where conduct of debtor's business manager rose to level of willful disobedience; manager notified debtor that he would not appear for his deposition in London due to health reasons and it was later revealed that manager had flown to U.S. to attend his son's college graduation. Valner v O'Brien (In re O'Brien) (2003, CA8 Mo) 351 F3d 832, 42 BCD 67, CCH Bankr L Rptr P 80023, 57 FR Serv 3d 531, reh den, motion gr (2004, CA8 Mo) 2004 US App LEXIS 1662.

District court properly upheld bankruptcy court's sanction order, which dismissed bankruptcy trustee's adversary action pursuant to *Fed. R. Civ. P. 37(b)*, because no abuse of discretion on bankruptcy court's part was shown; record established that trustee's counsel had repeatedly failed to comply with bankruptcy court's discovery orders, that he had lied to bankruptcy court concerning his compliance with orders, and that bankruptcy court had warned counsel that he might not make it to trial if he continued to file non-responsive discovery responses and continued to ignore bankruptcy court's discovery orders. Thomas Consol. Indus. v Herbst (In re Thomas Consol. Indus.) (2006, CA7 Ill) 456 F3d 719, 46 BCD 233, CCH Bankr L Rptr P 80716.

In action for violation of federal securities laws, plaintiffs' failure to comply with magistrate's order granting motion to compel responses to interrogatories and imposing fine justifies dismissal of defendant where there is no evidence that plaintiffs' failure to comply with order was based on good faith belief that bankruptcy automatic stay was in effect. Almy v Terrace Land Dev., Ltd. (1983, ND Cal) 32 BR 390.

Dismissal of Chapter 13 debtor's adversary complaint pursuant to *Fed. R. Civ. P. 37* for failure to comply with bankruptcy court's discovery order was proper because debtor willfully disregarded discovery deadlines and rules to prejudice of defendant and alternative sanctions would have been ineffective. Bushay v McDonnell (In re Bushay) (2005, BAP1) 327 BR 695, affd (2006, CA1) 187 Fed Appx 17.

Unpublished Opinions

Unpublished: Dismissal of adversary proceeding filed by Chapter 13 debtor based on his continuing failure to comply with discovery obligations and with prior order compelling discovery and awarding attorney's fees was appropriate sanction under *Fed. R. Civ. P. 37*, made applicable to case by Fed. R. Bankr. P. 7037, but award of additional attorney's fees was unjust given that dismissal was based on same discovery violations that had already been sanctioned and because debtor was pro se litigant. Coleman v Nat'l Cmty. Reinvestment Coalition (In re Coleman) (2010, BC DC Dist Col) 2010 Bankr LEXIS 1405.

**228. --Civil rights and discrimination**

Dismissal of plaintiffs' civil rights action as sanction for failing to provide discovery was not abuse of discretion, where discovery abuses were not minor default, documentation requested was central to plaintiffs claims and either within their possession or available upon their authorization, and record reflected that magistrate judge and district judge considered appropriate factors. LaFleur v Teen Help (2003, CA10 Utah) 342 F3d 1145, 56 FR Serv 3d 497.

Employee's discrimination claim was dismissed as sanction for employee's failure to comply with discovery orders on at least six different occasions over period of at least nine months; employee refused, in disregard to advice from counsel to disclose post-termination employment activity and actively avoided completion of deposition, and review by court of lesser sanctions that could be imposed revealed that none would be effective. *Handwerker v AT&T Corp. (2002, SD NY) 211 FRD 203,* affd (2004, CA2 NY) 93 Fed Appx 328.

District court dismissed action which law student filed against City, pursuant to *42 USCS § 1983*, alleging that City violated his rights under First and *Fourteenth Amendments to U.S. Constitution* when it prosecuted him for telephone harassment under ordinance that was later found to be unconstitutional, because even though court found that City violated student's rights, student failed to comply with court's orders that he answer interrogatories City sent him on question of damages, and dismissal was appropriate sanction under *Fed. R. Civ. P. 37(b)(2)* and 41(b). Whatcott v City of Provo (2005, DC Utah) 231 FRD 627, affd (2006, CA10 Utah) 171 Fed Appx 733.

Unpublished Opinions

Unpublished: In employment and age discrimination case in which pro se former employee failed to: (1) provide disclosures required by *Fed. R. Civ. P. 26(a)(1)*; (2) respond to his former employer's discovery requests; (3) appear for his own deposition, for which he had received formal notice; and (4) participate in scheduled telephone conference with magistrate judge, district court did not abuse its discretion in dismissing case with prejudice pursuant to *Fed. R. Civ. P. 37(b)(2)* as sanction. Taylor v Safeway, Inc. (2004, CA10 Colo) 116 Fed Appx 976.

Unpublished: District court did not abuse its discretion when it imposed *Fed. R. Civ. P. 37* sanctions and dismissed car driver's *42 USCS § 1983* complaint with prejudice; after examining driver's arguments and considering six relevant Poulis factors, district court properly concluded that dismissal was warranted where defendants city and city police department were prejudiced

by driver's continuing failure to respond to their discovery requests, driver's long history of dilatoriness evidenced bad faith on his part, court had sufficiently explained why lesser sanctions would not address driver's behavior, and driver's due process and equal protection claims lacked merit. Roman v City of Reading (2005, CA3 Pa) 121 Fed Appx 955.

Unpublished: Civil rights plaintiffs' egregious noncompliance with repeated discovery orders and failure to produce evidence that supported its claims of criminal and fraudulent behavior by defendant city officials warranted dismissal of complaint and award of attorney's fees to defendants under *Fed. R. Civ. P. 37(b)(2)* and *42 USCS § 1988.* Tech. Recycling Corp. v City of Taylor (2006, CA6 Mich) 186 Fed Appx 624.

Unpublished: District court did not err in dismissing plaintiff's civil rights complaint pursuant to *Fed. R. Civ. P. 37(b)* and 41(b) for failure to comply with district court's discovery orders because (1) although plaintiff claimed that defendants engaged in conduct as egregious as her own by failing to produce documents responsive to her discovery requests, record did not reflect any abuse of discovery process by defendants, and plaintiff never moved to compel production of any specific documents; (2) district court, in ordering plaintiff to be deposed, properly discounted her doctor's note stating that her medical condition excused her from attending court meetings as being inconsistent with plaintiff's otherwise substantial participation in preparing her case, and doctor did not show sufficient familiarity with factual requirements of deposition to assess plaintiff's fitness to be deposed; and (3) district court was within its discretion when it found that plaintiff's early departure from her deposition was failure to appear altogether. Lindsey v St. Paul Fire & Home Ins. Co. (2006, CA7 Wis) 202 Fed Appx 137.

Unpublished: Former employee's lawsuit alleging unlawful termination was properly dismissed as sanction under *Fed. R. Civ. P. 37* because he repeatedly and intentionally concealed relevant and discoverable information, he repeatedly failed to comply with district court's discovery orders, district court advised him repeatedly that his suit was subject to dismissal, and district court considered efficacy of other, lesser sanctions before dismissing case. Burrell v AT&T Corp. (2008, CA2 NY) 2008 US App LEXIS 13094.

Unpublished: District court did not abuse its discretion in dismissing an applicant's employment discrimination case under *Fed. R. Civ. P. 37(b)* because (1) the district court carefully considered and applied the Poulis factors; (2) any delay or failure to follow the district court's order was directly attributable to the applicant because she was representing herself pro se; (3) defendants, the State of Delaware and the State of Delaware Department of Transportation, were prejudiced in their inability to adequately prepare for trial, by the applicant's delay and her failure to comply with the district court's orders; (4) the applicant's refusal to participate in discovery and to follow court orders was ongoing; and (5) the applicant's claim did not appear meritorious because she alleged age discrimination pursuant to the Age Discrimination in Employment Act (ADEA), defendants had not waived their sovereign immunity under the Eleventh Amendment, and Congress did not validly abrogate the states' sovereign immunity to ADEA suits filed by private individuals. Shahin v State (2009, CA3 Del) 2009 US App LEXIS 20286.

**229. --Personal injuries and wrongful death**

In action for personal injuries, even though plaintiff disappeared after his deposition had been taken and after lapse of four years his counsel had been unable to locate him, action should not

have been dismissed on ground that plaintiff failed to appear for physical examination and for further deposition as ordered by court so to do. O'Toole v William J. Meyer Co. (1957, CA5 Fla) 243 F2d 765.

Dismissal of action for failure to comply with discovery order was too drastic under facts of case, where (1) ultimate medical issue in case was whether plaintiff sustained serious and severe injury to his foot or whether he is malingering, and court assumed what is ultimately question for finder of fact, namely, that plaintiff did not have condition alleged, and (2) District Court assumed that because plaintiff would not allow physician to touch his foot, this prevented doctor from making examination, but doctor based his extensive conclusions on examination he conducted and which he clearly believed adequate to support those conclusions. *De Crescenzo v Maersk Container Service Co. (1984, CA2 NY) 741 F2d 17, 1985 AMC 873, 39 FR Serv 2d 908.*

In action by plaintiff against manufacturers of Agent Orange alleging that plaintiff's illnesses were caused by exposure to Agent Orange during tour of duty in Vietnam, where plaintiff discontinued his deposition after several hours claiming that he was suffering from cardiac arrhythmia and refused to continue in spite of order of magistrates, who had received report of independent physician that deposition could be continued without adversely affecting plaintiff's health, District Court was justified in dismissing claim pursuant to Rule 37(b)(2) based on finding that plaintiff's claim of ill health was unfounded, was excuse to prevent embarrassment during searching deposition, and was blatant attempt to frustrate discovery. In re "Agent Orange" Prod. Liab. Litig. (1987, CA2 NY) 818 F2d 210, 7 FR Serv 3d 1056, cert den *(1988) 484 US 1004, 98 L Ed 2d 648, 108 S Ct 695.*

Discovery sanction of dismissal with prejudice was too severe for failure to comply with discovery orders where plaintiff had filed over 160 asbestos personal injury cases in federal court, unique situation demanding some leniency on court's part, and there was no indication that violations were willful. In re Asbestos II Consol. Pretrial Proceedings (1989, ND Ill) 124 FRD 187, 13 FR Serv 3d 1050.

Unpublished Opinions

Unpublished: Dismissal of personal injury suit was warranted because plaintiff withheld relevant information about possible preexisting condition and medical treatment and he failed to provide adequate explanation or excuse. Freddie v Marten Transp., Ltd. (2011, CA10) 2011 US App LEXIS 12533.

**230. --Products liability**

In action by plaintiff against manufacturers of Agent Orange alleging that plaintiff's illnesses were caused by exposure to Agent Orange during tour of duty in Vietnam, where plaintiff discontinued his deposition after several hours claiming that he was suffering from cardiac arrhythmia and refused to continue in spite of order of magistrates, who had received report of independent physician that deposition could be continued without adversely affecting plaintiff's health, District Court was justified in dismissing claim pursuant to Rule 37(b)(2) based on

finding that plaintiff's claim of ill health was unfounded, was excuse to prevent embarrassment during searching deposition, and was blatant attempt to frustrate discovery. In re "Agent Orange" Prod. Liab. Litig. (1987, CA2 NY) 818 F2d 210, 7 FR Serv 3d 1056, cert den *(1988) 484 US 1004, 98 L Ed 2d 648, 108 S Ct 695.*

In Multidistrict Litigation case under 28 USCS § 1407, which arose from alleged injuries from ingestion of products containing phenylpropanolamine (PPA), district court did not abuse its discretion in dismissing 11 cases pursuant to former *Fed. R. Civ. P. 37(b)(2)(C)* and Fed. R. Civ. P. 41(b) for failure to comply with case management orders established pursuant to Fed. R. Civ. P. 16 in order to simplify discovery process and promote product identification; district court, however, erred in dismissing one case in which plaintiffs filed their severed complaints late and another case in which plaintiffs filed affirmation setting forth ingested PPA product late because delay in providing information that had already been given in original multiparty complaints did not cause prejudice to pharmaceutical companies sufficient to warrant dismissal. Allen v Bayer Corp. (In re : Phenylpropanolamine (PPA) Prods. Liab. Litig.) (2006, CA9 Wash) 460 F3d 1217, summary judgment gr, dismd (2006, WD Wash) 2006 US Dist LEXIS 82102.

Preclusion of consumer's expert witness under *Fed. R. Civ. P. 37* for failure to disclose was reversed because less severe remedy could have easily achieved same aims as preclusion of expert while still giving consumer, potentially innocent victim of defective product, his day in court. Esposito v Home Depot U.S.A. (2009, CA1 RI) 590 F3d 72.

Because both injured worker and attorney were personally responsible for delays in prosecuting worker's negligence, breach of warranty, and strict products liability case, manufacturer and retailer were prejudiced by worker and attorney's conduct, and history of dilatory conduct lasted for over nine months, both dismissal and excessive fees were appropriate sanctions; in particular, attorney's personal responsibility was also to blame because, inter alia, about nine months after Fed. R. Civ. P. 16 conference, attorney failed to provide *Fed. R. Civ. P. 26* disclosures, produce all requested evidence as ordered by court, and return defense counsel's telephone calls, emails, and mail. Carter v Ryobi Techtronics (2008, ED Pa) 250 FRD 223.

Unpublished Opinions

Unpublished: Dismissal of a consumer's breach of warranty and other claims against a food producer whose tainted peanut butter was placed in the market was warranted under *Fed. R. Civ. P. 37(b)(2)* where the consumer failed to respond to the producer's motion to dismiss, as well as failed to comply with the district court's order compelling the consumer to file a fact sheet. Dinkens v ConAgra Foods, Inc. (2009, CA11 Ga) 2009 US App LEXIS 20416.

**b. Willfulness, Bad Faith or Fault**

**231. Generally**

Dismissal of complaint pursuant to *FRCivP 37(b)(2)* for failure to comply with order requiring answers to interrogatories is only available when failure to comply has been due to willfulness, bad faith, or any fault of petitioner. Kropp v Ziebarth (1977, CA8 ND) 557 F2d 142, 23 FR Serv 2d 830, later app (CA8 ND) 601 F2d 1348.

*Fed. R. Civ. P. 37* does not require trial court to find that plaintiff has acted in willful and wanton fashion before court may impose sanction of dismissal. Aura Lamp & Lighting, Inc. v Int'l Trading Corp. (2003, CA7 Ill) 325 F3d 903, 66 USPQ2d 1524, 55 FR Serv 3d 14.

District court is required to have clear and convincing evidence of willfulness, bad faith, or fault before dismissal is appropriate for discovery violation. Maynard v Nygren (2003, CA7 Ill) 332 F3d 462, 14 AD Cas 777, 55 FR Serv 3d 1184, subsequent app (2004, CA7 Ill) 372 F3d 890, 15 AD Cas 1121, 58 FR Serv 3d 1020, cert den *(2005) 543 US 1049, 125 S Ct 865, 160 L Ed 2d 769.*

Court may dismiss where noncompliance with discovery orders is result of willfulness or bad faith. Costal Plastics, Inc. v Morgan, Olmstead, Kennedy & Gardner, Inc. (1976, WD Pa) 72 FRD 601.

It is within inherent equitable powers of trial court to dismiss action when just determination of action has been seriously thwarted by plaintiff's willful misconduct. United States v Moss-American, Inc. (1978, ED Wis) 78 FRD 214, 25 FR Serv 2d 16.

When behavior to be sanctioned is plaintiff's flouting of discovery orders, dismissal is appropriate only when plaintiff's actions are due to willfulness, bad faith or any fault of party. Baba v Japan Travel Bureau Int'l (1996, SD NY) 165 FRD 398, 34 FR Serv 3d 1521, affd (1997, CA2 NY) 111 F3d 2, 74 BNA FEP Cas 864, 70 CCH EPD P 44592.

Sanction of dismissal is appropriate when party's failure to comply with discovery order is due to willfulness, bad faith, or any fault. Quiles v Beth Isr. Medical Ctr. (1996, SD NY) 168 FRD 15, 71 BNA FEP Cas 733, 69 CCH EPD P 44358, 36 FR Serv 3d 1385.

Dismissal is harsh remedy that is only appropriate when court finds "willfulness, bad faith, or any fault" on part of prospective deponent. Zouarhi v Colin Serv. Sys. (2004, SD NY) 223 FRD 315.

Only in case where court imposes most severe sanction under *Fed. R. Civ. P. 37*--default or dismissal--is finding of willfulness or bad faith failure to comply necessary. United States v Batchelor-Robjohns (2005, SD Fla) 96 AFTR 2d 6727, magistrate's recommendation, costs/fees proceeding (2006, SD Fla) 97 AFTR 2d 508.

Dismissal is sanction of last resort and should be issued only in cases of "flagrant bad faith" by offending party. BRAC Group, Inc. v Jaeban (U.K.) Ltd. (In re BRAC Group, Inc.) (2004, BC DC Del) 43 BCD 17, subsequent app, remanded on other grounds (2005, DC Del) 2005 US Dist LEXIS 38911.

Nonexclusive factors to consider in determining whether to impose ultimate sanction of dismissal are (1) extent of party's personal responsibility, (2) prejudice to adversary caused by failure to meet scheduling orders and respond to discovery, (3) history of dilatoriness, (4) whether conduct of party or attorney was willful or in bad faith, (5) effectiveness of sanctions other than dismissal, which entails analysis of alternative sanctions, and (6) meritoriousness of claim or defense. BRAC Group, Inc. v Jaeban (U.K.) Ltd. (In re BRAC Group, Inc.) (2004, BC

DC Del) 43 BCD 17, subsequent app, remanded on other grounds (2005, DC Del) 2005 US Dist LEXIS 38911.

In Federal Circuit, there must be showing of bad faith before plaintiff can be sanctioned under spoliation doctrine for loss of documents. Columbia First Bank, F.S.B. v United States (2002) 54 Fed Cl 693 (criticized in Commercial Fed. Bank, F.S.B. v United States (2004) 59 Fed Cl 338).

Unpublished Opinions

Unpublished: In context of Rule 37(b)(2), dismissal is drastic remedy that should be imposed only in extreme circumstances, usually after consideration of alternative, less drastic sanctions, but dismissal sanction is proper where party fails to comply with court orders willfully, in bad faith, or through fault. Carter v Jablonsky (2005, CA2 NY) 121 Fed Appx 888.

Unpublished: Former employee's retaliation action against former employer was properly dismissed as sanction under *Fed. R. Civ. P. 37(b)* and Fed. R. Civ. P. 41(b) because employee willfully disobeyed discovery order to produce employee's medical records, which interfered with judicial process; employee's waiver of issue by failing to raise it in employee's appellate brief pursuant to *Fed. R. App. P. 28(a)(9)(a)* served as additional basis for affirmance. Gross v GM LLC (2011, CA10 Kan) 2011 US App LEXIS 20478.

**232. Attorney's fault**

District Court's dismissal of plaintiff's complaint for failure of plaintiff to comply with discovery order is not abuse of discretion where plaintiff's attorney is guilty of willful disobedience of court's order, he abrogates control of discovery to himself and changes date of compliance to suit his own convenience and that of his client. Damiani v Rhode Island Hospital (1983, CA1 RI) 704 F2d 12, 1983-1 CCH Trade Cases P 65297, 36 FR Serv 2d 40.

District Court did not abuse its discretion in dismissing plaintiff's RICO claims as sanction against his attorney because of attorney's discovery abuse where record amply supported finding that counsel willfully and in bad faith refused to amend answers to interrogatories as ordered and attempted to obfuscate issues in objections to magistrate's report and at hearing. Boogaerts v Bank of Bradley (1992, CA8 Ark) 961 F2d 765, RICO Bus Disp Guide (CCH) P 7983, 22 FR Serv 3d 1021.

District court did not abuse its discretion in dismissing plaintiff's complaint for failure to prosecute and to comply with order of court where defendant served plaintiff with its original discovery requests nearly year earlier, but plaintiff's attorney failed to respond to amicable requests of defendant's counsel, failed to respond to defendant's motion to compel or with district court's order, and then failed to respond to motion to dismiss even after district court granted extension of time. Harmon v CSX Transp. (1997, CA6 Tenn) 110 F3d 364, 37 FR Serv 3d 1, 1997 FED App 115P, reh den (1997, CA6) 1997 US App LEXIS 11341 and cert den *(1997) 522 US 868, 139 L Ed 2d 119, 118 S Ct 178.*

Failure to comply with discovery order was deliberate and in bad faith where attorney of record repeatedly asserted attorney-client privilege subsequent to court order holding privilege

inapplicable, was unable to recall answers to same questions he asserted were privileged at earlier deposition, and admitted that refusal to answer questions was dilatory maneuver. Costal Plastics, Inc. v Morgan, Olmstead, Kennedy & Gardner, Inc. (1976, WD Pa) 72 FRD 601.

Notwithstanding plaintiff's counsel's allegation that he was required to spend considerable time with his child during child's illness and thus failed to keep up with his law practice, dismissal of action is warranted under Rule 37, where discovery deadlines have come and gone and record shows that plaintiff has failed to conduct discovery and has failed to obey court's discovery orders and where plaintiff's counsel's conduct can only be characterized as gross dereliction of his professional responsibilities; client is not excused from his counsel's nonfeasance unless extraordinary circumstances exist. Tisdale v Darkis (1984, DC Kan) 101 FRD 307, 38 FR Serv 2d 734.

In civil rights suit, protestors were entitled, pursuant to *Fed. R. Civ. P. 37(b)(2)*, to attorney's fees and costs from District of Columbia because District repeatedly violated court orders requiring production of command center resume from day of protestors' arrest, but no monetary sanction was imposed against District's attorneys because there was no evidence that they had intentionally violated court's orders, particularly where attorneys averred that they learned of resume only shortly before it was produced. Bolger v District of Columbia (2008, DC Dist Col) 248 FRD 339.

### 233. Deception

District court did not abuse its discretion in dismissing former employee's Title VII suit against former employer for discovery abuses where she willfully withheld information directly responsive to defendant's interrogatory and deposition questions concerning prior treatment by mental health care providers and failed to disclose her lawsuits against other former employers; district court conducted hearing on sanctions motion at which plaintiff's admissions as well as her unconvincing and contradictory responses provided ample basis for district court's findings, including that dismissal was only sanction that would effectively punish plaintiff, lessen prejudice to defendant and protect integrity of proceeding. Martin v DaimlerChrysler Corp. (2001, CA8 Mo) 251 F3d 691, 86 BNA FEP Cas 123, 80 CCH EPD P 40618, 49 FR Serv 3d 1039.

Investor's complaint against brokerage firm would be dismissed where investor failed to comply with explicit oral order that he produce documents relating to account with another brokerage firm, alleging that he had no such account, but evidence at trial revealed otherwise, indicating investor's failure to comply with order was willful and in bad faith. Murray v Dominick Corp. of Canada, Ltd. (1987, SD NY) 117 FRD 512, CCH Fed Secur L Rep P 93512.

### 234. Ineffective response

Plaintiff's submission, more than 4 months after required time for response, of incomplete and improperly executed answers to interrogatories constitutes willful failure to comply with court-ordered discovery and dismissal is proper where such failure seriously hampered defendant's trial preparations. Hindmon v National-Ben Franklin Life Ins. Corp. (1982, CA7 Ill) 677 F2d 617, 34 FR Serv 2d 571.

Flagrant disregard of court orders justified imposition of dismissal sanction where defendant failed to provide any meaningful discovery concerning core trial issue despite 3 clear court orders, which included 2 warnings that dismissal would follow if defendant failed to provide adequate responses to plaintiff's request. John B. Hull, Inc. v Waterbury Petroleum Products, Inc. (1988, CA2 Conn) 845 F2d 1172, 1988-1 CCH Trade Cases P 67995, 11 FR Serv 3d 318.

**235. Justification or excuse for noncompliance lacking**

Refusal of IRS special agent to comply with District Court's order to answer taxpayer's questions in course of deposition relevant to issue whether criminal investigation was underway at time IRS brought civil summons enforcement proceeding was calculated, willful refusal to obey such order without justification or excuse, and therefore District Court did not abuse discretion in dismissing such proceeding with prejudice under Rule 37(b)(2), even though IRS had valid civil purpose for investigation. United States v Wright Motor Co. (1976, CA5 Ala) 536 F2d 1090, 76-2 USTC P 9605, 22 FR Serv 2d 23, 38 AFTR 2d 5597, reh den (1976, CA5 Ala) 542 F2d 576 and (superseded by statute on other grounds as stated in In re EEOC (1983, CA5) 709 F2d 392, 32 BNA FEP Cas 361, 32 CCH EPD P 33716, 37 FR Serv 2d 1060).

District court does not abuse its discretion in dismissing plaintiffs' complaint where record indicates that plaintiffs themselves and their counsel were at fault for failure to make discovery, and prior to dismissal both plaintiffs and their counsel were afforded numerous opportunities to explain their failure to make discovery. Denton v Mr. Swiss of Missouri, Inc. (1977, CA8 Mo) 564 F2d 236, 195 USPQ 609, 1977-2 CCH Trade Cases P 61667, 24 FR Serv 2d 431.

Dismissal of patent infringement action with prejudice was appropriate sanction for plaintiffs' willful disobedience of court's discovery deadlines; plaintiffs asserted no lack of ability to fully comply with discovery deadlines, were on notice that dismissal sanction could result from continued failure to comply, and court considered lesser sanctions. Wexell v Komar Indus. (1994, CA FC) 18 F3d 916, 29 USPQ2d 2017, 28 FR Serv 3d 394.

Plaintiffs' counsel's deliberate violation of protective order protecting identity of AIDS-contaminated blood donor in suit by recipient of blood warranted dismissal of action in absence of any excuse or mitigating circumstances to explain flagrant disregard of order; counsel's conduct was attributable to plaintiffs, who could seek recovery in lawsuit against counsel for legal malpractice based on inexcusable error in judgment. Coleman v American Red Cross (1993, ED Mich) 145 FRD 422, 25 FR Serv 3d 470.

**236. Lesser or alternative sanctions**

Dismissal of case for willful violation of procedural rules and orders of court was proper despite existence of less drastic sanctions. Morgan v Massachusetts General Hosp. (1990, CA1 Mass) 901 F2d 186, 53 BNA FEP Cas 1780, 134 BNA LRRM 2172, 53 CCH EPD P 39860, 30 Fed Rules Evid Serv 205, 16 FR Serv 3d 813 (criticized in Ralph v Lucent Techs. (1998, CA1 Mass) 135 F3d 166, 7 AD Cas 1345, 157 BNA LRRM 2466).

Dismissal of action for plaintiffs' non-compliance with discovery was abuse of discretion when there was no showing that plaintiffs' actions were willful or made in bad faith, and lesser

sanction would have been appropriate. Hairston v Alert Safety Light Prods. (2002, CA8 Mo) 307 F3d 717, 53 FR Serv 3d 945.

In action for alleged theft of trade secrets, sanction of dismissal will not be imposed upon plaintiff who failed to answer defendant's interrogatories respecting damages, even though plaintiff's failure is so complete and its justification for failure are so inadequate that plaintiffs overall conduct can be deemed willful, because consent discovery order is somewhat ambiguous and there is no significant elaboration of particular obligation. Unicure, Inc. v Thurman (1982, WD NY) 97 FRD 7, 35 FR Serv 2d 434.

**237. --Ineffectiveness**

Dismissal of plaintiff's antitrust action pursuant to Rule 37(b)(2) for failure to comply with court-ordered discovery is proper exercise of court's discretion where court finds that failure to comply is willful and knowingly done and that less severe sanction would be ineffective. Aztec Steel Co. v Florida Steel Corp. (1982, CA11 Fla) 691 F2d 480, 1982-83 CCH Trade Cases P 65019, 35 FR Serv 2d 217, cert den *(1983) 460 US 1040, 103 S Ct 1433, 75 L Ed 2d 792.*

District Court did not abuse its discretion by dismissing plaintiff's employment discrimination action for failure to adequately respond to certain interrogatories, pursuant to Rules 16(f), 26(f), and 37(b)(2), where District Court specifically found that plaintiff's and plaintiff's attorney's failure to comply with discovery orders resulted from willfulness or bad faith, it found that sanction less harsh than dismissal would be of no avail because previous orders had been disregarded, and it had given plaintiff's attorney explicit warnings that failure to comply with its orders would result in dismissal. Bluitt v Arco Chemical Co., Div. of Atlantic Richfield Co. (1985, CA5 Tex) 777 F2d 188, 39 CCH EPD P 35842, 3 FR Serv 3d 893.

Dismissal with prejudice of plaintiff's civil rights suit against Postal Service was not abuse of discretion under Rules 16, 37, and 41 where, after mistrial had been declared because of lack of preparation on part of plaintiff's attorney, plaintiff willfully failed to comply with pre-trial order requiring both parties to file information with court prior to new trial, including complete list of witnesses and every direct question and anticipated response, since plaintiff's conduct greatly impeded resolution of case and prevented trial court from adhering to its trial schedule, plaintiff's last-minute notification of decision not to comply with pre-trial order had prejudicial effect on defendant which had by then made diligent effort to comply, and trial court's declaration of mistrial and subsequent pre-trial order constituted attempts at less drastic alternatives then dismissal. Malone v United States Postal Service (1987, CA9 Cal) 833 F2d 128, 45 BNA FEP Cas 901, 45 CCH EPD P 37587, 9 FR Serv 3d 897, cert den *(1988) 488 US 819, 109 S Ct 59, 102 L Ed 2d 37, 47 BNA FEP Cas 1592, 48 CCH EPD P 38453.*

Dismissal of attorney's employment discrimination suit was appropriate remedy for willful refusal to comply with discovery orders where court offered opportunity for in camera hearing and imposed civil contempt and daily fine before it dismissed suit. Powers v Chicago Transit Authority (1989, CA7 Ill) 890 F2d 1355, 51 BNA FEP Cas 1015, 52 CCH EPD P 39501, 15 FR Serv 3d 453.

Dismissal of claims in forfeiture action as sanction for failure to comply with discovery orders was proper since claimants were personally responsible for refusal to comply, refusal resulted

from deliberate decision by claimants, post-dismissal assertion of Fifth Amendment privilege was no justification, claimants displayed patterns of dilatoriness, and less severe sanctions were ineffective since claimants had simply paid fines and continued to disobey court orders. United States v One Million Three Hundred Twenty-Two Thousand Two Hundred Forty-Two Dollars & Fifty-Eight Cents (1991, CA3 Del) 938 F2d 433, 20 FR Serv 3d 81.

Dismissal of complaint was entirely appropriate response to deliberate defiance of court orders during 4 year pendency of case where district judge properly determined that no other sanctions would adequately insure future compliance. Mindek v Rigatti (1992, CA3 Pa) 964 F2d 1369, 23 FR Serv 3d 201.

Plaintiff's complaint for partnership accounting would be dismissed for failure to comply with discovery orders and to attend his own deposition where plaintiff conducted litigation in bad faith from beginning, sanctions had already been imposed twice on plaintiff, and plaintiff had repeatedly changed lawyers. Weinstein v Ehrenhaus (1988, SD NY) 119 FRD 355, affd without op (1988, CA2 NY) *868 F2d 1268* and affd without op (1989, CA2 NY) *876 F2d 891,* cert den *(1989) 493 US 994, 107 L Ed 2d 542, 110 S Ct 544.*

Dismissal of suit for plaintiffs' wilful violation of expedited discovery order, including confidentiality provisions, would be ordered where conduct constituted contempt and plaintiffs had remained completely undeterred by sanctions previously imposed. Hi-Tek Bags v Bobtron Int'l (1992, CD Cal) 144 FRD 379, 24 USPQ2d 1787, vacated on other grounds (1993, CD Cal) 887 F Supp 230, 129 USPQ2d 1239.

Plaintiff, who twice failed to appear at her deposition, was sanctioned (payment of attorney's fees and costs) for her failure to appear at second scheduled deposition, was ordered by magistrate to appear for third deposition on particular date, and failed to appear at third scheduled deposition, was sanctioned with dismissal of her case, since plaintiff acted in bad faith, defendant was prejudiced by plaintiff's actions, and less severe sanction did not work. Viswanathan v Scotland County Bd. of Educ. (1995, MD NC) 165 FRD 50, affd (1996, CA4 NC) 1996 US App LEXIS 1269.

Bankruptcy court did not commit error in granting order of default on United States Trustee's motion to dismiss debtor's case under 11 USCS §§ 349(a), 1307(c), and *Fed. R. Bankr. P. 1017*, where debtor had been warned that her failure to appear at her deposition would likely result in dismissal of her case, and sanction was warranted under *Fed. R. Civ. P. 37*. In re Cline (2012, BAP6) 2012 Bankr LEXIS 2456, decision reached on appeal by (2012, BAP6) *474 BR 789.*

### 238. Pro se and attorney litigants, generally

Dismissal with prejudice of pro se attorney's suit for willful violation of discovery orders was not abuse of discretion where litigant should have known better and had been amply warned about increasing likelihood of sanctions. Godlove v Bamberger, Foreman, Oswald, & Hahn (1990, CA7 Ind) 903 F2d 1145, 16 FR Serv 3d 1366, cert den *(1991) 499 US 913, 113 L Ed 2d 230, 111 S Ct 1123.*

Failure to comply with discovery order is willful and dismissal is proper where pro se litigant who is attorney attempts to comply with request for year's tax returns by submitting front page of

1040 tax form since pro se litigant who is attorney must meet higher standard of conduct and competence than pro se litigant who is not attorney. Cross v General Motors Corp. (1982, ED Mo) 93 FRD 823, 40 BNA FEP Cas 415, 34 FR Serv 2d 772, dismd without op (1982, CA8 Mo) *685 F2d 438.*

Plaintiff's pro se status entitles him to "one more chance" to comply with lawful discovery order before his action is dismissed for his obstinate and bad-faith efforts to resist giving defendant information to which defendant is entitled. Wheeler v England (1982, ED Tenn) 96 FRD 546.

Pro se plaintiff's complaint is subject to dismissal pursuant to former Rule 37(b)(2)(C), where (1) plaintiff not only ignored order of court but also disregarded Local Rules, (2) not until after defendant filed motion for sanctions did plaintiff file single paper other than complaint and notice of deposition, (3) plaintiff did not file response to motion for sanctions but rather filed motion for protective order in which, for first time, he raised Fifth Amendment privilege to prevent requested discovery, and (4) although plaintiff is pro se, he is attorney who has previously practiced before court. Hosner v Adler (1984, ND Fla) 39 FR Serv 2d 1183.

Dismissal of pro se attorney's willful failure to comply with court's orders to produce documents and file pretrial pleadings would be ordered; court had sanctioned attorney in past and he had indicated he had no intention of obeying court's orders, despite being on notice that case would be dismissed if he did not. Jackson v University of Pittsburgh (1992, WD Pa) 141 FRD 253.

Sanction of dismissal is appropriate when party's failure to comply with discovery order is due to willfulness, bad faith, or any fault, and where such criteria are met, even pro se litigant's claim may be dismissed. Quiles v Beth Isr. Medical Ctr. (1996, SD NY) 168 FRD 15, 71 BNA FEP Cas 733, 69 CCH EPD P 44358, 36 FR Serv 3d 1385.

**239. Repeated violations or persistent refusal to comply**

Dismissal of personal injury cause of action under Rule 37 of Federal Rules of Civil Procedure, is appropriate where plaintiffs persistently continue to withhold complete responses to interrogatories as required by prior court order, as such conduct meets Rule 37 by constituting failure to comply with discovery order through willfulness, bad faith or fault. Roland v Salem Contract Carriers, Inc. (1987, CA7 Ind) 811 F2d 1175, 6 FR Serv 3d 1222.

Party's persistent refusal, in face of warnings by court and his corporation's attorney, to answer any questions at duly scheduled deposition indicated willful attempt to obstruct course of discovery and District Court was fully justified in imposing harsh sanction of dismissal. Jones v Niagara Frontier Transp. Auth. (1987, CA2 NY) 836 F2d 731, 9 FR Serv 3d 1371, cert den *(1988) 488 US 825, 102 L Ed 2d 50, 109 S Ct 74.*

Dismissal of physician's antitrust suit, in position of fees and expenses against physician and his attorneys, and contempt against one attorney were fully justified where physician's attorneys raised meritless deposition objections, willfully and contumaciously disobeyed court's order by interfering with questions posed by defendants' counsel and directing physician not to respond to certain questions already approved by court, and by plaintiff's attorney's incivility in threateningly refusing to permit defendants' attorney to use office telephone to call judge to

resolve discovery dispute. Castillo v St. Paul Fire & Marine Ins. Co. (1991, CA7 Ill) 938 F2d 776, 1991-2 CCH Trade Cases P 69525, 20 FR Serv 3d 295, reh den (1991, CA7) 1991 US App LEXIS 22202.

Dismissal of plaintiff's civil rights diversity action for repeated and willful refusals to cooperate in discovery was proper; without cause plaintiff failed to comply with four discovery orders, failed to appear for properly noticed deposition and never sought any type of protective order from court. Bass v Jostens, Inc. (1995, CA6 Mich) 71 F3d 237, 69 BNA FEP Cas 987, 67 CCH EPD P 43855, 33 FR Serv 3d 711, 1995 FED App 353P.

Party's failure to produce critical memorandum justified dismissal sanction despite its having produced other discovery documents, since it repeatedly withheld memorandum which destroyed party's claim that contract performance difficulties arose from conditions it could not have anticipated. Valley Eng'rs v Electric Eng'g Co. (1998, CA9 Cal) 158 F3d 1051, 98 CDOS 7983, 98 Daily Journal DAR 11091, 41 FR Serv 3d 1524, cert den *(1999) 526 US 1064, 143 L Ed 2d 542, 119 S Ct 1455.*

Sanction of dismissal of plaintiff's claim was justified and would be applied where plaintiff had repeatedly and persistently failed to comply with orders of court directing him to answer certain interrogatories, which failure was not attributable to inability of plaintiff to supply adequate answers, but rather to willfulness and bad faith; result was especially appropriate where plaintiff had been fairly apprised of probability of imposition of sanction of dismissal and thereafter persisted in his attitude of abject refusal with respect to discovery. Plant v Chrysler Corp. (1975, DC Del) 70 FRD 35, 20 FR Serv 2d 1266.

Seaman's failure to appear for 5 depositions, failure to comply with magistrate's order, his unavailability and his refusal to provide any verified discovery response constitute willfulness and fault, warranting dismissal of his personal injury action with prejudice. Wright v Maritime Overseas Corp. (1983, ND Cal) 96 FRD 686, 36 FR Serv 2d 336.

Plaintiff's conduct in consistently refusing to acknowledge authority of judiciary and to meet discovery obligations is contumacious and evinces willful, flagrant, bad faith and callous disregard for responsibilities of litigants; thus, sanction of dismissal of action is warranted. Star-Kist Foods, Inc. v S/S Anchorage (1983, SD Tex) 97 FRD 527, 36 FR Serv 2d 582.

Dismissal of action under former Rule 37(b)(2)(C) is appropriate where (1) plaintiff has completely and willfully failed to produce documents, notwithstanding representation to court that production was forthcoming, (2) plaintiff's intransigence in supplying answers to interrogatories rose to level of gross negligence, (3) defendant, having been forced to file motion for summary judgment without benefit of full discovery, was prejudiced by plaintiff's conduct, and (4) lesser sanctions would be ineffective. International Mining Co. v Allen & Co., Inc. (1983, SD NY) 567 F Supp 777.

Employment discrimination plaintiff directly disobeyed discovery orders on at least three occasions and stated his refusal to pay any court-ordered sanctions and his intention to appear at any future deposition even though he had been warned of possible dismissal, warranting

dismissal with prejudice for willful and bad faith refusal to obey discovery orders. Baker v ACE Advertisers' Serv. (1992, SD NY) 153 FRD 38.

Distributor's claims against competitor will be dismissed with prejudice as sanction for numerous discovery violations, where competitor outlines pattern of disobedience to or inadequate and belated response to discovery orders, because distributor's objections only offer incomplete and evasive explanation for its failures, persuading court that distributor has willfully ignored magistrate's orders and made tactical decisions to delay or totally avoid compliance. *Phillips USA v Allflex USA (1994, DC Kan) 869 F Supp 842,* affd without op (1996, CA10 Kan) *77 F3d 493,* reported in full (1996, CA10 Kan) 1996 US App LEXIS 3116.

In action concerning alleged assault, plaintiff individual's complaint was dismissed with prejudice, pursuant to *Fed. R. Civ. P. 37(d)*, for failure to comply with discovery orders because (1) counsel for defendant individual had, in good faith, attempted over and over again to confer with plaintiff's counsel and plaintiff himself in effort to obtain responses to discovery demands; (2) notwithstanding warnings concerning possible sanctions under *Fed. R. Civ. P. 37*, which included dismissal of case, plaintiff had flouted five court orders to comply with his discovery obligations; (3) plaintiff's actions had prejudiced defendant by denying him access to highly relevant information; (4) as long as plaintiff failed to comply with discovery orders, merits of case eluded determination; (5) court considered lesser sanctions and concluded that they would have been futile and ineffective to deter plaintiff from repeating his conduct; and (6) it was clear that plaintiff would never produce documents that he was required by law to produce, nor did plaintiff intend to pay monetary sanctions imposed by court, which was itself basis for dismissal, under Fed. R. Civ. P. 41(b). *Masi v Steely (2007, SD NY) 242 FRD 278.*

Tax shelter promoter's persistent failure to comply with discovery requests made by government in connection with its suit for injunctive relief per 26 USCS §§ 7402(a) and 7408 against his further promotion of materials facilitating tax evasion resulted in entry, as sanction under *Fed. R. Civ. P. 37(b)*, of default judgment against him because promoter had engaged in knowing, willful, and bad faith effort to delay litigation; moreover, because underlying tax shelter scheme was clearly within scope of schemes prohibited by 26 USCS § 6700, equitable relief in form of injunction was properly granted. United States v Hempfling (2008, ED Cal) 2008-1 USTC P 50230, 101 AFTR 2d 1372.

Unpublished Opinions

Unpublished: Appellant failed to show that district court abused its discretion when it dismissed her employment discrimination complaint with prejudice, pursuant to former *Fed. R. Civ. P. 37(b)(2)(C)*, as (1) appellant and her counsel had history of repeatedly failing to appear and missing discovery deadlines, (2) complaint had already been dismissed twice without prejudice due to appellant's conduct, and (3) district court implicitly found that appellant's failure to comply with its last discovery order, after she had represented that she was ready, willing, and able to serve her discovery responses, was willful. Sharpe v Village of Fox Lake (2006, CA7 Ill) 176 Fed Appx 694.

Unpublished: District court properly dismissed plaintiffs' personal injury action under *Fed. R. Civ. P. 37(b)* where plaintiffs acted unreasonably by failing to respond to six discovery motions,

three court orders to produce discovery, two court orders imposing sanctions, and letters from defendant requesting documents, and also failing to request extension of time; further, merits and equities in this case supported dismissal as action was 15 years old, there was concern that crucial evidence no longer existed, and defendant's counsel repeatedly used letters and telephone calls to try to complete discovery before seeking court's aid. Bolanowski v GMRI, Inc. (2006, CA7 Ind) 178 Fed Appx 579.

Unpublished: District court did not abuse its discretion in dismissing owner's action, which alleged fraud in collection of note and repossession of his vehicle, without prejudice, under *Fed. R. Civ. P. 37*, because (1) owner was uncooperative and at times affirmatively frustrated discovery process; (2) in its order granting corporation's first motion to compel, district court observed that owner's initial discovery responses were evasive and incomplete; and (3) district court gave owner opportunity to comply with its order and only dismissed owner's action after corporation filed second motion to compel. Gary v Capital One Auto Fin., Inc. (2007, CA11 Ga) 2007 US App LEXIS 23909.

Unpublished: In case in which home owner appealed district court's *Fed. R. Civ. P. 37(b)(2)* dismissal of his claims against his insurer with prejudice, appeal was wholly without merit. All four elements for dismissal were present, and law was clear that willful violation of district court's discovery orders gave that court discretion to impose sanctions, including dismissal. Chisesi v Auto Club Family Ins. Co. (2010, CA5 La) 2010 US App LEXIS 4941.

Unpublished: Plaintiffs' repeated failure to comply with discovery orders, even after being warned of possibility of sanctions and personally instructed on how to comply, constituted willful noncompliance. Bell v Texaco, Inc. (2012, CA5 Miss) 2012 US App LEXIS 21192.

Unpublished: District court properly dismissed plaintiff's action because she repeatedly failed to attend ordered deposition despite being warned that failure to attend would result in dismissal, her failure to attend was result of intentional conduct, she had acted in bad faith and had clear record of contumacious conduct, her refusals to follow orders of district court and magistrate judge were attributable only to her as she was proceeding pro se, and it was abundantly clear that no other sanction would achieve desired deterrent effect. Sandres v La. Div. of Admin., Office of Risk Mgmt. (2013, CA5 La) 2013 US App LEXIS 25814.

**240. --Pro se and attorney litigants**

Dismissal of complaint was not abuse of discretion where plaintiff consistently refused to comply with discovery or engaged in piecemeal disclosure designed to impede discovery, had received prior warnings and monetary sanctions, prejudiced defendant since they could not assess validity of claim, and plaintiff was attorney who should have been fully aware of his discovery obligations. Prince v Poulos (1989, CA5 Tex) 876 F2d 30, 14 FR Serv 3d 957, reh den (1989, CA5) 1989 US App LEXIS 13175.

Employment discrimination plaintiff's case was properly dismissed for her repeated and willful refusal to comply with district court's discovery orders for more than one year, despite repeated warnings to pro se plaintiff. Baba v Japan Travel Bureau Int'l (1997, CA2 NY) 111 F3d 2, 74 BNA FEP Cas 864, 70 CCH EPD P 44592.

Attorney's persistent and willful discovery abuses warranted dismissal of employment discrimination action where he refused to provide releases to authorize production of his medical records, had been sanctioned for spoliation of evidence and threatened with dismissal previously, intentionally misidentified witness, and failed to appear at hearing for reconsideration of court's order dismissing case. Gratton v Great Am. Communs. (1999, CA11 Ala) 178 F3d 1373, 80 BNA FEP Cas 162, 44 FR Serv 3d 116, 12 FLW Fed C 1000.

Pro se third-party plaintiff's repeated failure to even attempt to respond to discovery warranted dismissal of his claims. Pope v Lexington Ins. Co. (1993, ED Wis) 149 FRD 586, 26 FR Serv 3d 313.

Where pro se plaintiff was ordered by court to respond to defendants' legitimate discovery requests, but persisted in refusing to provide substantive responses to interrogatories propounded by defendants, and refused to even disclose his age during his deposition, dismissal of action pursuant to *Fed. R. Civ. P. 37* was warranted; plaintiff's repeated and persistent refusal to participate in discovery process was wilful and done in defiance of express and unambiguous orders of court. Kafele v Javitch, Block, Eisen, & Rathbone, LLP (2005, SD Ohio) 232 FRD 286, 63 FR Serv 3d 479.

### 241. Show cause ordered disregarded

Dismissal with prejudice is authorized under Rule 37(d) and is also within inherent power of court; District Court's dismissal of complaint with prejudice is proper where, after plaintiff failed to complete deposition and court entered order requiring plaintiff to show cause why action should not be dismissed with prejudice, plaintiff's complete disregard of trial court's show cause order and his attorney demonstrated inexcusable fault, wilfulness, and bad faith. Rohauer v Eastin-Phelan Corp. (1974, CA8 Iowa) 499 F2d 120, 18 FR Serv 2d 1256.

Where taxpayer who sued U.S. to set aside determination by Internal Revenue Service failed to comply with several court orders, including show cause order, and to respond to U.S.' discovery requests and summary judgment motion, court dismissed lawsuit with prejudice as sanction pursuant to *Fed. R. Civ. P. 37*. Sutton v United States (2002, MD Ga) 90 AFTR 2d 7130.

### 242. Tardy compliance

Federal District Court did not abuse discretion in finding bad faith on part of plaintiffs and in ordering dismissal because of plaintiffs' failure to timely answer written interrogatories as ordered by District Court during 11-month time in which crucial interrogatories remained substantially unanswered despite numerous extensions and several admonitions by court and promises and commitments by plaintiffs, where (1) District Court had considered full record in determining to dismiss, (2) record showed that District Court had been extremely patient in efforts to allow plaintiffs time to comply with court's discovery order, and (3) plaintiffs not only failed to file responses on time, but filed ultimate responses which were found to be grossly inadequate. National Hockey League v Metropolitan Hockey Club (1976) 427 US 639, 96 S Ct 2778, 49 L Ed 2d 747, 1976-1 CCH Trade Cases P 60941, 21 FR Serv 2d 1027, reh den *(1976) 429 US 874, 97 S Ct 196, 97 S Ct 197, 50 L Ed 2d 158.*

District Court did not abuse its judicial discretion in dismissing action on ground of noncompliance with court order directing complete and responsive answers to defendant's interrogatories where, despite court order and three hearings, plaintiff had yet to file sworn answers to defendant's interrogatories, plaintiff's untimely answers remained unamended and unfiled in face of court order, wilfulness was mirrored on record, District Court did not impose dismissal precipitately or rashly, and District Court's dismissal did not constitute mere punishment and a consequent denial of due process. Di Gregorio v First Rediscount Corp. (1974, CA3 Del) 506 F2d 781, 19 FR Serv 2d 728.

Plaintiff's submission, more than 4 months after required time for response, of incomplete and improperly executed answers to interrogatories constitutes willful failure to comply with court-ordered discovery and dismissal is proper where such failure seriously hampered defendant's trial preparations. Hindmon v National-Ben Franklin Life Ins. Corp. (1982, CA7 Ill) 677 F2d 617, 34 FR Serv 2d 571.

Unpublished Opinions

Unpublished: Chapter 11 debtor was found to be at fault and was sanctioned under *Fed. R. Civ. P. 37* for not imposing "litigation hold" on all documents pertinent to its dealings with creditor that had been providing post-petition janitorial services to debtor after creditor filed $ 25 million claim for post-petition tortious interference and breach of contract because creditor's claim, which was very detailed and asserted claim for significant amount of money, effectively put debtor on notice that litigation was likely, thereby imposing duty to preserve documents; however, creditor failed to establish that debtor had acted willfully or in bad faith, had intentionally destroyed documents, or otherwise was liable for spoliation thereof, with result that more draconian sanctions that creditor sought, such as entry of default judgment against debtor or imposition of adverse inference, were not justified, though award was made of portion of creditor's legal fees and expenses in amount to be determined after trial on merits. In re Kmart Corp. (2007, BC ND Ill) 48 BCD 178.

**243. Warning by court**

Flagrant disregard of court orders justified imposition of dismissal sanction where defendant failed to provide any meaningful discovery concerning core trial issue despite 3 clear court orders, which included 2 warnings that dismissal would follow if defendant failed to provide adequate responses to plaintiff's request. John B. Hull, Inc. v Waterbury Petroleum Products, Inc. (1988, CA2 Conn) 845 F2d 1172, 1988-1 CCH Trade Cases P 67995, 11 FR Serv 3d 318.

Dismissal with prejudice of pro se attorney's suit for willful violation of discovery orders was not abuse of discretion where litigant should have known better and had been amply warned about increasing likelihood of sanctions. Godlove v Bamberger, Foreman, Oswald, & Hahn (1990, CA7 Ind) 903 F2d 1145, 16 FR Serv 3d 1366, cert den *(1991) 499 US 913, 113 L Ed 2d 230, 111 S Ct 1123.*

Court did not err in dismissing claims by plaintiffs in individual actions arising from Exxon Valdez oil spill since history of proceedings reflected virtually total refusal by plaintiffs over period of

more than two years to comply with discovery obligations and orders and plaintiffs were warned repeatedly by both court and master that failure to comply would result in dismissal. Allen v Exxon Corp. (In re Exxon Valdez) (1996, CA9 Alaska) 102 F3d 429, 96 CDOS 8961, 96 Daily Journal DAR 14861, 36 FR Serv 3d 964, reported at (1996, CA9 Alaska) *96 CDOS 9144* and (criticized in Ray v Eyster (In re Orthopedic "Bone Screw" Prods. Liab. Litig.) (1997, CA3 Pa) 132 F3d 152, 39 FR Serv 3d 608) and (criticized in Hernandez v Conriv Realty Assocs. (1999, CA2 NY) 182 F3d 121, 43 FR Serv 3d 1136).

District court provided adequate notice that it might dismiss suit for lack of prosecution where party's attorneys' lack of respect for rules of litigation and court's scheduled deadlines was manifest from case's inception, court warned them that "consequences will flow under Rule 37," if they did not comply with court's orders, and court had already meted out stiff sanction of barring litigant from using evidence not produced by certain date. Williams v Chicago Bd. of Educ. (1998, CA7 Ill) 155 F3d 853, 41 FR Serv 3d 433.

District court did not abuse its discretion in dismissing case for repeated failures to comply with court orders, despite warning that noncompliance could result in dismissal. Serra-Lugo v Mayaguez Consortium-Las Marias (2001, CA1 Puerto Rico) 271 F3d 5.

Because, in contested matter under *Fed. R. Bankr. P. 9014*, Fed. R. Bankr. P. 7037 applied, which incorporated *Fed. R. Civ. P. 37* governing sanctions, court found that creditor's ground-shifting tactics resulted in failure to comply and demonstrated willfulness and bad faith, which prejudiced debtor; court found that it was within its discretion to dismiss creditor's claim for discovery abuse but, because court did not specifically warn creditor that further failure to comply would result in dismissal, court imposed lesser sanction and ordered creditor not to offer particular evidence against debtor. In re LTV Steel Co. (2004, BC ND Ohio) 307 BR 37.

Unpublished Opinions

Unpublished: District court's *Fed. R. Civ. P. 37(b)(2)*dismissal of plaintiff's case was not abuse of discretion where (1) plaintiff repeatedly failed to heed discovery orders, thus delaying resolution of case for more than three years, (2) district court routinely explored less drastic alternatives to dismissal to secure plaintiff's compliance with its discovery orders, including, but by no means limited to, issuing stay of proceedings to afford her sufficient time to produce relevant documents to corporation, providing explicit instructions to plaintiff regarding her various discovery obligations, and affording her final opportunity to comply with discovery after sanction motion was fully briefed, (3) throughout, district court repeatedly warned plaintiff that continued failure to comply with its orders could result in dismissal, and (4) her persistent refusal to comply with increasingly stern and direct court orders demonstrated not only bad faith but willfulness. Mahon v Texaco Inc. (2005, CA2 NY) 122 Fed Appx 537.

Unpublished: Appellant's suit against corporation was properly dismissed as *Fed. R. Civ. P. 37(b)(2)* sanction for appellant's failure to comply with order compelling his attendance at oral deposition where (1) appellant's motion for protective order, which was filed after order compelling attendance, did not excuse his attendance at deposition where appellant was informed that only stay would excuse his attendance; and (2) appellant was warned that if he

refused to intend, he would be sanctioned, possibly in form of dismissal. Albert v Starbucks Coffee Co. (2007, App DC) 2007 US App LEXIS 196.

**244. Other particular cases**

Dismissal of personal injury action, under Rule 37 of Federal Rules of Civil Procedure, requires showing of willfulness, bad faith, or fault on part of non-complying party. Roland v Salem Contract Carriers, Inc. (1987, CA7 Ind) 811 F2d 1175, 6 FR Serv 3d 1222.

Dismissal action was not abuse of discretion since record clearly supported inference that plaintiff's failure to comply with discovery was willful where plaintiff ignored 2 court orders to post bond until threatened with dismissal, failed to retain new counsel despite 3 court orders, refused to comply with discovery request on 2 occasions even though he was warned case would be dismissed, offered no reason why he could not comply with discovery, despite excuse that actions arose from his living outside of Puerto Rico and continuing moving about, since it is plaintiff's responsibility for keeping abreast of developments in action he instituted. Spiller v U.S.V. Laboratories, Inc. (1988, CA1 Puerto Rico) 842 F2d 535.

Court did not abuse its discretion in dismissing plaintiff's civil rights action as sanction for failure to obey discovery order where discovery was necessary to defendant's attempt to establish claim of qualified immunity and record indicated plaintiff's refusal was willful, was not brought about by any intimidation by defendant's attorney, court considered alternative sanctions, and warned plaintiff that dismissal would be ordered if he continued to fail to comply. Hicks v Feeney (1988, CA3 Del) 850 F2d 152, 12 FR Serv 3d 442, cert den *(1989) 488 US 1005, 102 L Ed 2d 777, 109 S Ct 786.*

District court is required to have clear and convincing evidence of willfulness, bad faith, or fault before dismissal is appropriate for discovery violation; therefore, dismissal of action filed under Americans with Disabilities Act, 42 USCS §§ 12101-213, for discovery violations was remanded for further proceedings because it was unclear if appropriate standard was applied. Maynard v Nygren (2003, CA7 Ill) 332 F3d 462, 14 AD Cas 777, 55 FR Serv 3d 1184, subsequent app (2004, CA7 Ill) 372 F3d 890, 15 AD Cas 1121, 58 FR Serv 3d 1020, cert den *(2005) 543 US 1049, 125 S Ct 865, 160 L Ed 2d 769.*

Where district court dismissed plaintiff's claims under § 43(a) of Lanham Act, *15 USCS § 1125(a)*, as sanction for failing to produce certain data after having been ordered to do so, which data was not retained by plaintiff because it proved to be not useful in plaintiff's assessment of damages, it was impossible to conclude that plaintiff acted with requisite culpability to justify sanction of dismissal because it was unclear what district court considered plaintiff's duties to have been regarding preservation and production of data. P&G v Haugen (2005, CA10 Utah) 427 F3d 727, 77 USPQ2d 1029, 2005-2 CCH Trade Cases P 74976, 68 Fed Rules Evid Serv 715, 63 FR Serv 3d 303.

Although dismissal is not to be readily granted in absence of compelling reasons, dismissal with prejudice under former Rule 37(b)(2)(C) is proper in medical malpractice action for plaintiffs' failure to comply with court order directing them to answer interrogatories, where plaintiffs

consciously disregarded court's order to file answers, where interrogatories which had not been answered were material to plaintiffs' allegation of negligent post-operative care and material to preparation of defense, and where permitting case to continue would amount to travesty of justice. Roberson v Christoferson (1975, DC ND) 65 FRD 615, 19 FR Serv 2d 1160.

Dismissal is appropriate where misconduct of government's agent constituted blatant bad faith and evinced willful disregard of government's duty in carrying out discovery process. United States v Moss-American, Inc. (1978, ED Wis) 78 FRD 214, 25 FR Serv 2d 16.

Dismissal of action is not appropriate in antitrust action despite initial willful refusal of counsel for defendant to submit certain documents where documents are later submitted, where antitrust action is of considerable public interest and defendant has produced over 3 1/2 million pages of documents already. Litton Systems, Inc. v American Tel. & Tel. Co. (1981, SD NY) 91 FRD 574, 1981-2 CCH Trade Cases P 64306, 32 FR Serv 2d 950, affd (1983, CA2 NY) 700 F2d 785, 1982-83 CCH Trade Cases P 65194, 12 Fed Rules Evid Serv 1426, cert den *(1984) 464 US 1073, 104 S Ct 984, 79 L Ed 2d 220.*

France's refusal to comply with discovery orders is not willful or in bad faith and therefore dismissal is not warranted where refusal to produce testimony and documents gathered by inquiry commissions is necessitated by French nondisclosure statute which was enacted for reasons other than to prevent that specific disclosure. Re Oil Spill by Amoco Cadiz etc. In re Oil Spill by Amoco Cadiz etc. (1982, ND Ill) 93 FRD 840, 34 FR Serv 2d 536.

Unpublished Opinions

Unpublished: District court's finding that plaintiff former prisoner's discovery violations were willful based on his failure to abide by procedural rules and discovery orders was supported by evidence, and discovery failings harmed defendant doctor; thus, dismissal as discovery sanction under *Fed. R. Civ. P. 37(b)* was affirmed. Watkins v Nielsen (2010, CA7 Ill) 2010 US App LEXIS 25775.

**245. --Labor and employment**

District Court's order dismissing sex-based wage discrimination suit brought by Equal Employment Opportunity Commission on ground that Commission failed to comply with discovery order will be reversed since Commission's action in suggesting alternatives for producing requested discovery material does not amount to willful misconduct justifying dismissal pursuant to Rule 37. EEOC v Troy State University (1982, CA11) 693 F2d 1353, 30 BNA FEP Cas 929, 25 BNA WH Cas 1065, 30 CCH EPD P 33249, 96 CCH LC P 34332, 35 FR Serv 2d 748, reh den (1983, CA11 Ala) 698 F2d 1238 and cert den *(1983) 463 US 1207, 103 S Ct 3538, 77 L Ed 2d 1388, 32 BNA FEP Cas 120, 26 BNA WH Cas 404, 32 CCH EPD P 33682.*

Because clear and convincing evidence had been presented that employee willfully obstructed discovery process by refusing to meet doctor and then refusing to answer questions necessary for doctor to evaluate her mental state and violated court's discovery orders requiring her to comply with discovery requests, and because clear and convincing evidence was presented that employee attempted to influence testimony of two witnesses in bad faith, employee's

misconduct so jeopardized integrity of judicial process itself, that any sanction short of dismissal would have been inadequate to deal with employee's misconduct; therefore, Office of U.S. Senate Sergeant at Arms' motion to dismiss lawsuit pursuant to Fed. R. Civ. P. 16(f), *37(b)*, and 41(b) and pursuant to inherent power of court to preserve integrity of judicial system was granted. Young v Office of the United States Senate Sergeant at Arms (2003, DC Dist Col) 217 FRD 61, 92 BNA FEP Cas 1047.

Unpublished Opinions

Unpublished: Magistrate did not abuse her discretion in dismissing former employee's discrimination suit with prejudice under *Fed. R. Civ. P. 37(b)(2)* because record showed that employee's failure to cooperate in discovery was willful, lesser sanctions had already been imposed, he had been warned that his case was subject to dismissal, and opposing parties were prejudiced by his conduct; in three years during which discovery had been conducted, employee had failed to fully comply with his discovery obligations, he had failed to comply with magistrate's discovery orders, and he had filed several frivolous motions, including one seeking to have case taken away from magistrate, even though he had consented to have her decide suit. Moses v Sterling Commerce (America), Inc. (2005, CA6 Ohio) 122 Fed Appx 177.

**246. --Products liability**

Court did not abuse its discretion in dismissing exploding bottle products liability case for plaintiffs' willful refusal to disclose its experts and produce bottle fragments for inspection by defendant's experts since plaintiffs had over 4 years to locate an expert and conduct an investigation and their dilatory conduct prejudiced defendants. Patterson v Coca-Cola Bottling Co. (1988, CA7 Ill) 852 F2d 280, 11 FR Serv 3d 952.

In products liability action, court will not, as sanction for plaintiffs' failure to comply with scheduling order, refuse to consider plaintiffs' expert's affidavit, where sanction requested would be functional equivalent of dismissal since, without affidavit, there would be no evidence of causation, because failure to comply with scheduling order was not willful, and granting sanction requested would be unduly harsh and at odds with mandate of FRCP 1 to construe and administer rules to secure just administration of actions. Waitek v Dalkon Shield Claimants Trust (1995, ND Iowa) 908 F Supp 672, CCH Prod Liab Rep P 14554, affd (1997, CA8 Iowa) 114 F3d 117.

**5. Evidence Prohibited**

**247. Generally**

If party declines to answer interrogatories he may be precluded by court from offering proof at trial. Michigan Window Cleaning Co. v Martino (1949, CA6 Mich) 173 F2d 466, 16 CCH LC P 65039.

District court may, in its discretion, render discovery and evidentiary rulings necessary to insure fair and orderly trial even where no specific order is involved. *Lewis v Darce Towing Co. (1982, WD La) 94 FRD 262, 35 FR Serv 2d 330.*

Gross negligence in party's compliance with discovery order may constitute basis for sanction of precluding evidence. Higginbotham v Volkswagenwerk Aktiengesellschaft (1982, MD Pa) 551 F Supp 977, CCH Prod Liab Rep P 9608, 12 Fed Rules Evid Serv 1137, 35 FR Serv 2d 1519, affd without op (1983, CA3 Pa) *720 F2d 662* and affd without op (1983, CA3 Pa) *720 F2d 669.*

In negligence case in which manufacturing company asserted workers' compensation defense, worker's motion to strike that defense was granted, and evidence of existence of worker's compensation policy would not be allowed to be presented in case; at case management conference, court instructed manufacturing company to determine as quickly as possible if there was workers' compensation policy in place that would affect recovery, and, after initially stating that no such policy existed, manufacturing company, in response to worker's motion, for first time stated that workers' compensation policy existed. Tobias v Davidson Plywood (2007, ED Tex) 241 FRD 590.

Although plaintiff's motion seeking to bar previously undisclosed witness from testifying at trial on its common law unfair competition and § 43(a) of Lanham Act, *15 USCS § 1125*, false and misleading advertising claims was denied, because excluding evidence under *Fed. R. Civ. P. 37(c)(1)* was extreme sanction and no grounds for imposing that sanction were shown, plaintiff was entitled to depose witness prior to trial; plaintiff could renew its motion to exclude testimony if defendants refused to make witness available for deposition or failed to disclose documentary evidence relevant to his testimony. Merisant Co. v McNeil Nutritionals, LLC (2007, ED Pa) 242 FRD 303, 2007-1 CCH Trade Cases P 75679.

After multiple hearings, court held that corporation was precluded from introducing newly produced evidence under *Fed. R. Civ. P. 37(c)*, and awarded attorney's fees, as sanctions for corporation's failure to disclose key documents and information related to causation with respect to corporation's false advertising claim until week before scheduled trial because; (1) late production of 2006 corporate charge data was not "substantially justified" since court did not permit corporation to produce new documents which should have been disclosed during discovery in recasting its theory of injury after summary judgment ruling; (2) 2006 sales data was relevant to issues of causation, injury, and damages; (3) omissions were not harmless. Hipsaver Co. v J.T. Posey Co. (2007, DC Mass) 497 F Supp 2d 96.

In nondischargeability proceeding, creditor was precluded from offering any exhibits or calling any witnesses other than parties to action pursuant to Fed. R. Civ. P. 16(f)(1)(C) and *37(b)(2)(A)(ii)*-(vii) because he failed to comply with pretrial order requiring pretrial filing of exhibits and witness lists. Maloney v Harte (In re Harte) (2010, BC WD Mich) 440 BR 133.

### 248. Admissibility for other purposes

Failure to produce postcards at taking of deposition on request for information relating to any correspondence between parties does not preclude their production at trial when used for impeachment purposes only. Middlebrooks v Curtis Publishing Co. (1969, CA4 SC) 413 F2d 141.

Where plaintiff failed to produce documents as part of mandatory disclosure on ground that documents were solely for impeachment purposes, but documents also had value as substantive

proof of plaintiff's employment discrimination claim, plaintiff's failure to produce documents precluded their use at trial for purposes other than impeachment. Lomascolo v Otto Oldsmobile -Cadillac, Inc. (2003, ND NY) 253 F Supp 2d 354, 91 BNA FEP Cas 780.

**249. Deception**

District court abused its discretion in limiting testimony of longtime employee of defendant who could have testified to incident in which she observed supervisor make unwelcome advance to plaintiff, who alleged sexual harassment by supervisor, since defendant admitted that it was aware of witness's testimony from deposition and thus was not subjected to last-minute surprise. Quinn v Consol. Freightways Corp. (2002, CA3 Pa) 283 F3d 572, 88 BNA FEP Cas 459, 82 CCH EPD P 41010, 52 FR Serv 3d 226.

In personal injury action in which plaintiff seeks, inter alia, damages for past and future loss of earnings, minimally prejudicial sanction to be imposed against plaintiff for failure to accurately prepare answer to interrogatory and thereafter to supplement it, which allows reasonable protection to defendants' interests, is to preclude evidence of past loss of earnings from case, where plaintiff's response to interrogatory had indicated that his income tax returns were being requested from his accountant, but such returns were never provided to defendants and it appears that accountant did not exist and that answer was either fabricated or such gross mistake as to have violated Rule 11. Libbi v Sears, Roebuck & Co. (1985, ED Pa) 107 FRD 227, 1 FR Serv 3d 1576.

**250. Destruction or spoliation of evidence**

In action by personal representative of family members who allegedly died from carbon monoxide fumes from unventilated furnace, district court did not abuse its discretion in barring all evidence concerning furnace as sanction for plaintiff's failure to produce furnace for inspection by defendant, even if furnace was lost due to flood of friend's garage where he had stored it, since plaintiff demonstrated poor judgment in where and with whom he stored furnace and degree of indolence, as well as lack of candor in failing to report loss of furnace. Langley by Langley v Union Elec. Co. (1997, CA7 Ill) 107 F3d 510, 37 FR Serv 3d 177.

District court did not abuse its discretion in instructing jury that it could draw adverse inference from employer's failure to produce relevant files in breach of employment contract action until eleventh hour where it was clear that employer exhibited at least gross negligence in failing to produce files until eleventh hour and employee showed through identification of missing documents that employer had "sanitized" those files; finding of bad faith of intentional misconduct is not requisite to sanctioning spoliator with adverse inference instruction. Reilly v Natwest Mkts. Group Inc. (1999, CA2 NY) 181 F3d 253, 52 Fed Rules Evid Serv 676, 44 FR Serv 3d 260, cert den *(2000) 528 US 1119, 145 L Ed 2d 818, 120 S Ct 940.*

In action by manufacturer of casino gaming chips against supplier of resin used to make chips, district court did not abuse its discretion in denying, on eve of trial, motion to exclude evidence that customers had returned thousands of chips manufactured with defendant's resin because chips had been destroyed, since gaming chips are form of quasi-currency which state gaming

laws commonly require manufacturer to destroy upon removal from service and, despite knowing this, defendant failed to ask district court to intervene in destruction process but instead lay in wait until eve of trial before filing its motion in limine. JOM, Inc. v Adell Plastics, Inc. (1999, CA1 Me) 193 F3d 47, 44 FR Serv 3d 1196, 39 UCCRS2d 609 (criticized in Coastal & Native Plant Specialties, Inc. v Engineered Textile Prods., Inc. (2001, ND Fla) 139 F Supp 2d 1326, 44 UCCRS2d 75).

In copyright infringement/trade secret misappropriation suit, sanction of adverse evidentiary inference for spoliating evidence was not imposed against software developers under *Fed. R. Civ. P. 37(b)(2)* because evidence did not show either that they had destroyed software licensor's hard drives or had influenced licensee to do so. R.C. Olmstead, Inc. v CU Interface, LLC (2009, ND Ohio) 657 F Supp 2d 878.

**251. Expert witnesses**

Magistrate's refusal to permit use of expert witness was inappropriately drastic sanction since it went to ability of plaintiff to make out prima facie case, no reason was given for magistrate's action, there was no failure of plaintiff to comply with discovery orders, nor violation of scheduling or pretrial order. Brooks v United States (1988, CA11 Fla) 837 F2d 958, 10 FR Serv 3d 993.

District court did not err in excluding party's experts from testifying at trial for violating court's accelerated discovery order in light of party's failure to adhere to discovery deadlines and fact that expected testimony ultimately proved to be relatively unimportant. Sierra Club, Lone Star Chapter v Cedar Point Oil Co. (1996, CA5 Tex) 73 F3d 546, 41 Envt Rep Cas 1897, 34 FR Serv 3d 874, 26 ELR 20522, cert den *(1996) 519 US 811, 136 L Ed 2d 20, 117 S Ct 57, 43 Envt Rep Cas 1672.*

District court did not abuse its discretion in striking testimony of plaintiff's experts for plaintiff's failure to meet court's discovery deadlines where failure to complete experts' depositions appeared to be due to plaintiff's dilatoriness, defendants would be materially prejudiced, plaintiffs were warned of possible sanction, and plaintiffs never requested continuance. Barrett v Atlantic Richfield Co. (1996, CA5 Tex) 95 F3d 375, 45 Fed Rules Evid Serv 776, 36 FR Serv 3d 130, 151 ALR Fed 793 (criticized in Meade Instruments Corp. v Reddwarf Starware, LLC (2000, CA FC) 2000 US App LEXIS 17877).

Where district court set June deadline for disclosure of plaintiff copyright holder's expert reports and deadline of October 15 for financial expert reports, and expert affidavits, which appeared both to restructure and to supplement prior expert reports but addressed no financial issues whatsoever, were filed on October 5, and another expert's supplemental report did address financial impact and was not filed until October 19, affidavits and report were untimely filed, and district court did not abuse its discretion in excluding them in action against defendant amusement park owner. Corwin v Walt Disney World Co. (2007, CA11 Fla) 475 F3d 1239, 81 USPQ2d 1496, 20 FLW Fed C 243.

*Fed. R. Civ. P. 26(a)(2)* requires that party disclose to other parties identity of any expert witness it may use at trial; if party fails to designate expert witness, *Fed. R. Civ. P. 37* prohibits party from

using that witness to supply evidence at motion, hearing, or trial unless failure was substantially justified or harmless. Brumfield v Hollins (2008, CA5 Miss) 551 F3d 322.

Plaintiff identified his treating physicians in his discovery materials, and therefore *Fed. R. Civ. P. 37(c)(1)* did not preclude admission of their testimony. Crispin-Taveras v Municipality of Carolina (2011, CA1 Puerto Rico) 647 F3d 1, 79 FR Serv 3d 919.

Judge can sanction party's continued and unexcused refusal to name expert witness by precluding testimony from such witness without first determining how badly party needs the witness, and where such sanction led to de facto dismissal of party's case, sanction was not so harsh as to constitute abuse of discretion. Hull v Eaton Corp. (1987, App DC) 263 US App DC 311, 825 F2d 448, CCH Prod Liab Rep P 11563, 8 FR Serv 3d 1161, 4 UCCRS2d 764.

Where patent claim limitation was construed by reference to industry standard, and patent holders subsequently sought to introduce expert evidence of application of standard to alleged infringer's products, evidence was properly excluded as untimely under discovery schedule since holders were well aware that standard would be used in construing claim limitation and were aware of difficulties and time involved in testing. Chimie v PPG Indus. (2005, CA FC) 402 F3d 1371, 74 USPQ2d 1321, 61 FR Serv 3d 724, reh den (2005, CA FC) 2005 US App LEXIS 10615.

Residential program for juvenile delinquents was not entitled to post-trial judgment as matter of law under *Fed. R. Civ. P. 50* or new trial under *Fed. R. Civ. P. 59* in parent's *42 USCS § 1983* action after her son was murdered while in program because (1) resident's contributory negligence did not bar claim when jury found that program acted with deliberate indifference for resident's safety in violation of Fifth Amendment; (2) trial court properly excluded as hearsay under *Fed. R. Evid. 801(c)*, 602 police detective's recitation of statement by resident's assailant that resident had stolen money from assailant; (3) testimony by parent's juvenile justice expert about program's pattern of indifference was not unfair surprise under *Fed. R. Civ. P. 26(a)(2)(B)*, *37(c)(1)* when testimony was elaboration of expert's report and if erroneous, was harmless error under Fed. R. Civ. P. 61 in light of other evidence showing that program was indifferent to resident's safety and treatment; and (4) jury instruction directing jury to consider whether resident's actions were those of reasonable person with similar mental health problems was not plain error under Fed. R. Civ. P. 51(d)(2) as there was substantial evidence of resident's mental illness, and jury found resident negligent notwithstanding instruction. Muldrow v Re-Direct, Inc. (2007, App DC) 493 F3d 160, costs/fees proceeding, request gr (2007, App DC) 2007 US App LEXIS 19185.

District court did not abuse its discretion under *Fed. R. Civ. P. 37(c)(1)*, during patent infringement action, when it denied patent holders' request to use testimony of two expert witnesses, including witness who was employed by patent holders, because patent holders did not provide competitors they sued with written reports prepared by witnesses, pursuant to *Fed. R. Civ. P. 26(a)(2)(B)*; patents holders did not establish that witness who was their employee was not regularly used to provide expert testimony, and failure to provide reports was neither harmless nor substantially justified. Tokai Corp. v Easton Enters. (2011, CA FC) 632 F3d 1358, 97 USPQ2d 1673.

Proper procedure under Rule 37, where party asserts that its adversary's designated experts have failed to cooperate during depositions, is to apply to court for order compelling deponents to respond to questions, rather than immediately requesting that testimony be excluded. Perlov v G.D. Searle & Co. (1985, DC Md) 621 F Supp 1146, CCH Prod Liab Rep P 10879, 73 FR Serv 3d 228.

Party's failure to comply with order extending discovery for purpose of permitting it to retain expert and review and analyze expert's report warranted exclusion of expert's testimony. Le Barron v Haverhill Cooperative School Dist. (1989, DC NH) 127 FRD 38, 13 FR Serv 3d 382, 15 FR Serv 3d 229.

Plaintiff was properly precluded from calling expert witness in liability stage of trial where it failed to designate expert until long after deadline for doing so had passed, in clear violation of court's scheduling order. Exxon Corp. v Halcon Shipping Co. (1994, DC NJ) 156 FRD 589, 30 FR Serv 3d 1135.

Individual had sufficient time to secure expert on issue of emotional damages, to obtain consultation and to generate meaningful opinion prior to designation deadline of October 30, 2002; in choosing not to do so, he took calculated risk and risk was exacerbated by continuing neglect of preparations as discovery deadline neared; while arguably court could have made accommodations to permit use of individual's expert, court was disinclined to impose on court, corporation, or its counsel burden of mitigating damage flowing from sizable risk that individual and his counsel took. Garrett v Tandy Corp. (2003, DC Me) 215 FRD 15, 91 BNA FEP Cas 794, motion to strike gr, motion to modify den, in part, magistrate's recommendation (2003, DC Me) 2003 US Dist LEXIS 8975, affd, adopted, summary judgment gr (2003, DC Me) 2003 US Dist LEXIS 12662, affd (2004, CA1 Me) 86 Fed Appx 440.

Defendants failed to comply with scheduling order as to both identifying experts and disclosing their reports pursuant to *Fed. R. Civ. P. 37(b)(2)*; thus, plaintiffs' motion to preclude such testimony was granted where disclosures as required under *Fed. R. Civ. P. 26(a)(2)(A)* were made on eve of trial, case was almost six years old, expert discovery had long been closed, and there was no time for additional discovery before trial. Applera Corp. v MJ Research Inc. (2004, DC Conn) 220 FRD 13.

Expert testimony of arrestee's experts was barred because their reports were provided on afternoon of last day of discovery, which left no time for depositions or discovery under *Fed. R. Civ. P. 26(b)(4)(a)* regarding reports, or engaging rebuttal experts; arrestee did not show substantial justification for delay under *Fed. R. Civ. P. 37(c)(1)*. Finwall v City of Chicago (2006, ND Ill) 239 FRD 494.

Magistrate properly issued order pursuant to *Fed. R. Civ. P. 37(c)(1)* barring arrestee from presenting testimony of four proposed expert witnesses during trial of his false arrest claim: (1) arrestee had waited until waning days just before close of discovery to serve experts' reports on defendants as required by *Fed. R. Civ. P. 26(a)(2)*; (2) arrestee failed to show sufficient justification for waiting until last minute to disclose experts' reports, and such late disclosure violated court's clear direction that all discovery, including any necessary rebuttal discovery,

should be completed by discovery deadline that it had set; (3) defendants were prejudiced because lateness of disclosures prevented them from deposing arrestee's experts or proposing their own rebuttal experts before discovery deadline expired; and (4) court would be prejudiced, if experts' opinions were not excluded, because discovery would have to be reopened to allow defendants to respond to experts' opinions, which would negatively impact court, its schedule, and other cases pending before court. Finwall v City of Chicago (2006, ND Ill) 239 FRD 504.

Knee replacement recipient's untimely disclosure of expert in recipient's products liability case against manufacturer of knee replacement device did not warrant exclusion of expert's testimony as sanction under *Fed. R. Civ. P. 37(b)(2)*; expert's report was in nature of rebuttal report, which recipient acted diligently to obtain, and manufacturer had ample time to procure its own rebuttal expert. Soufflas v Zimmer (2007, ED Pa) 474 F Supp 2d 737.

Company correctly contended that corporation sought to introduce expert opinions of expert witness that were not, as required by *Fed. R. Civ. P. 26(a)(2)(B)*, disclosed during discovery, either initially or in any supplementary expert report, and company had neither shown that its failure to disclose was substantially justified nor that it was harmless as required by *Fed. R. Civ. P. 37(c)(1)*; to extent that expert witness' opinions went beyond those that were timely and properly disclosed, they had to excluded; therefore, company's motions in limine were allowed, and parties were ordered to revise their submissions to address merits of cases based solely on admissible evidence. Cell Genesys, Inc. v Applied Research Sys. ARS Holding, N.V. (2007, DC Mass) 499 F Supp 2d 59.

Because pipeline repair company charging conspiracy between former employees and competitor failed to properly disclose computer forensics expert under *Fed. R. Civ. P. 26* and *Fed. R. Evid. 702*, witness was only permitted to testify as fact witness under Fed. R. Evid. 701 and *401* to testify as to his experience in working on company computers; any attempt to introduce expert opinion testimony would be excluded at trial due to unfair surprise under *Fed. R. Civ. P. 37*. Furmanite Am., Inc. v T.D. Williamson, Inc. (2007, MD Fla) 506 F Supp 2d 1126.

Doctors' identities and subject matter of their knowledge, therefore, was made known to defendant county during discovery process, in accordance with *Fed. R. Civ. P. 26(e)*; thus, county's motion in limine was denied as to those witnesses. Coleman v Cook County (2010, ND Ill) 23 AD Cas 1884.

Because only pleadings could be subjected to motion to strike, motion to strike expert statement was denied; nevertheless, because plaintiff violated *Fed. R. Civ. P. 26(a)(2)(C)* by submitting new expert statement after court's deadline, plaintiff was sanctioned under *Fed. R. Civ. P. 37(c)(1)* for that violation; she could not use expert's updated statement, with exception of single phrase described referencing medical records. Pickens v United States (2010, DC Or) 750 F Supp 2d 1243.

Defendant power company's motion to strike paragraph of Government's expert's declaration was granted; because paragraph utilized previously undisclosed formulas and relied on previously uncited documents to come to new conclusion, opinion concerning expected emissions increase as stated in paragraph was new opinion, and Government had not shown

that its failure to disclose opinion was harmless. United States v Ala. Power Co. (2011, ND Ala) 274 FRD 686.

Creditor was not entitled to reconsideration of decision granting partial summary judgment in favor of debtor in adversary proceeding because once creditor's expert testimony was excluded court determined that there was no evidence to demonstrate crucial element of creditor's case, and summary judgment was appropriate; creditor's effort to raise "substantial justification" and "no prejudice" under *Fed. R. Civ. P. 26* and *37*, as incorporated by Fed. R. Bankr. P. 7026, for first time in its motion for reconsideration after grant of partial summary judgment was not appropriate. *Oliner v Kontrabecki (In re Cent. European Indus. Dev. Co., LLC) (2010, BC ND Cal) 427 BR 149.*

Unpublished Opinions

Unpublished: Court declined to strike expert report as sanction where plaintiffs had opportunity to counter it, but alternative sanction of declining to consider expert's surrebuttal report was warranted under *Fed. R. Civ. P. 37* where defendant's decision to withhold documents from shared directory was not justified. Wixon v Wyndham Resort Dev. Corp. (2009, ND Cal) 2009 US Dist LEXIS 86337.

**252. --Prejudice**

District Court did not err in excluding expert's deposition as sanction for plaintiff's failure to produce his medical records at deposition where District Court provided plaintiff's counsel with adequate opportunity to produce medical records and defendant testified that he would be prejudiced by lack of them. Navarro de Cosme v Hospital Pavia (1991, CA1 Puerto Rico) 922 F2d 926, 31 Fed Rules Evid Serv 1200.

Plaintiff's proffered excuse for delay in disclosing expert testimony was that expert could not have rendered proper written report without first reviewing parties' depositions and transcripts from plaintiff's criminal trial; although plaintiff claimed that he did not receive trial transcript until January 26 and deposition transcripts until February 13 and that he submitted expert's affidavit on day it was completed, district court found this excuse unsatisfactory because it merely addressed why his expert was not able to produce his affidavit earlier in discovery process, and provided no reason for untimely identification of expert's name; in addition to this, appellate court disagreed with plaintiff's characterization of necessity of trial and deposition transcripts to written report, as outcome of criminal trial, for example, was not critical to expert's opinion, as expert could have rendered report based upon presentation made in criminal trial or based upon factual assumptions furnished to him by plaintiff and, if those assumptions subsequently turned out to be erroneous, expert could have supplemented report at later time; moreover, at minimum, plaintiff could have filed motion to extend discovery period so as to permit proper disclosure but offered no excuse for failing to do so, so failure to comply with *Fed. R. Civ. P. 26(a)* was both unjustified and harmful to defendants and district court clearly acted within its discretion by excluding expert's affidavit under *Fed. R. Civ. P. 37(c)(1)*. Reese v Herbert (2008, CA11 Ga) 527 F3d 1253, 21 FLW Fed C 724.

Plaintiff's violation of scheduling order by failing to timely disclose expert witnesses did not warrant extreme sanction of precluding their testimony; defendant alleged no specific prejudice

or any reason why any prejudice could not be cured. Daugherty v Fruehauf Trailer Corp. (1993, ED Pa) 146 FRD 129, 25 FR Serv 3d 1420 (superseded by statute on other grounds as stated in Nelson v City & County of San Francisco (2005, CA9 Cal) 123 Fed Appx 817).

To extent individual's expert, during deposition, expressed tentative opinions, they bore no recognizable relationship to those set forth in designation (or to interim position individual's attorney took that his client had suffered only garden-variety emotional-distress damages); not only was corporation blindsided by barrage of serious new emotional-distress allegations but also, it lacked complete set of individual's medical and mental-health records and was handicapped by his lack of cooperation during Fed. R. Civ. P. 35 examination few days earlier; under circumstances, corporation's claim of "severe prejudice" rang true and its motion to strike designation of individual's expert and to exclude his testimony from both motion practice and trial was granted. Garrett v Tandy Corp. (2003, DC Me) 215 FRD 15, 91 BNA FEP Cas 794, motion to strike gr, motion to modify den, in part, magistrate's recommendation (2003, DC Me) 2003 US Dist LEXIS 8975, affd, adopted, summary judgment gr (2003, DC Me) 2003 US Dist LEXIS 12662, affd (2004, CA1 Me) 86 Fed Appx 440.

Where government, in its action against defendants, disclosed supplemental materials that its experts considered in reaching their opinions, and defendants argued that supplemental materials should be excluded because materials were available before they submitted their initial reports, court refused to issue blanket order excluding all materials because defendants had year and discovery opportunity to cure any prejudice. United States v Philip Morris USA Inc. (2004, DC Dist Col) 223 FRD 1.

Where government failed to comply with court's insolvency expert report deadline, magistrate judge's recommendation that government be precluded from presenting three insolvency reports and balance sheet and declaration was affirmed; defendants were prejudiced by government's failure to meet deadline, and sanction was not extreme and disproportionate to harm caused. United States v Batchelor-Robjohns (2005, SD Fla) 96 AFTR 2d 6727, magistrate's recommendation, costs/fees proceeding (2006, SD Fla) 97 AFTR 2d 508.

Declaration of handwriting expert submitted in support of home mortgage lender's supplemental motion for summary judgment was struck where court had previously struck declaration as sanction for lender's earlier discovery abuses and it would have been fundamentally unfair to penalize employee for not questioning expert about declaration when he was re-deposed because she had relied in good faith on court's earlier ruling. United States ex rel. Fago v M&T Mortg. Corp. (2007, DC Dist Col) 518 F Supp 2d 108.

Where plaintiff provided no explanation for its failure to comply with requirement to supplement expert disclosures, limited portion of expert's testimony was not of great importance, expert's declaration was filed after discovery was closed (and therefore, defendants would have been prejudiced and continuance would have been impractical), expert's declaration was stricken and expert could not testify as to new opinions. Highland Capital Mgmt., L.P. v Schneider (2008, SD NY) 551 F Supp 2d 173.

Expert witness was not precluded under *Fed. R. Civ. P. 26(a)(2)(C)* from testifying regarding any matter disclosed subsequent to deadline for expert disclosures because initial expert

disclosures were timely and follow-up disclosures were properly viewed as supplemental disclosures under *Fed. R. Civ. P. 26(e)*; moreover, under *Fed. R. Civ. P. 37*, sanctions were not warranted because there was no indication that opposing party was harmed or unfairly surprised by supplemental expert disclosures. Mintel Int'l Group, Ltd. v Neergheen (2009, ND Ill) 636 F Supp 2d 677.

Testimony of expert witness identified by plaintiff insureds was struck because plaintiff insureds did not make required expert disclosures until after close of discovery and defendant was prejudiced because it did not know complete substance of or basis for witness's opinions at time it deposed witness, and it did not have time to act upon information before trial; had plaintiffs timely disclosed witness as expert witness and provided required reports and information as required by *Fed. R. Civ. P. 26(a)(2)(C)*, defendant could have re-deposed him, but since that opportunity was not available, plaintiffs could not show that failure to timely designate was harmless under *Fed. R. Civ. P. 37(c)(1)*. Hewitt v Liberty Mut. Group, Inc. (2010, MD Fla) 268 FRD 681, 82 Fed Rules Evid Serv 970.

Because insureds failed to comply with *Fed. R. Civ. P. 26*'s disclosure requirements until three months after agreed-upon and court-ordered deadline, because insureds failed to proffer justification for failing to disclose their experts in timely fashion, and because insurer would be prejudiced if case management schedule were changed, insureds' experts were struck pursuant to *Fed. R. Civ. P. 37*. Young v Lexington Ins. Co. (2010, SD Fla) 269 FRD 692, 22 FLW Fed D 488.

In patent infringement case, plaintiff was not granted its motion to strike pursuant to *Fed. R. Civ. P. 26* and *37* with respect to expert analysis provided by defendants regarding invalidity because plaintiff was not prejudiced, either procedurally or substantively, by disclosure of defendants' experts' additional declarations and attached evidence. Only First, Ltd. v Seiko Epson Corp. (2011, ND Ill) 822 F Supp 2d 767.

Plaintiff's failure to timely comply with disclosure requirements was harmless because plaintiff's delay in providing notice of expert's publications and previous testimony and statement of compensation did not result in prejudice or surprise to defendant. Smith v Allstate Ins. Co. (2012, WD Pa) 912 F Supp 2d 242, 89 Fed Rules Evid Serv 1116.

Unpublished Opinions

Unpublished: Where court had emphatically ordered that all discovery, including expert discovery, was to conclude by specified date; where court had extended that date on several occasions; where plaintiff, nevertheless, failed to identify any experts within specified time and failed to articulate reasonable explanation for its negligence in district court; and where excusing belated disclosure would prejudice defendants who had, as consequence of plaintiff's failure to identify experts, not retained any of their own, district court acted within its discretion in refusing to consider expert submissions in ruling on summary judgment motion. Bastys v Rothschild (2005, CA2 NY) 154 Fed Appx 260.

Unpublished: Because plaintiff did not properly disclose their witness as expert and only provided his declarations after close of discovery, defendants did not have opportunity to

anticipate, challenge, or counter witness's statements, assessments, methods, or conclusions; accordingly, district court did not abuse its discretion in determining that plaintiff's failure to designate witness as expert caused defendants prejudice. DVL, Inc. v Niagara Mohawk Power Corp. (2012, CA2 NY) 2012 US App LEXIS 16167.

**253. --Accident reconstruction**

Preclusion of railroad employee's expert accident reconstruction testimony in FELA action as sanction for violation of discovery deadline established in continuance order was not abuse of discretion. Scaggs v Consolidated Rail Corp. (1993, CA7 Ind) 6 F3d 1290, 38 Fed Rules Evid Serv 63, 26 FR Serv 3d 1337.

Where trucking company and its accident reconstruction expert failed to supplement expert's deposition testimony with equations that were used in computer program that he had used for his opinion, they were sanctioned and expert was not allowed to testify about program. Abrams v Mendsen (2003, ED Mich) 218 FRD 539, 57 FR Serv 3d 1.

**254. --Labor and employment**

District court's exclusion of EEOC's expert witness' testimony as sanction for EEOC's violation of discovery order was abuse of discretion since EEOC's failure to comply arose from reasonable interpretation of vague order and whatever prejudice would have resulted from permitting expert to testify could have been cured by continuance. EEOC v General Dynamics Corp. (1993, CA5 Tex) 999 F2d 113, 62 BNA FEP Cas 1120, 62 CCH EPD P 42524, 26 FR Serv 3d 755.

District court's prohibiting employment discrimination defendant's sole expert witness from testifying as sanction for defendant's discovery abuses was not abuse of discretion; plaintiff was greatly prejudiced by defendant's non-disclosure of statistical study until eve of trial and district court was under no obligation to postpone trial to allow plaintiff to wade through quagmire of statistical data that was finally produced. Melendez v Illinois Bell Tel. Co. (1996, CA7 Ill) 79 F3d 661, 70 BNA FEP Cas 589, 67 CCH EPD P 43996, 34 FR Serv 3d 1324, reh, en banc, den (1996, CA7 Ill) 1996 US App LEXIS 9838.

In female employees' action for gender discrimination under Title VII of Civil Rights Act, 42 USCS § 2000e et seq., employer was not entitled to exclusion of employees' expert report and testimony under *Fed. R. Civ. P. 37*; exclusion was inappropriate because expert testimony was extremely important to employees' claim, because employees' explanation for late disclosure was reasonable, and because expert's report did not prejudice employer. Mathers v Northshore Mining Co. (2003, DC Minn) 217 FRD 474, 92 BNA FEP Cas 1360.

In employer's motion to decertify two classes of employees that had been conditionally certified for collective action under FLSA, employees were entitled to strike declarations of certain witnesses presented by employer because names of certain witnesses were not disclosed during discovery, one employee's testimony was not relevant because it concerned only drafts, which were never implemented, of employee job descriptions, and another employee's

testimony regarding compensation lacked foundation because it concerned matters preceded his employment. Beauperthuy v 24 Hour Fitness USA, Inc. (2011, ND Cal) 772 F Supp 2d 1111.

**255. --Personal injuries and wrongful death**

District court's disallowing wrongful death plaintiff's product identification witnesses produced in contravention of pretrial order deadlines was not abuse of discretion. Shine v Owens-Illinois, Inc. (1992, CA7 Ill) 979 F2d 93, CCH Prod Liab Rep P 13422, 24 FR Serv 3d 313.

Where seaman fell into open hatch, sustaining injuries that rendered him paralyzed below his mid-chest, seaman was not entitled to new trial on issue of contributory negligence, sought on basis that court allowed defendant to call individual to offer expert opinion testimony relating to seaman's comparative negligence despite fact that court had previously ordered that defendant could not call individual during its case in chief as sanction for discovery violations, because seaman's counsel prominently raised issue of who had responsibility to assure safety of vessel, allowing defendant to call individual in rebuttal and making sanction of wholesale exclusion no longer appropriate. Falconer v Penn Mar., Inc. (2006, DC Me) 421 F Supp 2d 190, 2006 AMC 1430, 64 FR Serv 3d 344.

**256. --Products liability**

Where plaintiffs in aircraft products liability case repeatedly failed to disclose that its expert had conducted flight test, District Court did not abuse its discretion in opposing sanction that plaintiffs be precluded from using substitute pilot expert, since allowing them to use substitute would put them in stronger position than if preclusion order had not been entered because first expert's credibility had been undermined by inconsistencies in his deposition testimony. Hagans v Henry Weber Aircraft Distributors, Inc. (1988, CA3 Pa) 852 F2d 60, 11 FR Serv 3d 1019.

District Court did not err in striking affidavit of plaintiffs' expert witness in products liability case as sanction for plaintiff's misconduct, even though it led to summary judgment for defendants, where plaintiff failed to comply with numerous discovery orders, had been granted several extensions for discovery, court had denied previous request for sanctions, given explicit warning that failure to comply with orders would result in sanctions, and defendant had been prejudiced by delay. Taylor v Medtronics, Inc. (1988, CA6 Ohio) 861 F2d 980, CCH Prod Liab Rep P 11979, 12 FR Serv 3d 1008.

District court did not abuse its discretion in barring products liability plaintiff from calling expert witnesses where record clearly demonstrated that plaintiff willfully disregarded district court's discovery orders. Parker v Freightliner Corp. (1991, CA7 Ill) 940 F2d 1019, 20 FR Serv 3d 438.

Exclusion of bicyclist's expert was not abuse of discretion in products liability action since expert evidence was unquestionably late, plaintiff did not request extension of deadline for expert discovery, and his failure to comply with deadline was not substantially justified nor harmless since manufacturer had prepared its summary judgment motion at least partially premised on lack of expert opinion to support plaintiff's claims. Trost v Trek Bicycle Corp. (1998, CA8 Minn) 162 F3d 1004, 42 FR Serv 3d 652.

Products liability plaintiff is precluded from introducing expert evidence concerning automobile engineering, steering column design and automobile safety since plaintiff failed to comply with discovery order and failure to comply was not result of good faith inability to supply required information, since sequence of events indicate deliberate failure to comply and since defendants were prejudiced by waste of their trial preparation time and by being misled as to plaintiff's theory of liability. Higginbotham v Volkswagenwerk Aktiengesellschaft (1982, MD Pa) 551 F Supp 977, CCH Prod Liab Rep P 9608, 12 Fed Rules Evid Serv 1137, 35 FR Serv 2d 1519, affd without op (1983, CA3 Pa) *720 F2d 662* and affd without op (1983, CA3 Pa) *720 F2d 669.*

**257. --Students**

District court did not abuse its discretion by excluding testimony that student sought to present in his disability discrimination action against university on ground that expert witnesses were not timely identified as was required by court order because need for those witnesses could reasonably have been anticipated prior to supplemental identification. Wong v Regents of the Univ. of Cal. (2004, CA9 Cal) 379 F3d 1097, 15 AD Cas 1509, amd on other grounds, reh den, reh, en banc, den (2005, CA9 Cal) *410 F3d 1052, 19 AD Cas 415* and reprinted as amd (2005, CA9 Cal) *410 F3d 1052.*

District court did not abuse its discretion by refusing to allow student to identify additional expert witnesses after expert identification deadline and discovery cut-off date had passed or in barring experts from testifying and student from relying on their testimony regarding University's challenge to his status as disabled under Americans with Disabilities Act and Rehabilitation Act because student could have reasonably anticipated necessity of witnesses at time parties' exchanged witness lists. *Wong v Regents of Univ. of Cal. (2005, CA9 Cal) 410 F3d 1052.*

**258. Good faith effort to comply**

District court errs in precluding plaintiff from introducing into evidence any documents not furnished pursuant to production order where it is shown that plaintiff made good faith efforts to produce those documents which she then had or would subsequently have in her possession; that her inability to produce was not caused by her own misconduct; and that any documents subsequently coming into her possession would immediately be made available to defendant. Dorsey v Academy Moving & Storage, Inc. (1970, CA5 Fla) 423 F2d 858, 14 FR Serv 2d 90.

Motion of county executives and workforce board and consortium and their directors to strike worker's affidavit, which was filed in support of employee's opposition to summary judgment in political discrimination action and which was not disclosed as part of employee's mandatory disclosure, it was denied because its disclosure week after witness was identified did not even amount to good faith oversight of counsel in supplementing discovery, provided circumstantial evidence supporting employee's claim, and it did not prejudice defendants who were permitted to depose worker before filing replies in further support of summary judgment. Krause v Buffalo & Erie County Workforce Dev. Consortium, Inc. (2005, WD NY) 426 F Supp 2d 68.

**259. Instructions to jury**

After District Court prohibited evidence as sanction for discovery abuse, its instruction that jury could find that party had engaged in wrongful conduct with regard to discovery constituted plain

error since it constituted double sanction. Werbungs Und Commerz Union Austalt v Collectors' Guild, Ltd. (1991, CA2 NY) 930 F2d 1021, 19 FR Serv 3d 799, later proceeding, remanded (1991, SD NY) 782 F Supp 870.

Dismissal of personal injury complaint arising out of tire's exploding as it was being mounted on wheel rim, for spoliation of second wheel on which similar tire had been mounted successfully, was drastic sanction; alternative sanctions could have fully protected defendants from prejudice, including instructing jury to presume that second tire was overinflated and that tire mounting machine and air compressor malfunctioned, and precluding plaintiff from offering evidence on these issues. West v Goodyear Tire & Rubber Co. (1999, CA2 NY) 167 F3d 776, 42 FR Serv 3d 1161.

District court did not abuse its discretion in instructing jury that it could draw adverse inference from employer's failure to produce relevant files in breach of employment contract action until eleventh hour where it was clear that employer exhibited at least gross negligence in failing to produce files until eleventh hour and employee showed through identification of missing documents that employer had "sanitized" those files; finding of bad faith of intentional misconduct is not requisite to sanctioning spoliator with adverse inference instruction. Reilly v Natwest Mkts. Group Inc. (1999, CA2 NY) 181 F3d 253, 52 Fed Rules Evid Serv 676, 44 FR Serv 3d 260, cert den *(2000) 528 US 1119, 145 L Ed 2d 818, 120 S Ct 940.*

**260. Privileged and confidential matters**

In securities action brought by Securities and Exchange Commission in which individual defendant has declined to answer interrogatories based on privilege against self-incrimination and has stated in his response that he reserves right to waive privilege at later time, SEC is properly granted order barring defendant from offering into evidence any matter relating to factual bases for his denials and defenses as to which he continues to assert his Fifth Amendment rights upon expiration of 10-day period, notwithstanding defendant's contention that order should be limited to evidence that SEC has not received from other sources. SEC v Cymaticolor Corp. (1985, SD NY) 106 FRD 545, CCH Fed Secur L Rep P 92216 (criticized in United States v Certain Real Prop. (2006, SD Fla) 444 F Supp 2d 1258).

Although defendant union contends that it was unable to respond to plaintiffs' interrogatories because individual defendants have asserted their Fifth Amendment privilege and remained completely silent, such individual defendants have no right to prevent union from producing equivalent information; even if union's unresponsiveness was not in bad faith, it is properly precluded pursuant to Rule 37(b)(2) from offering any evidence regarding subjects which were implicated, directly or by inference, by plaintiffs' interrogatories. C & W Constr. Co. v Brotherhood of Carpenters & Joiners, Local 745 (1985, DC Hawaii) 108 FRD 389.

**261. Tardy compliance**

District Court abused its discretion in denying to government right to call experts as trial witnesses or to offer their reports in evidence where government failed by 7 weeks to comply with discovery deadline where delay resulted form bureaucratic red tape in department not

party to action and taxpayer was also guilty of delay. Potlatch Corp. v United States (1982, CA9 Cal) 679 F2d 153, 34 FR Serv 2d 600.

District court did not abuse its discretion in imposing discovery sanction of excluding any evidence of tenured university professor's future lost earnings at damages phase of trial for wrongful termination where he waited until one month before trial of damages phase to inform defendants that his part-time position as emergency room physician was being eliminated, although he knew of this 7 months earlier, and court found that permitting evidence would substantially prejudice defendants and would likely require lengthy stay and disrupt orderly conclusion of trial already in progress. Nicholas v Pennsylvania State Univ. (2000, CA3 Pa) 227 F3d 133, 55 Fed Rules Evid Serv 1028.

District court properly struck most of plaintiff's damages evidence either as appropriate discovery sanctions (*Fed. R. Civ. P. 37*) or for proper procedural reasons; further, evidence did not support modest actual damages award imposed by district court, as plaintiff calculated its damages on lost revenues rather than lost profits, so plaintiff was entitled to only nominal damages. E360 Insight, Inc. v Spamhaus Project (2011, CA7 Ill) 658 F3d 637.

In action rising out of contract where plaintiff moved, pursuant to former Rule 37(b)(2)(C), for judgment by default, or order under former Rule 37(b)(2)(B) prohibiting defendant from introducing evidence at trial relating to damages alleged in counterclaim because defendant's answers to 12 of 26 interrogatories consisted wholly or partly of statements that information was being compiled and would be available at later date, although defendant's answers did not comply with court order that interrogatories be answered by particular date or with requirement of Rule 34 that interrogatories be fully answered, such failure was not sufficient reason for entering default judgment or order excluding evidence in light of fact that defendant filed supplemental answers which had not been objected to by plaintiff. Lakeside Bridge & Steel Co. v Mountain State Constr. Co. (1975, ED Wis) 400 F Supp 273, 21 FR Serv 2d 74, 17 UCCRS 917.

Plaintiff's request to bar newly-disclosed advertising evidence from trial on its common law unfair competition and § 43(a) of Lanham Act, *15 USCS § 1125*, false and misleading advertising claims was denied; although court was troubled by defendants' seeming late disclosure of new advertisements, no grounds for imposing extreme sanction of exclusion under *Fed. R. Civ. P. 37(c)(1)* were shown. Merisant Co. v McNeil Nutritionals, LLC (2007, ED Pa) 242 FRD 303, 2007-1 CCH Trade Cases P 75679.

In case alleging that landlord unlawfully subjected actual and prospective tenants to sexual harassment in violation of federal law, where one landlord disclosed its witness list one week after court-imposed deadline, government was not entitled to exclusion of all of this landlord's witnesses as sanction because government had ample time to discover nature and scope of their testimony and did not file motion to compel, but instead sought motion in limine to exclude this evidence. United States v Peterson (2010, ED Mich) 83 Fed Rules Evid Serv 330, injunction gr, sanctions allowed (2011, ED Mich) 2011 US Dist LEXIS 21540.

In case alleging that landlord unlawfully subjected actual and prospective tenants to sexual harassment in violation of federal law, where one landlord did not submit witness list until two

weeks before trial date, government was entitled to exclusion of all of this landlord's witnesses as sanction. United States v Peterson (2010, ED Mich) 83 Fed Rules Evid Serv 330, injunction gr, sanctions allowed (2011, ED Mich) 2011 US Dist LEXIS 21540.

**262. Willfulness, bad faith or fault**

Trial court's finding of willful failure to comply with its order for production of documents by plaintiff from facts that plaintiff represented, after such order and more than one year before trial, that discovery had been completed, but then came forth with nine additional documents three weeks before trial and another exhibit one day before trial justified exclusion of such evidence under former Rule 37(b)(2)(B), even though plaintiff argued that such evidence was dispositive of case and that its exclusion amounted to dismissal under former Rule 37(b)(2)(C). Von Brimer v Whirlpool Corp. (1976, CA9 Cal) 536 F2d 838, 190 USPQ 528, 21 FR Serv 2d 1385.

United States is properly precluded from introducing any evidence on issue of damages where government willfully and callously fails to comply with court-ordered discovery and government's attorney must personally pay $ 500 sanction for failure to comply with court-ordered discovery; Rule 55(e), prohibiting default judgments against United States, does not bar Rule 37(b) sanctions. *United States v Sumitomo Marine & Fire Ins. Co. (1980, CA9 Cal) 617 F2d 1365, 29 FR Serv 2d 863.*

Defendant accounting firm was precluded from introducing evidence concerning information possessed by it relating to plaintiff's claims where it could reasonably be said that material in files would lead to information concerning issues sought by plaintiff through those documents and where defendant followed willful, deliberate, and flagrant scheme of delay and resistance in providing evidence to plaintiff. Ohio v Crofters, Inc. (1977, DC Colo) 75 FRD 12, 23 FR Serv 2d 876, affd (1978, CA10) 570 F2d 1370, 24 FR Serv 2d 1139, cert den *(1978) 439 US 833, 58 L Ed 2d 129, 99 S Ct 114.*

Court would not prohibit defendant from introducing evidence of fault of nonparty since both plaintiff and defendant were responsible for failure to identify third party before discovery deadline for identifying party whose fault they wanted compared. Devone v Newlin (1989, DC Kan) 126 FRD 68.

Failure of former official of nonprofit judicial watchdog group (plaintiff) to produce any documents requested by group and some of its directors and officials (defendants) resulted in *Fed. R. Civ. P. 37(b)(2)* sanctions because plaintiff's repeated refusal to comply with court's discovery orders prejudiced defendants by preventing them from reviewing any evidence relating to plaintiff's damages or alleged defenses to counterclaims, as well as judicial system by burdening court; as experienced lawyer, representing himself pro se, plaintiff acted willfully and with full knowledge that his actions were not in accordance with Federal Rules of Civil Procedure and court's orders; consequently, he was barred from testifying to or admitting any evidence in support of his damage claims or his alleged defenses to defendant's counterclaims. Klayman v Judicial Watch, Inc. (2009, DC Dist Col) 256 FRD 258.

Pursuant to *Fed. R. Civ. P. 37*, magistrate ordered sanctions of insureds and their counsel --through striking their *Fed. R. Civ. P. 26(a)(2)(C)* expert report, forbidding use of materials not

timely produced, and requiring payment of costs of sanction motion--because failure to timely produce room folios was calculated to deceive insurer, prevent insurer from conducting discovery regarding some of facts underlying insureds' alleged business interruption losses, sabotage expert opinions and analysis, and exploit insureds' continuing discovery misconduct to insurer's detriment, and to insureds' benefit. Bray & Gillespie Mgmt. LLC v Lexington Ins. Co. (2009, MD Fla) 259 FRD 591.

In a case in which the founder of judicial oversight organization objected to a magistrate judge's order sanctioning him for failing to comply with the court's discovery orders and the sanction prohibited him from testifying to or introducing into evidence any documents in support of his claims for damages or in support of his defenses to defendants' counterclaims, the founder had made no effort to dispute the magistrate judge's findings that: (1) his conduct had severely prejudiced defendants by preventing them from reviewing any documentary evidence relating to the founder's damages or alleged counterclaims; (2) his conduct throughout the case, and particularly with respect to his recalcitrance to provide any discovery in response to the present discovery requests, had burdened the court; and (3) he had acted willfully and with full knowledge that his actions were not in accordance with the Federal Rules of Civil Procedure and the court's orders, and had repeatedly failed to meet his obligations to a party before the court; it was beyond dispute that the magistrate judge was well within his discretion to sanction the founder, and the sanction order was appropriate. Klayman v Judicial Watch, Inc. (2009, DC Dist Col) 628 F Supp 2d 84.

Unpublished Opinions

Unpublished: Federal district court did not abuse its discretion by imposing sanctions pursuant to Fed. R. Civ. P. 16(f)(1)(C) and *Fed. R. Civ. P. 37(b)(2)(A)(ii)* on defendant partner for his failure to disclose witness and exhibit lists pursuant to *Fed. R. Civ. P. 26(a)(3)* in bad faith contravention of its orders; though partner claimed that he did not so disclose due to conditional offer of judgment that he made pursuant to Fed. R. Civ. P. 68, such acceptance was never filed with district court, as was required under Rule 68; district court gave partner multiple chances to designate exhibits and witnesses, and he offered no reason why federal court of appeals should consider that sanctions-which resulted in partner not being allowed to present exhibits or witnesses-were not in interests of justice or disproportionate to partner's violation of procedural rules or district court's orders. CFTC v Brockbank (2008, CA10 Utah) 2008 US App LEXIS 7259.

Unpublished: Where plaintiff former employee did not serve any initial disclosures required by *Fed. R. Civ. P. 26*, did not respond to discovery, and did not timely reply to defendant former employe's summary judgment motion, and even given extension to reply to motion for summary judgment, she replied two days after extended deadline and did not timely respond to employer's motion to strike, and it was only after sua sponte giving employee extra time to respond, and employee's failure to respond or request continuance, did district court strike exhibits, striking exhibits was not abuse of discretion under *Fed. R. Civ. P. 37(c)(1)*. Bennett v GEO Group, Inc. (2013, CA5 Miss) 2013 US App LEXIS 10369.

**263. --Attorney's fault**

District Court may order preclusion of evidence tantamount to dismissal of claim where counsel's failure to comply with magistrate's order compelling discovery constitutes to total

dereliction of professional responsibility amounting to gross negligence. Cine Forty-Second Street Theatre Corp. v Allied Artists Pictures Corp. (1979, CA2 NY) 602 F2d 1062, 1979-2 CCH Trade Cases P 62778, 27 FR Serv 2d 828, 49 ALR Fed 820.

In former employee's action for compensation for services rendered for former employer, employer's counsel's deliberate failure to comply with discovery and court orders warranted sanctions consisting of precluding employer from introducing evidence at trial in opposition to plaintiff's claims that he was employed by defendants during period relevant to his complaint and that defendants had funds with which to pay him. Jankins v TDC Management Corp. (1989, DC Dist Col) 131 FRD 629 (superseded by statute on other grounds as stated in Walker v District of Columbia (1995, Dist Col App) 656 A2d 722).

As sanction for plaintiffs' submission of expert reports and supplemental affidavits after court-ordered filing deadlines, court will not order all such documents excluded, because this would result in effective dismissal of much of plaintiffs' case, and would be unduly harsh result since plaintiffs themselves were not at fault for their counsel's flagrant abuse of discovery process and disregard of court orders; rather, certain documents will be excluded and counsel will be directed to show cause why monetary sanctions against counsel should not be imposed. In re TMI Litig. Cases Consol. II (1996, MD Pa) 922 F Supp 997.

**264. Other particular cases**

Judgment allowing dancer-insured to recover on accident and health policy, without proof that she had engagements on days of alleged disability, was reversed because trial court erroneously held that preliminary oral agreement, under which such proof was unnecessary, was controlling; upon remand, assured was entitled to new trial in which she should be permitted to offer such proof, although she had properly been precluded from offering such proof at first trial, because of her refusal to answer insurer's interrogatories. Fisher v Lord (1941, CA7 Ill) 125 F2d 117.

Precluding testimony is permissible sanction in face of government's failure to comply with discovery orders. EEOC v Kenosha Unified School Dist. (1980, CA7 Wis) 620 F2d 1220, 22 BNA FEP Cas 1362, 24 BNA WH Cas 728, 23 CCH EPD P 30897, 29 FR Serv 2d 873.

Order prohibiting defendant from presenting evidence on issue of "alter ego" liability was appropriate sanction for party's failure to comply with explicit order to comply with subpoena duces tecum and its obstructive behavior at deposition. Daval Steel Products, Div. of Francosteel Corp. v M/V Fakredine (1991, CA2 NY) 951 F2d 1357, 1992 AMC 891, 21 FR Serv 3d 685.

Defendant railroad, who denies plaintiff access to information relating to braking power of trains by disclaiming existence of such information, cannot claim prejudice by court's refusal at trial to admit such evidence. Cage v New York C. R. Co. (1967, WD Pa) 276 F Supp 778, 12 FR Serv 2d 817, affd (1967, CA3 Pa) 386 F2d 998.

Plaintiff's repeated failure to comply with legitimate discovery efforts of defendant, follow orders of court, or fulfill her duties to supplement discovery responses warranted prohibiting her from calling as fact witness any person not listed in response to defendant's interrogatories,

prohibiting her from calling any expert witnesses, and precluding her from utilizing certain exhibits at trial. Carter v Moog Automotive, Inc. (1989, ED Mo) 126 FRD 557, 49 BNA FEP Cas 1382, 49 CCH EPD P 38886, affd, motion den (1989, CA8 Mo) 52 CCH EPD P 39477.

Defendant who had refused to produce trial exhibit relied on by its expert witness pursuant to an unambiguous scheduling order would be precluded from introducing exhibit at trial, despite defendant's contention that other party had already obtained copy of exhibit; even if this was so it did not excuse defendant's obligation to produce exhibit. In re Air Crash Disaster at Detroit Metro. Airport (1989, ED Mich) 130 FRD 652.

In lawsuit by US to avoid allegedly fraudulent transfer, magistrate granted US's motions for order precluding transferor from testifying and for sanctions; despite reasonable efforts by US to accommodate transferor's schedule and needs, transferor failed four times to appear for scheduled and ordered depositions. United States v Munger (2003, DC Minn) 91 AFTR 2d 1794.

Failure to present evidence under pretrial schedule was cause for striking evidence. Mallinckrodt, Inc. v Masimo Corp. (2003, CD Cal) 254 F Supp 2d 1140.

In breach of contract action between manufacturer and its sales agent, certain evidence relating to product group was properly excluded under *Fed. R. Civ. P. 37(b)(2)* and *Fed. R. Evid. 403* because agent reasonably relied on manufacturer's representation that product group consisted only of certain brand of products and, in reliance on that representation, agent calculated its damages, commissioned expert report, and presented that evidence to jury; it would have prejudiced agent for manufacturer to introduce evidence in direct contradiction to that representation, and, therefore, whether termed as equitable estoppel or as sanction for violation of discovery order, it was proper to limit prejudice to agent by precluding certain evidence. Total Control, Inc. v Danaher Corp. (2005, ED Pa) 359 F Supp 2d 387.

As sanction under *Fed. R. Civ. P. 37(b)(2)*, and to prevent unfair surprise, company's former key employee would not be allowed to testify at trial relating to transactions that he performed in course of acquiring and fulfilling subcontract for company: (1) card personalization equipment and software provider filed sanction motion after employee failed to appear for scheduled deposition; (2) provider wanted to obtain information from employee with regard to its bribery-based tortious interference with prospective business advantage counterclaim, arising from company's purported decision to pay $ 3.5 million commission to facilitate bribes to Nigerian officials, in order to obtain subcontract; (3) company's claimed good faith efforts to produce employee did not take away from fact that employee failed to appear for deposition; and (4) in order to preserve effect of another sanction, namely deemed admission by company of three facts relating to counterclaim, it was necessary to bar employee from testifying in contradiction to those admitted facts, should he appear to testify at trial. Card Tech. Corp. v Datacard Inc. (2008, DC Minn) 249 FRD 567.

Company's motion to compel production of documents elucidating parties' agreement was granted in part and denied in part as follows: (1) because company was not prejudiced by corporation's failure to produce drafts, copies, metadata, and communications related to

vendor standards manual unless corporation later relied upon them in seeking to prove its allegations, corporation was precluded from later relying upon any documents responsive to those requests that it did not produce before July 22, 2011, under *Fed. R. Civ. P. 37(b)(2)(A)(ii)*; and (2) because document requests sought documents that were highly relevant to interpretation of manual's fine provision, topic that was at core of litigation, corporation was ordered to produce all documents in its possession that were responsive to document requests. Trilegiant Corp. v Sitel Corp. (2011, SD NY) 275 FRD 428.

Corporation's request that court deny company and its owner opportunity to submit evidence regarding their purported costs of goods and expenses as sanction pursuant to *Fed. R. Civ. P. 37(b)* for their failure to participate in discovery and their litigation misconduct was granted because company and its owner's failure to produce requested documents within specified time frame was inexcusable. Chanel, Inc. v Veronique Idea Corp. (2011, SD NY) 795 F Supp 2d 262.

In adversary proceeding, where debtor completely failed to comply with final pretrial order, which required parties to exchange and file exhibits, exhibit lists, and witness lists and to file trial briefs, pursuant to FRCP 16(f), which incorporated former *FRCP 37(b)(2)(B)*, court barred debtor from introducing exhibits and presenting witnesses at trial, limiting debtor's participation at trial to cross-examination and argument. Michael v Khan (In re Khan) (2005, BC ND Ill) 321 BR 709.

### 265. --Antitrust and pricing

Proof by plaintiff-retail gasoline dealers of secondary damage claims as result of gasoline distributor's alleged price discrimination is precluded where plaintiff fails to comply with court's discovery order that required identification of documents used in computing such damages. Krieger v Texaco, Inc. (1972, WD NY) 373 F Supp 108, 1974-2 CCH Trade Cases P 75163, 1974-2 CCH Trade Cases P 75164.

In order to offset advantage that defendants obtained by meeting with competitors regarding price-fixing, and to insure that no information gained directly or uncovered indirectly, as result of communications with those individuals by counsel for defendants was used against plaintiffs, sanction of directing that defendants not be permitted to offer into evidence any information in opposition to plaintiffs' claims was appropriate. In re Anthracite Coal Antitrust Litigation (1979, MD Pa) 82 FRD 364, 1979-1 CCH Trade Cases P 62511, 27 FR Serv 2d 1079.

### 266. --Labor and employment

District court did not abuse its discretion in permitting evidence of plaintiff's damage evidence for failure to disclose its damage theory prior to trial, since defendant knew numbers on which witness based his calculation, defendant was given significant opportunity to cure any prejudice by cross-examining witness outside jury's presence but it failed to do so, defendant failed to elicit any information on subject from its subsequently called witness, and pretrial disclosures occurred before trial court ruled that ERISA preempted number of plaintiff's claims, which no doubt prompted it to change its damage theory. Woodworker's Supply, Inc. v Principal Mut. Life Ins. Co. (1999, CA10 NM) 170 F3d 985, 1999 Colo J C A R 1697, 43 FR Serv 3d 1363.

Discovery sanctions of barring defendant from presenting evidence to refute plaintiff's proof that he was employed by defendant and that defendant had funds with which to pay him but did not, plus nearly $ 71,000 for attorneys' fees and expenses, were warranted by defendant's continued pattern of delay and obfuscation in violating at least 11 express discovery orders. Jankins v TDC Management Corp. (1994, App DC) 305 US App DC 342, 21 F3d 436, 128 CCH LC P 57752, 39 Fed Rules Evid Serv 1, 28 FR Serv 3d 1410.

In class action sexual harassment suit against District of Columbia as employer of plaintiffs, trial court abused its discretion in precluding defendant from offering any fact witness as discovery sanction for failing to timely respond to interrogatory requesting names of all persons with knowledge of relevant events and then providing inadequate response, since record did not support district court's explanation on remand that this more severe sanction, rather than lesser sanction of precluding defendant from calling any fact witnesses whom plaintiffs had not deposed at time of discovery violations, was necessary for deterrence and to avoid prejudice to plaintiffs' case and court's calendar, nor did record show that defendant acted in flagrant or egregious bad faith. Bonds v District of Columbia (1996, App DC) 320 US App DC 138, 93 F3d 801, 35 FR Serv 3d 1542, reh den (1996, App DC) 323 US App DC 60, 105 F3d 674 and reh, en banc, den (1996, App DC) 323 US App DC 60, 105 F3d 674 and cert den *(1997) 520 US 1274, 138 L Ed 2d 211, 117 S Ct 2453* and injunction den, app dismd (1999, App DC) 1999 US App LEXIS 2476.

Where widow, in suit against employer of husband killed in slip and fall on employer's ship, fails to comply with discovery request, pursuant to Rule 26(e), relating to autopsy performed on plaintiff's decedent, exclusion of all evidence derived from autopsy is appropriate sanction since employer is prejudiced by being deprived of opportunity to participate in autopsy and to examine whether there may have been other medical explanations for decedent's death, widow acted in bad faith and it is not certain that all prejudice can be cured. *Lewis v Darce Towing Co. (1982, WD La) 94 FRD 262, 35 FR Serv 2d 330.*

Declarations of three fact witnesses submitted by home mortgage lender in support of supplemental motion for summary judgment on employee's claims under False Claims Act, 31 USCS § 3729 et seq., were struck where lender had failed to disclose witnesses' identities and that failure was not harmless because employee had not been afforded opportunity to depose or otherwise challenge declaration on central issue in case, i.e., whether lender had forged signatures on documents in loan binders submitted to government. United States ex rel. Fago v M&T Mortg. Corp. (2007, DC Dist Col) 518 F Supp 2d 108.

Home mortgage lender's supplemental interrogatory response submitted in support of its supplemental motion for summary judgment on employee's claims under 31 USCS § 3729 et seq., was struck where lender had not served supplemental response until more than month after close of discovery. United States ex rel. Fago v M&T Mortg. Corp. (2007, DC Dist Col) 518 F Supp 2d 108.

Under *Fed. R. Civ. P. 37(b)(2)(A)*, once plaintiffs established prima facie case of discriminatory non-promotion, defendant could not defend any such prima facie case, as, inter alia: day for court to consider merits of this case had been delayed in large measure by defendant's failure

to provide discovery without virtually continuous intervention of court; defendant made mockery of Fed. R. Civ. P. 34, case management orders of court, order granting plaintiffs' motion to compel, and evidentiary hearing; multiple lesser sanctions court previously imposed did not deter discovery misconduct which was subject of 16-day evidentiary hearing; and lesser sanctions would not have been more appropriate. Moore v Chertoff (2008, DC Dist Col) 255 FRD 10, 105 BNA FEP Cas 409.

In case alleging race discrimination in failing to promote Secret Service special agents, court upheld magistrate's imposition of sanctions precluding Secretary of Department of Homeland Security from offering certain rebuttal evidence due to her failure to comply, without substantial justification, with order compelling reasonable document search. Moore v Napolitano (2010, DC Dist Col) 2010 US Dist LEXIS 70892, class certif den, motion den, as moot (2010, DC Dist Col) 269 FRD 21.

Unpublished Opinions

Unpublished: Because plaintiff failed to comply with court's scheduling order, district court was authorized to exclude testimony of two witnesses who were not identified until months after completion of discovery under Fed. R. Civ. P. 16(f)(1) and *37(b)(2)(A)(I)*. Luty v City of Saginaw (2009, CA6 Mich) 2009 FED App 107N.

Unpublished: District court did not abuse its discretion when it denied plaintiff's request to admit resume into evidence because plaintiff had not complied with disclosure requirements set forth by court, pursuant to Fed. R. Civ. P. 16, *26* , and *37*. Weathersby v One Source Mfg. Tech. (2010, CA5 Tex) 2010 US App LEXIS 10103.

**267. --Patents, copyrights and trademarks**

Although district court did not err in determining that plaintiff bank's untimely disclosure of documents, and its disclosure of misleading documents, entitled defendant corporation to some type of remedy in form of sanction in Lanham Act action, exclusion of all proposed witness testimony on confusion (which was tantamount to dismissal of its claims) was vacated because district court should have considered possibility of lesser sanctions. Heartland Bank v Heartland Home Fin., Inc. (2003, CA8 Mo) 335 F3d 810, 67 USPQ2d 1410, 56 FR Serv 3d 124.

Findings of United States Patent and Trademark Office, Trademark Trial and Appeal Board were affirmed where there was substantial evidence demonstrating likelihood of confusion between trademarked "Beggin' Strips" and competing dog treats that were called "Waggin' Strips." *Fed. R. Civ. P. 37(c)(1)* did not apply to preclude use of documents that were not produced. Midwestern Pet Foods, Inc. v Societe Des Produits Nestle S.A. (2012, CA FC) 685 F3d 1046, 103 USPQ2d 1435.

Where defendant, alleged product counterfeiter, did not give "full and complete accounting" because his affidavits and first deposition failed to disclose extent of his involvement in deals with plaintiff companies, and alleged counterfeiter and companies he controlled did significant business in plaintiff companies' products during relevant time period, even if he was not aware that he was dealing in counterfeit goods, his stonewalling ran afoul of court's discovery order;

whether he was guilty party hiding from his bad acts or innocent party seeking to avoid unwarranted inferences, alleged counterfeiter knowingly and brazenly violated discovery order; therefore, companies' ability to present their case was impaired, and it was appropriate that sanction address impact of violation; appropriate remedies included that (1) alleged counterfeiter be precluded from introducing evidence on question of damages; (2) plaintiff companies be given all reasonable adverse inferences against defendant on issue of damages; and (3) plaintiff companies be paid reasonable attorney's fees for having to gather what information they have been able to marshal. Nike, Inc. v Top Brand Co. Ltd. (2003, SD NY) 216 FRD 259.

In patent infringement case, motion to limit introduction of evidence was granted because patentee's complaint was broad, alleged infringer was entitled to limit scope of claims, and patentee, without substantial justification, failed to comply with order to disclose certain information. Tech. Licensing Corp. v Thomson, Inc. (2005, ED Cal) 76 USPQ2d 1146.

New trial under *Fed. R. Civ. P. 59* was not warranted in patent infringement case due to court's preclusion of certain evidence under *Fed. R. Civ. P. 37* because, in each case, court was attempting to make sure that discovery and trial process remained fair despite tactics of defendant that included delaying release of volume of new prior art references, despite informing court and plaintiff on earlier date that it had no more known prior art to disclose. Praxair, Inc. v ATMI, Inc. (2006, DC Del) 445 F Supp 2d 460, injunction den (2007, DC Del) 479 F Supp 2d 440.

In patent infringement suit in which defendants also advanced counterclaim for infringement, plaintiffs failed to show good cause under Fed. R. Civ. P. 16(b) to support their motion for leave to serve untimely invalidity contentions where plaintiffs chose not to submit contentions prior to court's claim construction order because such contentions were costly, and although exclusion of invalidity contentions under *Fed. R. Civ. P. 37(b)(2)(A)(ii)* prohibited plaintiffs from asserting invalidity defense, allowing untimely service would improperly reward plaintiffs for their gamesmanship. Mass Engineered Design, Inc. v Ergotron, Inc. (2008, ED Tex) 250 FRD 284, 70 FR Serv 3d 1113.

**268. --Personal injuries and wrongful death**

Jury verdict in favor of deckhand on his claims under Jones Act, 46 USCS §§ 688 et seq., and general maritime law was affirmed because even if admission of 2006 photographs was error and they should have been excluded under *Fed. R. Civ. P. 37*, admission did not alter outcome of trial because there were uncontested photographs from 2003 which also showed inflamed condition of deckhand's skin. Taylor v Teco Barge Line, Inc. (2008, CA6 Ky) 517 F3d 372, 2008 FED App 85P.

In employees' suit asserting claims of negligence, product liability, and breach of warranty in connection with their exposure to beryllium-containing products made by their employer, evidence of lung biopsy slides of one of employees was properly excluded under *Fed. R. Civ. P. 37* where (1) employees did not supply slides to employer until six months after district court's deadline for doing so; (2) slides were unreliable because it remained unknown who had prepared them and if they even originated from employee's biopsy; (3) employer would be

prejudiced by introduction of slides into evidence because continuance would be required; and (4) employees failed to offer persuasive explanation for why they did not provide slides earlier. Paz v Brush Engineered Materials Inc. (2009, CA5 Miss) 555 F3d 383, CCH Prod Liab Rep P 18161.

Where widow, in suit against employer of husband killed in slip and fall on employer's ship, fails to comply with discovery request, pursuant to Rule 26(e), relating to autopsy performed on plaintiff's decedent, exclusion of all evidence derived from autopsy is appropriate sanction since employer is prejudiced by being deprived of opportunity to participate in autopsy and to examine whether there may have been other medical explanations for decedent's death, widow acted in bad faith and it is not certain that all prejudice can be cured. *Lewis v Darce Towing Co. (1982, WD La) 94 FRD 262, 35 FR Serv 2d 330.*

In wrongful death suit against gym operator, court declined to enter default judgment against operator for repeated discovery misconduct, including operator's failure to disclose identities of two employees who were present when person died at gym; however, court deemed admitted plaintiff's requests for admissions, prohibited operator from using as evidence information not included in interrogatory responses, and required operator to pay expenses incurred by plaintiff in discovery dispute. Abston v Fitness Co. (2003, DC Dist Col) 216 FRD 143.

In parents' action against car manufacturer and national car seller (defendants), that alleged that defective design in vehicle caused vehicle to roll in accident, killing parents' son, supplemental report prepared by automotive expert on behalf of parents was admissible under *Fed. R. Civ. P. 26(a)(2)(C)*, (e)(1) and did not need to be excluded under former *Fed. R. Civ. P. 37(b)(2)(B)* because (1) defendants were not prejudiced or surprised when they were aware of testing report upon which expert relied in drafting his report and supplemental report merely stated that testing report supported expert's conclusion regarding design defect in model of vehicle but did not contain actual testing report; (2) defendants could cure any prejudice through cross-examination; (3) allowing supplemental report would not disrupt trial or affect judicial economy; and (4) parents did not act in bad faith in failing to adhere to court's scheduling order. Montgomery v Mitsubishi Motors Corp. (2006, ED Pa) 448 F Supp 2d 619.

### 6. Expenses

### 269. Generally

Trial judge has power to tax as costs necessary and reasonable expenses incurred in discovery procedures. Harrington v Texaco, Inc. (1964, CA5 Tex) 339 F2d 814, 9 FR Serv 2d 54D.143, Case 3, 21 OGR 635, cert den *(1965) 381 US 915, 14 L Ed 2d 435, 85 S Ct 1538, 22 OGR 429.*

Once court dismisses action for failure to comply with discovery orders and refuses to award expenses to opposing party, it must make findings that failure to obey orders was substantially justified or that other circumstances make award of expenses unjust. Metrocorps, Inc. v Eastern Massachusetts Junior Drum & Bugle Corps Ass'n (1990, CA1 Mass) 912 F2d 1, 17 FR Serv 3d 733.

Principal purpose of Rule 37(b) is punitive, not compensatory and although Rule 37(b) is silent as to whom judge may award attorneys' fees, it is up to trial judge's discretion, under proper

circumstances to make decision whether to award fees to client or directly to attorneys; if contingent fee agreement makes no specific reference to any possible attorney fee which may be awarded by court and makes no specific provision for manner in which such fee is to be considered in computing amount, source, and manner of distribution of contingent fee, any attorney fee awarded by court shall be offset as credit or deduction from amount of agreed contingent fee. Hamilton v Ford Motor Co. (1980, App DC) 205 US App DC 37, 636 F2d 745, 30 FR Serv 2d 1025.

Under Rule 37, court may award expenses for abuse of discovery, including attorneys' fees, to attorney for a party. Hamilton v Motorola, Inc. (1979, DC Dist Col) 85 FRD 549, 28 FR Serv 2d 373, revd on other grounds (1980, App DC) 205 US App DC 37, 636 F2d 745, 30 FR Serv 2d 1025.

Court, when awarding attorney's fees as sanction, may award lodestar amount (number of hours reasonably spent on litigation multiplied by reasonable hourly rate). Trbovich v Ritz-Carlton Hotel Co. (1996, ED Mo) 166 FRD 30, 70 BNA FEP Cas 991, 68 CCH EPD P 44129.

When imposing monetary sanctions pursuant to FRCP 16 or *37*, reasonableness requirement of *FRCP 11* should be applied; thus, court may only award reasonable expenses and attorney's fees. Lithuanian Commerce Corp. v Sara Lee Hosiery (1997, DC NJ) 177 FRD 205, motions ruled upon (1997, DC NJ) 177 FRD 245, 49 Fed Rules Evid Serv 84, vacated in part on other grounds, summary judgment gr, in part, summary judgment den, in part (1998, DC NJ) 179 FRD 450.

Any fee award requested under Fed. R. Civ. P. 16(f), and *37(b)(2)* would entitle party to seek only those fees resulting from other party's failure to comply with court's discovery and scheduling orders. Greenier v Pace, Local No. 1188 (2003, DC Me) 245 F Supp 2d 247, 14 AD Cas 1360.

Unpublished Opinions

Unpublished: In action by technology transferor for breach, misappropriation, and bailment against transferee, attorney fees were properly awarded to transferee for discovery sanctions under *Fed. R. Civ. P. 37(b)(2)* because transferor's actions contravened district court's general discovery order. Contract Materials Processing, Inc. v KataLeuna GmbH Catalysts (2012, CA4 Md) 2012 US App LEXIS 1929.

**270. Joint and several liability**

Plaintiff counsel's failure to comply with protective discovery order warrants imposition of sanction against both counsel and plaintiff in form of liability for resulting cost and attorney fees, and issue of attorney fees is not preserved for Court of Appeals review since counsel waived procedures by which it could demonstrate special circumstances justifying failure to comply with protective order. Falstaff Brewing Corp. v Miller Brewing Co. (1983, CA9 Cal) 702 F2d 770, 1983-1 CCH Trade Cases P 65300, 36 FR Serv 2d 455.

Sanctions imposed on plaintiff and its attorney of joint and several liability for expenses including attorneys' fees were proper given plaintiff's failure to fulfill defendants' legitimate

discovery requests and to comply with court orders compelling complete discovery. Thomas E. Hoar, Inc. v Sara Lee Corp. (1989, CA2 NY) 882 F2d 682, 1989-2 CCH Trade Cases P 68716, 14 FR Serv 3d 1066 (ovrld on other grounds as stated in New Pac. Overseas Group (U.S.A.) Inc. v Excal Int'l Dev. Corp. (2001, CA2 NY) 252 F3d 667, 49 FR Serv 3d 1252).

Attorney who was held jointly and severally liable with client for monetary discovery sanctions had sufficient notice of sanctions where record indicated that issues had been subject of numerous motions, briefs, and extensions of time. Thomas E. Hoar, Inc. v Sara Lee Corp. (1990, CA2 NY) 900 F2d 522, 1990-1 CCH Trade Cases P 68982, 16 FR Serv 3d 1093, cert den *(1990) 498 US 846, 111 S Ct 132, 112 L Ed 2d 100.*

When District Court apportions liability for expenses between party and his attorney pursuant to Rule 37, apportionment determination is as much subject of appellate review as any other and must be adequately explained by specific findings. Weisberg v Webster (1984, App DC) 242 US App DC 186, 749 F2d 864, 40 FR Serv 2d 657.

**271. Contempt proceedings**

Plaintiff in antitrust actions, who was forced twice to seek motion to compel, and engaged in extensive and contested discovery to ascertain true amount of damages for defendant's willful violation of preliminary injunction, may recover all attorney's fees in prosecuting contempt proceeding, including counsel's standard hourly billing rate multiplied by hours usually spent on contempt matter, because of such violation, and predictable result of defendant's behavior that attorney's fees incurred by plaintiff are much higher than they would have been had necessary information been produced as requested. Engine Specialties, Inc. v Bombardier, Ltd. (1979, CA1 Mass) 605 F2d 1, 1979-2 CCH Trade Cases P 62770, cert den *(1980) 449 US 890, 101 S Ct 248, 66 L Ed 2d 116,* reh den *(1983) 459 US 1189, 103 S Ct 840, 74 L Ed 2d 1032.*

Where party is found in contempt of court for failing to obey court's discovery orders, attorney's fees, awarded as sanction, are generally computed according to lodestar figure (reasonable rate times reasonable number of hours). Cobell v Babbitt (1999, DC Dist Col) 188 FRD 122.

Where party is found in contempt of court for failing to obey court's discovery orders, attorney's fees, awarded as sanction, are generally computed according to lodestar figure (reasonable rate times reasonable number of hours). Cobell v Babbitt (1999, DC Dist Col) 188 FRD 122.

It was appropriate to reduce number of overall hours corporation's attorneys claimed for contempt motion and proceeding arising from defendant companies' failure to comply with court's discovery orders where there was some overlap of effort, and reduction of 10 percent seemed reasonable to compensate for that overlap. Tokyo Electron Ariz., Inc. v Discreet Indus. Corp. (2003, ED NY) 215 FRD 60, 67 USPQ2d 1284, subsequent app (2006, CA2 NY) 189 Fed Appx 3.

Pursuant to *Fed. R. Civ. P. 37(b)(2)*, company was entitled to attorney's fees and costs associated with motion for sanctions and contempt finding in company's suit against Democratic Republic of Congo (DRC) after court found, pursuant to its inherent power to make contempt finding, that DRC was in civil contempt for responding to court's discovery order concerning

DRC's assets outside District of Columbia with documents pertaining only to DRC's assets in District, which documents were already produced pursuant to earlier order. FG Hemisphere Assocs., LLC v Democratic Rep. of Congo (2009, DC Dist Col) 603 F Supp 2d 1.

**272. Deception**

Court acts within its discretion where it dismisses action against defendant with prejudice and orders plaintiffs to pay defendant's expenses to defendants, including attorneys fees, because of plaintiffs' failure to timely file answers to defendant's interrogatories in obedience to court's order entered after repeated directions to answer interrogatories which had been outstanding for many months, and because of false statements and false testimony given by plaintiffs' attorney and officer of plaintiff to deceive counsel for defendant and court regarding timeliness of service of plaintiffs' answers. Independent Investor Protective League v Touche Ross & Co. (1978, CA2 NY) 607 F2d 530, 25 FR Serv 2d 222, cert den *(1978) 439 US 895, 58 L Ed 2d 241, 99 S Ct 254,* reh den *(1978) 439 US 998, 58 L Ed 2d 673, 99 S Ct 604.*

Where District Court granted defendant protective order essentially to insure that plaintiff refrained from discouraging witnesses from speaking freely to both parties or from revealing relevant documents and where, during deposition, plaintiff's attorney told witness that he did not have to refer to document to refresh his memory if he didn't want to, explaining that if he did refer to document it would then be discoverable, District Court did not abuse discretion in ordering monetary sanction of attorneys' fees and costs under Rule 37(b) against plaintiff. *United States v National Medical Enterprises, Inc. (1986, CA9 Cal) 792 F2d 906, 1987-1 CCH Trade Cases P 67519, 5 FR Serv 3d 349* (criticized in Anheuser-Busch, Inc. v Natural Beverage Distribs. (1995, CA9 Cal) 69 F3d 337, 95 CDOS 8383, 95 Daily Journal DAR 14487, 33 FR Serv 3d 266).

Defendant's failure to divulge materials to plaintiffs during discovery and to court in direct violation of court's orders, and concealment of materials was part of course of conduct adopted by defendant in bad faith for sole purpose of delaying final resolution of controversy, such conduct justified award of attorneys' fees and other expenses as sanction; however, record did not support sanctions measured by award of all litigation expenses, as urged by plaintiffs, since there was no misconduct by defendants during portion of law suit devoted to public health claims. United States v Reserve Mining Co. (1976, DC Minn) 412 F Supp 705, 8 Envt Rep Cas 1978, 21 FR Serv 2d 796, 6 ELR 20481.

Depending on relevance or materiality of documents involved in motion for sanctions, movant may be entitled to costs and attorneys' fees for deposing witnesses to extent that depositions are concerned with opposing party's alleged concealment and destruction of documents. Alexander v National Farmers' Org. (1985, WD Mo) 614 F Supp 745.

**273. Delay and dilatory actions**

Imposition of personal monetary sanctions against party's attorney, consisting of expenses incurred by opposing party, would be upheld for substantially unjustified and willfully delayed noncompliance with certain pretrial discovery orders. First American State Bank v Continental Ins. Co. (1990, CA8 Iowa) 897 F2d 319, 15 FR Serv 3d 1270.

Defendants would be required to pay attorneys' and expert witnesses' fees to plaintiff as sanction for undue and protracted delay in complying with discovery orders in case alleging that defendant discriminated against Hispanic employees since, 2 years after class was certified and orders compelling discovery were issued, plaintiffs are still without necessary data and cannot notify class or prepare their case until it is provided. Muniz v Meese (1988, DC Dist Col) 122 FRD 1.

Given defendant's history of refusing to comply with court's orders and rules of procedure governing depositions, interrogatories, and requests for production of documents and for admissions, magistrate's award of attorney's fees to sanction defendant for its deliberate actions to delay completion of litigation was clearly correct. *Estates of Ungar v Palestinian Auth. (2004, DC RI) 325 F Supp 2d 15.*

Under *Fed. R. Civ. P. 37(b)(2)(A)*, defendant was to pay plaintiffs their costs, including reasonable attorneys' fees, of drafting, filing and litigating motion for sanctions, as, inter alia: day for court to consider merits of this case had been delayed in large measure by defendant's failure to provide discovery without virtually continuous intervention of court; defendant made mockery of Fed. R. Civ. P. 34, case management orders of court, order granting plaintiffs' motion to compel, and evidentiary hearing; multiple lesser sanctions court previously imposed did not deter discovery misconduct which was subject of 16-day evidentiary hearing; and lesser sanctions would not have been more appropriate. Moore v Chertoff (2008, DC Dist Col) 255 FRD 10, 105 BNA FEP Cas 409.

In mortgagor's fraud suit against defendants, credit management group and lending company, mortgagor was entitled to sanctions under *Fed. R. Civ. P. 37*, in form of attorneys' fees related to her efforts to pursue discovery after discovery order issued, where defendants (1) disregarded court order that they present privilege log under *Fed R. Civ. P. 26(b)(5)(A)* and instead produced incomplete privilege log; (2) produced compensation plan document six weeks late, without explanation; (3) produced incomplete information about certain related law suits against defendants; and (4) failed to produce copies of their licenses in conjunction with document in which licenses were discussed. Crawford v Franklin Credit Mgmt. Corp. (2009, SD NY) 261 FRD 34.

Award of attorney's fees was appropriate in light of debtor's consistent failure to meet agreed-upon and court-ordered discovery deadlines, which failures significantly delayed resolution of case and placed opposing counsel and court at distinct disadvantage. In re King (2004, BC SD NY) 305 BR 152, 51 CBC2d 1343, 53 UCCRS2d 158.

Unpublished Opinions

Unpublished: It was not abuse of discretion to award $ 23,376.00 in costs to defendants as sanction for plaintiffs' lateness in designating experts; amount awarded was documented by defendants and took into account delay in discovery that resulted from plaintiffs' failure to comply with deadlines. Smith v Johnson & Johnson, Inc. (2012, CA5 Miss) CCH Prod Liab Rep P 18895.

**274. Destruction or spoliation of evidence**

Discovery sanctions of barring defendant from presenting evidence to refute plaintiff's proof that he was employed by defendant and that defendant had funds with which to pay him but did

not, plus nearly $ 71,000 for attorneys' fees and expenses, were warranted by defendant's continued pattern of delay and obfuscation in violating at least 11 express discovery orders. Jankins v TDC Management Corp. (1994, App DC) 305 US App DC 342, 21 F3d 436, 128 CCH LC P 57752, 39 Fed Rules Evid Serv 1, 28 FR Serv 3d 1410.

Defendant which was on notice from inception of litigation that certain records it possessed were subject to discovery, but nonetheless destroyed those and other relevant records, is subject to monetary sanction for period from commencement of litigation to date of first oral discovery order which it disobeyed, in addition to monetary sanction under Rule 37(b) for noncompliance subsequent to entry of first oral discovery order. Crocker Nat'l Bank v M.F. Sec. (Bahamas), Ltd. (1985, CD Cal) 104 FRD 123.

In accordance with implicit direction by Court of Appeals to penalize defendant for egregious conduct and also to impose sanctions which will deter others who might be tempted to engage in such conduct in other cases, District Court will award to plaintiffs their costs, fees, and expenses incurred in connection with (1) uncovering defendant's suppression and destruction of evidence, (2) pursuing relief under Rule 37, and (3) defending against defendant's counterclaim, but District Court will not award additional amount equal to one percent of defendant's gross revenues for 1982. Alexander v National Farmers' Org. (1985, WD Mo) 614 F Supp 745.

Defendants are awarded $ 34,918.37 and plaintiffs $ 175,000 in Rule 37 sanctions, where parties bitterly litigated antitrust case for more than decade, plaintiffs concealed and destroyed documents sought by defendants and defendants protractedly opposed disclosure of grand jury materials sought by plaintiffs, because nature of parties' submissions on sanctions issue makes it impossible to make other than discretionary "equitable judgment," based on intimate knowledge of litigation and careful review of specific discovery proceedings, that plaintiffs are entitled to sanctions approximately .5 times that of defendants. Alexander v National Farmers Organization (1986, WD Mo) 637 F Supp 1487, 1986-2 CCH Trade Cases P 67226.

In contract dispute between manufacturer and dealer of hearing aids appropriate sanction would be award of expenses in favor of plaintiff-manufacturer for bringing motion to compel and prosecuting sanctions hearing, where evidence indicated that dealer-defendant withheld relevant information that had been requested and subject of previous disclosure order, but default judgment would not be entered as sanction since erasure of computer records did not appear to be intentional. Marketing Specialists, Inc. v Bruni (1989, WD NY) 129 FRD 35, 16 FR Serv 3d 260, affd without op (1990, CA2 NY) *923 F2d 843* and affd without op (1990, CA2 NY) *923 F2d 843.*

Employee was entitled to costs and attorney's fees under former *Fed. R. Civ. P. 37(a)(4)(A)* where employer had acted in bad faith when it failed to suspend its e-mail and data destruction policy or preserve essential personnel documents in compliance with its duty to preserve relevant documentation for purposes of potential litigation, but requested amount was excessive because hourly rates exceeded local guidelines and number of hours spent on client, third party, and intra-office meetings was excessive. Broccoli v Echostar Communs. Corp. (2005, DC Md) 229 FRD 506, 62 FR Serv 3d 817, subsequent app, dismd (2006, CA4 Md) 164 Fed Appx 374.

In seller's breach of contract suit, imposition of sanctions under *Fed. R. Civ. P. 37* against wife, who was one of buyers, and her counsel was appropriate because wife spoliated relevant evidence by allowing reinstallation of her computer's operating system; although adverse inference was not appropriate, assessment of attorney's fees and costs was appropriate for punitive and remedial purposes. Green v McClendon (2009, SD NY) 262 FRD 284.

**275. Evasive tactics**

In action brought by employee who sought declaration that he was entitled to participate in employer's pension plan, court, pursuant to *Fed. R. Civ. P. 37(b)(2)*, directed employer to pay costs incurred by employee as result of employer's evasive and incomplete responses to employee's requests for production of plan documents; imposition of costs was warranted because, inter alia, regardless of terms of merger agreement between employer and its predecessor, employer had duty under ERISA to maintain written version of its employee pension plan, and employer waited more than one year before orally informing employee that it was unable to produce documents. Izzo v ING Life Ins. & Annuity Co. (2005, ED NY) 235 FRD 177.

Government earned sanctions in case brought by Federal Deposit Insurance Corporation (FDIC) where government continually flouted orders, gave evasive and false answers at depositions and in interrogatories, and failed to produce and destroyed documents; where FDIC bought another agency, schemed with special-interest groups, federal agencies, congressional representatives, and Administration, repeatedly obstructed documentary discovery, brought meritless suits in two courts for amount it could not explain, and lied about it, it was ordered to pay $ 72,255,147 in sanctions; if court of appeals allowed recovery for costs of only instant action, FDIC would pay $ 15,334,905. FDIC v Hurwitz (2005, SD Tex) 384 F Supp 2d 1039.

**276. Good faith effort to comply**

District Court properly denies defendants' Rule 37(b) motion for imposition of sanctions where it is apparent that plaintiff's counsel's noncompliance with order was inadvertent and that he was being cooperative and was prepared to comply with order when it was received, but District Court properly awards to plaintiff its attorneys' fees and costs in responding to defendants' motion where, had parties not resolved defendants' motion to compel discovery among themselves, it would have been denied for defendants' failure to comply with local rule requiring sincere attempts to resolve discovery dispute as prerequisite to motion, and where defendants continued in their uncooperative way when order was not timely complied with, moving for drastic sanctions without so much as telephoning plaintiff's counsel for explanation. Jenkins v Toyota (1984, DC NY) 106 FRD 185, 40 FR Serv 2d 1125.

Secretary of Interior, Assistant Secretary of Interior, and Secretary of Treasury are adjudged in civil contempt of court for failure to comply with document production and scheduling orders, and they must pay plaintiffs' reasonable expenses, including attorney's fees, and work with special master to comply with massive production of documents required to straighten out government's alleged mismanagement of Individual Indian Money trust accounting system,

because federal government, acting through these cabinet members, did not substantially comply or even make good-faith effort to comply with court's orders. Cobell v Babbitt (1999, DC Dist Col) 37 F Supp 2d 6.

### 277. Inaction

Assessment by court of attorney fees against defendant is proper where defendant's counsel did not file answers to plaintiff's interrogatories and did not communicate with plaintiff's counsel in order to request extension of due date. Sapiro v Hartford Fire Ins. Co. (1971, CA7 Ill) 452 F2d 215, 15 FR Serv 2d 749.

Trial judge does not abuse his discretion in striking defendant's defenses, issuing permanent injunction in favor of plaintiff, and awarding plaintiff $ 1,000 for attorneys' fees incurred in its unsuccessful discovery efforts, where representative designated by defendant under Rule 30(b)(6) failed to appear for deposition and to produce documents and items requested, as ordered by court, and where defendant's supervisory employee also failed to appear at deposition, as ordered by court, and failed to forewarn plaintiff or explain failure to appear. Eastway General Hospital, Ltd. v Eastway Women's Clinic, Inc. (1984, CA5 Tex) 737 F2d 503, 39 FR Serv 2d 917, cert den *(1985) 470 US 1052, 84 L Ed 2d 816, 105 S Ct 1752.*

Sanctions of attorney's fees and expenses were properly assessed against corporate defendant and its law firm for failure to disclose, in response to discovery order, relevant documentation from two of three related cases in which defendant was involved; law firm failed to search client's one case file--which would have led it to other two cases--for documents responsive to discovery order when firm had full access to files. BankAtlantic v Blythe Eastman Paine Webber, Inc. (1994, CA11 Fla) 12 F3d 1045, 28 FR Serv 3d 379, 7 FLW Fed C 1159 (criticized in Eaves v County of Cape May (2001, CA3 NJ) 239 F3d 527, 80 CCH EPD P 40589).

Government, in suit under Federal Tort Claims Act, was rightfully awarded expenses, including attorneys fees, due to defendant's failure to respond to government notice for production of documents, failure to supplement answers, refusal to answer questions, and failure to return deposition transcripts as agreed. Szilvassy v United States (1979, SD NY) 82 FRD 752, 27 FR Serv 2d 1404.

Defendant's attorneys are required to pay plaintiffs' reasonable expenses, including attorneys' fees, that plaintiffs incur in obtaining discovery order where defendants fail to comply with discovery order, and advance no reason why order, provision for expenses, and attorneys' fees should not be granted. Shenker v Sportelli (1979, ED Pa) 83 FRD 365, 28 FR Serv 2d 344.

Upon dismissal of employment discrimination action for failure to prosecute, court may assess attorneys' fee award against plaintiff who not only failed to allow reasonable discovery, but continued to fail to proceed with discovery after being ordered to do so by court. Crawford v American Federation of Government Employees (1983, DC Dist Col) 576 F Supp 812, 41 BNA FEP Cas 412, 33 CCH EPD P 33971, 37 FR Serv 2d 485.

Court must, under Rule 37(b), impose a sanction for unjustified failure to comply with discovery order, costs, including attorney fees, incurred by opponent on account of such failure. Brown v United States Elevator Corp. (1984, DC Dist Col) 102 FRD 526.

Monetary sanctions for employment discrimination defendant's obstruction of discovery was appropriate where magistrate judge had ordered defendant to disclose "studies" relating to additional personnel at regional offices and decentralization of whole system, but studies were not disclosed until discovered by plaintiff's attorney during deposition. Chmieloski v New York State Dep't of Economic Dev. (1993, SD NY) 149 FRD 42.

Former employee who had established prima facie case of quid pro quo and hostile work environment sexual harassment had to pay cancellation fee for failing to keep independent medical examination appointment that had been ordered by court; however, her claim for mental, psychological, and emotional damages were not struck as part of sanctions. Rachel-Smith v FTData, Inc. (2003, DC Md) 247 F Supp 2d 734, 91 BNA FEP Cas 559 (criticized in Roberts v County of Cook (2004, ND Ill) 2004 US Dist LEXIS 8089) and (criticized in McCulley v Allstates Tech. Servs. (2005, SD Ala) 2005 US Dist LEXIS 41550) and (criticized in Estes v Ill. Dep't of Human Servs. (2007, ND Ill) 2007 US Dist LEXIS 11666).

Unpublished Opinions

Unpublished: District court did not abuse its discretion when it imposed $ 1500 sanction against defendant for discovery misconduct because amount represented reasonable expenses caused by defendant's inaction that required court intervention. Pro Spice, Inc. v Omni Trade Group, Inc. (2005, CA3 Pa) 128 Fed Appx 836, 55 UCCRS2d 689.

**278. Negligence or inadvertence**

Even if plaintiff's failure to comply with discovery order was not willful but was result of gross or even simple negligence, trial court's imposition of monetary sanction of $ 3,500 was proper since noncompliance caused defendant to bear costs which would not have been necessary had plaintiff complied with court's order. Argo Marine Systems, Inc. v Camar Corp. (1985, CA2 NY) 755 F2d 1006, 40 FR Serv 2d 1223.

Unsuccessful medical malpractice plaintiff is not entitled to award of attorney's fees incurred after March 3, 1999, even though it is true that such costs could have been avoided if microscopic slides proving unavoidable cause of pregnant patient's death during childbirth had been provided at close of discovery, where both sides thought slides were irrelevant until counsel for defendant doctor requisitioned them in August 1999 and ultimately discovered their import, because failure to provide slides in this case is analogous to inadvertent omission of potential witness known to all parties, and should not be sanctioned under *FRCP 26* and *37*. Hirpa v IHC Hosps., Inc. (2001, DC Utah) 149 F Supp 2d 1289, affd (2002, CA10 Utah) 50 Fed Appx 928.

Where court dismissed with prejudice Chapter 7 trustee's accounting malpractice action brought against debtor's former accountants due to gross negligence in failing to properly disclose and produce in discovery some 36 bankers boxes of documents, containing many documents that firm had requested two and one-half years earlier, monetary sanctions pursuant to *Fed. R. Civ. P. 26(g)(3)* and *Fed. R. Civ. P. 37(c)(1)* were not warranted because imposing such sanctions would have been overkill; firm most likely would have been at least as

well off with dismissal with prejudice, but no award of attorney fees and expenses, as it would have been if trustee and his attorney had not committed discovery violations. Shapiro v Plante & Moran, LLP (In re Connolly N. Am., LLC) (2007, BC ED Mich) 376 BR 161.

**279. Notice of sanction, generally**

Attorney had sufficient notice of possibility of imposition of attorney's fees for his failure to make timely filing pursuant to pretrial order from District Court's statements in earlier proceedings when it dismissed client's case as sanction and by appellate court when it remanded case for further proceedings. John v Louisiana (1990, CA5 La) 899 F2d 1441, 52 BNA FEP Cas 1344, 53 CCH EPD P 39901, 16 FR Serv 3d 496, reh den (1990, CA5) 1990 US App LEXIS 9916.

Attorney who was held jointly and severally liable with client for monetary discovery sanctions had sufficient notice of sanctions where record indicated that issues had been subject of numerous motions, briefs, and extensions of time. Thomas E. Hoar, Inc. v Sara Lee Corp. (1990, CA2 NY) 900 F2d 522, 1990-1 CCH Trade Cases P 68982, 16 FR Serv 3d 1093, cert den *(1990) 498 US 846, 111 S Ct 132, 112 L Ed 2d 100.*

District court did not abuse its discretion in ordering counsel to pay attorneys' fees as sanction for failure to comply with court's discovery order since attorney was on notice that his failure to do so could result in imposition of fees and costs and there was no evidence that client was remotely at fault for counsel's failure to comply with court's express orders. *O'Neill v AGWI Lines (1996, CA5 Tex) 74 F3d 93, 1996 AMC 929, 33 FR Serv 3d 1114.*

Attorney on whom sanctions were imposed for violation of discovery orders was provided adequate notice, despite claim that he had turned case over to associate, since firm's counsel appeared on behalf of attorney's firm to report that associate had been hospitalized for treatment of leukemia and told court that attorney had called him night before and asked him to appear because he was otherwise engaged, numerous motions for sanctions were filed by opponent and attorney was made aware of outstanding orders of court compelling production of documents and answers to interrogatories when he first appeared on client's behalf. Stuart I. Levin & Assocs., P.A. v Rogers (1998, CA11 Fla) 156 F3d 1135, 48 USPQ2d 1442, 41 FR Serv 3d 1294, 12 FLW Fed C 123.

Corporation would be required to pay plaintiff's attorneys' fees and expenses in preparing and arguing second motion to compel discovery where corporation failed to designate and produce witness after having received proper notice and failed to produce documents after proper request and had filed no request for protective order. EEOC v Thurston Motor Lines, Inc. (1989, MD NC) 124 FRD 110, 50 BNA FEP Cas 1759, 54 CCH EPD P 40086.

**280. Prior warnings**

District court had authority to include sanction of $ 2,000 against sole officer of corporate defendant who had been previously warned of possible penalties for continued failure to answer plaintiff's interrogatories, where pursuant to limited continuation of collateral aspect of litigation district court was empowered to order sanctions that were just. David v Hooker, Ltd.

(1977, CA9 Cal) 560 F2d 412, 3 BCD 857, 14 CBC 303, CCH Bankr L Rptr P 66564, 24 FR Serv 2d 159.

Trial court properly dismissed pro se plaintiff's 2 lawsuits and imposed $ 5,000 attorney's fee sanction under Rule 37(b) where plaintiff defied numerous court orders and was warned on 3 separate occasions that dismissal could follow noncompliance with discovery, plaintiff abused court personnel and directed calumnies at judges, law clerks, administrators, and litigants, and court concludes that plaintiff's refusal to comply with discovery orders was willful and in bad faith. Day v Allstate Ins. Co. (1986, CA5 Tex) 788 F2d 1110, 5 FR Serv 3d 503.

Defendant's affirmative defenses would be stricken, default judgment would be entered against him, and monetary sanctions against his attorney would be imposed for failure to comply with discovery orders where numerous orders to compel discovery had been ignored and warnings of sanctions had been given. *Marshall v F.W. Woolworth, Inc. (1988, DC Puerto Rico) 122 FRD 117.*

Where defendant was prejudiced by plaintiff's misrepresentations in violation of court order, but order did not warn plaintiff that failure to comply could result in dismissal, lesser sanction, namely award of costs and fees, was more appropriate. Black & Veatch Int'l Co. v Foster Wheeler Energy Corp. (2002, DC Kan) 211 FRD 641.

In action in which plaintiff, financial institution in business of home lending, asserted claims for unfair competition and breach of fiduciary and requested production of loan files, management agreements, lists of employees, lease agreement, rental records, income records, and records of payments made to employees, defendants, competitor and employees, were ordered to produce all responsive documents in their control as well as in their possession, to provide written, sworn statements as to why they were not able to produce any of requested documents, and to pay attorneys' fees incurred by plaintiff in filing motions to compel because defendants' failure to comply with prior orders compelling production was willful, defendants' noncompliance lasted for approximately one year, and defendants received repeated warnings regarding possible imposition of sanctions for failure to comply. Kasprzycki v DiCarlo (2008, DC Conn) 584 F Supp 2d 470.

### 281. Repeated violations

Court acts within its discretion where it dismisses action against defendant with prejudice and orders plaintiffs to pay defendant's expenses to defendants, including attorneys fees, because of plaintiffs' failure to timely file answers to defendant's interrogatories in obedience to court's order entered after repeated directions to answer interrogatories which had been outstanding for many months, and because of false statements and false testimony given by plaintiffs' attorney and officer of plaintiff to deceive counsel for defendant and court regarding timeliness of service of plaintiffs' answers. Independent Investor Protective League v Touche Ross & Co. (1978, CA2 NY) 607 F2d 530, 25 FR Serv 2d 222, cert den *(1978) 439 US 895, 58 L Ed 2d 241, 99 S Ct 254,* reh den *(1978) 439 US 998, 58 L Ed 2d 673, 99 S Ct 604.*

Trial court properly dismissed pro se plaintiff's 2 lawsuits and imposed $ 5,000 attorney's fee sanction under Rule 37(b) where plaintiff defied numerous court orders and was warned on 3

separate occasions that dismissal could follow noncompliance with discovery, plaintiff abused court personnel and directed calumnies at judges, law clerks, administrators, and litigants, and court concludes that plaintiff's refusal to comply with discovery orders was willful and in bad faith. Day v Allstate Ins. Co. (1986, CA5 Tex) 788 F2d 1110, 5 FR Serv 3d 503.

Imposition of costs and attorneys' fees in addition to dismissal was warranted where appellants continuously refused to respond to discovery requests even after court ordered responses, delays were long and unjustified, and less drastic sanctions had been unsuccessful. Toth v Trans World Airlines, Inc. (1988, CA9 Cal) 862 F2d 1381, 12 FR Serv 3d 286.

Defendant's motion for dismissal and reasonable expenses, including attorney fees, is granted under Rule 37 where defendant disregarded notices and discovery procedures, failed to comply with court order compelling discovery, and court characterizes defendants' actions as repeated and flagrant disregard for orderly administration of justice, for court orders, and for requirements of discovery process. Chapman v Schnorf, Schnorf & Schnorf (1984, ND Ohio) 109 FRD 253.

Securities fraud defendants would be sanctioned $ 1,000 for unexcused failure to meet 2 court-ordered deadlines and to co-operate with counsel. Beshansky v First Nat'l Entertainment Corp. (1990, SD NY) 140 FRD 272.

Although Chapter 7 trustee, who had not yet deposed his witness, was not entitled to requested relief of default judgment, his motion to compel and for sanctions under *Fed. R. Civ. P. 37(a)(4)(A)* and (b)(2) was granted and companies and associated individual were required to pay tripled attorney's fees for repeatedly failing to answer discovery and blatantly disregarding court orders. Brunson v Heavy Lift Cargo Airlines, Ltd. (In re Pride Int'l, LLC) (2006, BC WD La) 358 BR 681.

Counsel to Chapter 7 trustee was entitled to attorneys' fees from debtor because $ 9,123 request was reasonable given that debtor's obstructive behavior throughout case, including disobeying court orders to compel discovery and refusing to cooperate with reasonable discovery requests, caused long delays and he had unclean hands in opposing application. Rinn v Fraidin (In re Fraidin) (2008, BC DC Md) 401 BR 725.

### 282. Tardy compliance

Awards under Rule 37(b)(2) are made in connection with court's internal control over its own procedures and are necessary to proper administration of discovery proceedings, which in turn are essential to conduct in orderly fashion of lawsuits under Rules, and Federal District Court properly exercised its discretion under Rule 37(b)(2) in allowing setoff to plaintiff against costs allowed to defendants for expenses plaintiff incurred in preparing for deposition of person which was precipitously canceled by last minute announcement that person to be deposed would not appear, where last possible moment was chosen to disobey court's lawful order that person appear for deposition on certain date, and where it was frivolous to contend that defendants were entitled not to have setoff because they ultimately prevailed on appeal. Trans World Airlines, Inc. v Hughes (1975, CA2 NY) 515 F2d 173, 1975-1 CCH Trade Cases P 60212, 19 FR Serv 2d 1411, cert den *(1976) 424 US 934, 96 S Ct 1147, 47 L Ed 2d 341.*

In action arising out of contract where defendant had failed to comply with court order requiring answers to interrogatories by certain date, and plaintiff moved for order requiring defendant or its attorneys to pay reasonable expenses, including attorney's fees, caused by defendant's failure to comply with court order, plaintiff's motion would be granted since defendants submitted nothing from which court could determine whether failure was substantially justified or whether there were other circumstances making award of expenses unjust. Lakeside Bridge & Steel Co. v Mountain State Constr. Co. (1975, ED Wis) 400 F Supp 273, 21 FR Serv 2d 74, 17 UCCRS 917.

Attorneys' fees of $ 5,000 awarded plaintiff's counsel as sanctions for defendants' sporadic-episodic production of requested documents and fact that final documents were only produced because plaintiff's counsel knew documents had been produced in another case. Stengel v Kawasaki Heavy Industries, Ltd. (1987, ND Tex) 116 FRD 263.

In adversary proceeding, defendant debtor and debtor's counsel were ordered to pay sanctions in amount of $ 1,000 each when debtor failed to respond to initial discovery requests until 45 days after responses were due pursuant to court's scheduling order and debtor did not provide any justifiable reason for delay. Riley v Sciaba (In re Sciaba) (2005, BC DC Mass) 334 BR 295, 63 FR Serv 3d 356.

**283. Willfulness, bad faith or fault**

Although showing of willful disobedience or gross negligence is required to impose harsher sanction of order of dismissal or entry of default judgment, finding of willfulness or contumacious conduct is not necessary to support sanctions which are less severe. Martinelli v Bridgeport Roman Catholic Diocesan Corp. (1998, DC Conn) 179 FRD 77, 41 FR Serv 3d 817.

Showing of bad faith is not required before court can impose sanctions in form of expenses. Venture Funding, Ltd. v United States (1999, ED Mich) 190 FRD 209, 85 AFTR 2d 362.

In suit alleging that computer owner violated copyrights by downloading music to her computer without paying for it, after default judgment was entered against computer owner pursuant to *Fed. R. Civ. P. 37(b)(2)* because she, in bad faith and with knowledge that copyright owners wished to examine her computer, permanently destroyed data that supported copyright owners' case, copyright owners, pursuant to *Fed. R. Civ. P. 37(b)(2)*, (c)(1), were entitled to fees and costs associated with their motion for sanctions because such costs were incurred as result of computer owner's misconduct. Arista Records, L.L.C. v Tschirhart (2006, WD Tex) 241 FRD 462.

**284. --Attorney's fault**

Refusal to comply with subpoena warrants award of $ 250 charge assessed against attorney who advised his clients to disobey subpoena. King v Fidelity Nat'l Bank (1983, CA5 La) 712 F2d 188, 11 BCD 223, 9 CBC2d 179, CCH Bankr L Rptr P 69396, 37 FR Serv 2d 346, cert den *(1984) 465 US 1029, 104 S Ct 1290, 79 L Ed 2d 692* and (criticized in In re Bowshier (2004, BC SD Ohio) 313 BR 232, 52 CBC2d 1045, 59 FR Serv 3d 495).

Appellate court's reluctance to assess expenses against party's attorney pursuant Rule 37(b) is overcome by fact that attorney has had opportunity to submit extensive brief regarding propriety of this sanction prior to its imposition. Tamari v Bache & Co. (Lebanon) S.A.L. (1984, CA7 Ill) 729 F2d 469, 38 FR Serv 2d 1044.

Imposition of personal monetary sanctions against party's attorney, consisting of expenses incurred by opposing party, would be upheld for substantially unjustified and willfully delayed noncompliance with certain pretrial discovery orders. First American State Bank v Continental Ins. Co. (1990, CA8 Iowa) 897 F2d 319, 15 FR Serv 3d 1270.

In Federal Tort Claims Act case where plaintiff's counsel was at fault, having obstructed discovery consciously at every turn, but where it was not clear to what extent, if any, plaintiff was at fault with respect to discovery violations, court would not dismiss action, but would require plaintiff's counsel, and not plaintiff, to pay reasonable expenses of motion for order dismissing complaint, including attorney fees. Szilvassy v United States (1976, SD NY) 71 FRD 589, 23 FR Serv 2d 871, dismd (1979, SD NY) 82 FRD 752, 27 FR Serv 2d 1404.

District Court would order pursuant to Rule 37(b)(2) that expenses associated with failure to comply with court's order concerning discovery conference and conference report be paid solely by culpable attorney's without indemnification or compensation in any way by clients or parties to suit. Associated Radio Service Co. v Page Airways, Inc. (1977, ND Tex) 73 FRD 633, 1977-2 CCH Trade Cases P 61742, 25 FR Serv 2d 218.

Where fault for repeated failures to comply with discovery orders lies with counsel rather than with defendant itself, it is appropriate under Rule 37 to hold counsel personally liable for expenses, including attorney's fees, which plaintiff incurred in its efforts to secure compliance with discovery order. J. M. Cleminshaw Co. v Norwich (1981, DC Conn) 93 FRD 338, 33 FR Serv 2d 554 (criticized in Satcorp Int'l Group v China Nat'l Silk Import & Export Corp. (1996, CA2 NY) 101 F3d 3, 36 FR Serv 3d 463).

Plaintiff's counsel must pay costs in connection with motion to compel discovery where counsel obstructed discovery by repeatedly recording objections on grounds of relevancy even though questioning never entered realm of harassment or embarrassment, repeatedly interjected inquiries into meaning of defendant's questions despite lack of any indication from witness that questions were unclear and otherwise obstructed discovery without substantial justification. Wright v Firestone Tire & Rubber Co. (1982, WD Ky) 93 FRD 491, 34 FR Serv 2d 890.

Defense attorney is personally liable to parties who seek discovery in employment discrimination action for reasonable expenses incurred in obtaining discovery material since his failure to comply with discovery order is without justification and since delegation of responsibility to answer to another attorney is not special circumstances which would make award of attorney fees unjust. Hawkins v Fulton County (1982, ND Ga) 96 FRD 416, 30 BNA FEP Cas 1015, 38 FR Serv 2d 723.

Sanctions of defendant's costs and attorney's fees against plaintiff's counsel would be ordered for violation of scheduling orders where plaintiff's attorney served request for production of

documents without leave of court after close of discovery and filed notices of 4 depositions for date certain after close of discovery while motion to extend discovery period to take depositions had not yet been acted upon or set for hearing. Odie v General Motors Corp. (1990, DC Mass) 131 FRD 365, 17 FR Serv 3d 164.

Sanctions for products liability plaintiff's attorney who violated protective order designed to protect trade secrets and other confidential information disclosed by defendant during discovery by assisting third party in obtaining protected material for use in another case against defendant would consist of paying defendant's attorney's fees and costs in bringing compliance and sanction motions and any other expenses incurred because of attorney's violation of order. Poliquin v Garden Way (1994, DC Me) 154 FRD 29, app dismd (1994, CA1 Me) 1994 US App LEXIS 31911.

Opposing attorneys' joint motion to reverse sanctions levied against them personally would be denied since imposition of sanctions was necessary to remind attorneys of their duties as officers of court and ensure that direct orders would be followed in future; court faced plain disregard for formal nature of proceedings, exemplified by constant accusations among attorneys and their inability to work together, which ultimately led to direct disregard of court's orders. Jaen v Coca-Cola Co. (1994, DC Puerto Rico) 157 FRD 146, 31 FR Serv 3d 178.

Personal injury plaintiff's counsel was under duty to supplement disclosure of plaintiff's medical records to defendant, and disclosure of only seven of seventy pages of medical reports, progress notes and test results was inexcusable, warranting sanctions of $ 1,000 to compensate defendant's expert witness for loss suffered by having cancelled paying patients on day set for his testimony. Arthur v Atkinson Freight Lines Corp. (1995, SD NY) 164 FRD 19, 34 FR Serv 3d 74.

*FRCP 37* sanctions of paying opponent's costs of opposing motion for reconsideration and fine for same amount are imposed personally on attorney representing law school seeking accreditation, where he not only failed to provide FRCP 45(d)(2) privilege log but also did not act in good faith in ignoring discovery requests and then later arguing ambiguities in order, because order clearly required and attorney's own conduct showed he understood order required compliance with subpoena to include production of documents and giving of testimony. Massachusetts Sch. of Law v American Bar Ass'n (1996, ED Pa) 914 F Supp 1172, 1996-1 CCH Trade Cases P 71308, 34 FR Serv 3d 845.

Magistrate's imposition of monetary sanctions under *Fed. R. Civ. P. 37(b)(2)* rather than default judgment for failing to comply with discovery order was affirmed because frivolous appeal of discovery order was legal blunder best attributed to defense attorney, not necessarily his client, and decision to order sanctions of $ 7,000, and not more, was reasonable. Collett v Socialist Peoples' Libyan Arab Jamahiriya (2006, DC Dist Col) 448 F Supp 2d 92.

Trustee for debtor is entitled to attorney's fees from defendant's attorney, as well as order granting his request for admissions previously served on defendant and requiring defendants in adversary proceedings in bankruptcy case to pay all expenses, including travel and transcription costs, to depose employees of defendant, as sanctions under Rule 37(b) of

Federal Rules of Civil Procedure, where defendant's counsel's failed to comply with rules providing for pretrial discovery and with court orders relative to discovery. In re Fulghum Constr. Corp. (1981, BC MD Tenn) 15 BR 52.

In adversary proceeding, law firm, which had been debtor's former corporate counsel, was ordered, pursuant to Fed. R. Bankr. P. 7037(b)(2) and *Fed. R. Civ. P. 37*, to pay reasonable attorneys' fees and costs that trustee incurred in pursuing discovery because law firm and its counsel responded to trustee's legitimate requests for electronic documents with disingenuousness, obfuscation, and frivolous claims of privilege and law firm twice filed meritless appeals of non-appealable discovery orders in attempts to prevent meaningful discovery by trustee. Oscher v Solomon Tropp Law Group, P.A. (In re Atl. Int'l Mortg. Co.) (2006, BC MD Fla) 352 BR 503, 66 FR Serv 3d 916, 20 FLW Fed B 24.

Unpublished Opinions

Unpublished: Pursuant to Fed. R. Civ. P. 16(f) and *37(b)*, conduct of couple's third attorney was sufficiently reprehensible to warrant imposition of sanctions against him personally, and he was required to reimburse opposing party for attorneys' fees and costs associated with its request for sanctions. Central Fla. Council BSA, Inc. v Rasmussen (2009, MD Fla) 2009 US Dist LEXIS 77439.

**285. --Other particular cases**

Defendants may recover expenses for legal fees and court reporter's fee from plaintiff where plaintiff, without any legitimate excuse, refuses to be deposed after district judge denies plaintiff's motion to stay discovery and directs that all discovery proceed despite plaintiff's pending motion to disqualify defendants' counsel; award to defendants is amply supported by submission of detailed affidavit setting forth counsel fees, copies of time records, and court reporter bills by defendants' counsel. Weigel v Shapiro (1979, CA7 Ill) 608 F2d 268.

Trial court properly dismissed pro se plaintiff's 2 lawsuits and imposed $ 5,000 attorney's fee sanction under Rule 37(b) where plaintiff defied numerous court orders and was warned on 3 separate occasions that dismissal could follow noncompliance with discovery, plaintiff abused court personnel and directed calumnies at judges, law clerks, administrators, and litigants, and court concludes that plaintiff's refusal to comply with discovery orders was willful and in bad faith. Day v Allstate Ins. Co. (1986, CA5 Tex) 788 F2d 1110, 5 FR Serv 3d 503.

In products liability action where defendant manufacturer's refusal to produce documents constituted willful and deliberate failure to comply with order, court would enter default judgment and further require defendant to pay reasonable expenses, including attorney fees, caused by defendant's failure to obey court order to produce. Kozlowski v Sears, Roebuck & Co. (1976, DC Mass) 71 FRD 594, 21 FR Serv 2d 1372.

Defendant and defense counsel in personal injury action resulting in 2 trials must pay plaintiff amount of her costs, including attorney's fees, from institution of suit to present as sanctions award under Rules 11, 26(g) and 37(b) for time and energy plaintiff was forced to expend as result of defendant's and defense counsel's discovery abuses, where magistrate found that

defendant deliberately failed to comply with discovery requests, was unnecessarily obstructive in providing pertinent documents and witnesses for depositions, failed to obey court orders, failed to maintain files relevant to litigation, and defendant's counsel regularly exceeded bounds of zealous representation and ignored obligations to cooperate in good faith during discovery process. Perkinson v Houlihan's/D.C., Inc. (1985, DC Dist Col) 108 FRD 667, 4 FR Serv 3d 219.

In action alleging discrimination and retaliation against emergency room physician, plaintiff's willful failure to respond to legitimate request for discovery of memorandum dealing with reprimand from prior employment warrants imposition of sanctions to effect of requiring plaintiff to pay defendants' cost of obtaining memorandum, along with reasonable expenses incurred in preparing various motions related to sanctions and for reconsideration and in preparing for and participating in evidentiary hearing before Magistrate. Joshi v Professional Health Services, Inc. (1985, DC Dist Col) 606 F Supp 302, 43 BNA FEP Cas 1092, affd (1987, App DC) 260 US App DC 154, 817 F2d 877, 43 BNA FEP Cas 1099, 43 CCH EPD P 37022.

Discovery sanctions of expenses, attorney's fees, and establishment of adverse inferences would be ordered against class representative and his law firm for failure to comply with discovery orders where plaintiff and his counsel initiated suit and continued its prosecution for 8 months despite fact that plaintiff was inadequate class representative who never intended to comply with his discovery obligations. Goldman v Alhadeff (1990, WD Wash) 131 FRD 188, CCH Fed Secur L Rep P 95285.

Premises liability defendant would be ordered to pay plaintiffs' attorney's fees and expenses for deliberate failure to produce relevant documents; parties' stipulation defining scope of discovery, and court's prior opinion identifying documents that fell within scope of plaintiffs' original request, constituted formal discovery orders which defendant disobeyed. Monaghan v SZS 33 Assocs., L.P. (1994, SD NY) 154 FRD 78.

U.S. President is held in civil contempt of court pursuant to *FRCP 37(b)(2)* for his willful failure to obey discovery orders and is ordered to pay expenses of plaintiff and court incurred in connection with such failure, because it is difficult to construe President's sworn statements in this civil lawsuit concerning his relationship with former White House intern as anything other than willful refusal to obey court's discovery orders, given his later admission that he was misleading with regard to questions being posed to him and given clarity with which his falsehoods are revealed by record. Jones v Clinton (1999, ED Ark) 36 F Supp 2d 1118, 79 BNA FEP Cas 1561.

Defendant judgment debtor, being unaware of any facts for argument on it motion for extension of time to respond to plaintiff judgment creditor's discovery in aid of execution, until after failing to respond, was not substantially justified in doing so, and while debtor's counsel argued he was only appellate counsel, debtor had noted that he had entered his appearance in district court and no motion to withdraw had been filed; thus, both debtor and its counsel played equal role and would equally share creditor's costs and fees in connection with creditor's motion to compel responses to discovery. Luken v Int'l Yacht Council (2007, SD Fla) 2007 US Dist LEXIS 83651, decision reached on appeal by (2008, CA11 Fla) 517 F3d 1271, 86 USPQ2d 1099, 21 FLW Fed C 433.

**286. Other particular cases**

Although trial court has good reasons to impose sanction on defendants under Rule 37, nevertheless, where penalty of $ 7,114 is involved, trial court should afford defendants opportunity of hearing on scope and cost of their default before imposing proper penalty therefor and, in particular, should afford defendants opportunity to cross-examine witness on whose affidavit determination of amount of penalty rested. McFarland v Gregory (1970, CA2 NY) 425 F2d 443, 14 FR Serv 2d 94.

Disparity of $ 11,000 between attorney's fees sought and those awarded as sanction for failure to produce party for examination pursuant to order under Rule 35 required remand for articulation of reasons. Black Ass'n of New Orleans Fire Fighters v New Orleans (1990, CA5 La) 911 F2d 1063, 54 BNA FEP Cas 1445, 54 CCH EPD P 40225, 17 FR Serv 3d 1079.

Party was not entitled to recover all of its attorney's fees after case was dismissed for discovery violations, because *Fed. R. Civ. P. 37* only supported reimbursement of fees resulting from discovery violation; moreover, attorney's fees are not generally granted to prevailing parties under Fed. R. Civ. P. 41, and action brought under Americans with Disabilities Act, 42 USCS §§ 12101-1213, was not frivolous, unreasonable, or without foundation. Maynard v Nygren (2003, CA7 Ill) 332 F3d 462, 14 AD Cas 777, 55 FR Serv 3d 1184, subsequent app (2004, CA7 Ill) 372 F3d 890, 15 AD Cas 1121, 58 FR Serv 3d 1020, cert den *(2005) 543 US 1049, 125 S Ct 865, 160 L Ed 2d 769.*

In antitrust litigation where defendants moved to impose sanctions on plaintiff for failing to obey orders to provide more detailed and specific discovery, court would not impose sanction of expenses and attorney's fees upon plaintiff in light of facts that plaintiff was nonprofit corporation and that there was strong indication of uncertainty of its financial condition. Harlem River Consumers Cooperative, Inc. v Associated Grocers of Harlem, Inc. (1974, DC NY) 64 FRD 459, 1974-2 CCH Trade Cases P 75305.

In action for property damage allegedly resulting from defective design of motorcycle, defendants would be assessed reasonable expenses incurred by plaintiff in translating documents which, although dutifully delivered to plaintiff pursuant to court's order implementing plaintiff's discovery, were in Japanese language and therefor in form which rendered them useless to plaintiff. Stapleton v Kawasaki Heavy Industries, Ltd. (1975, ND Ga) 69 FRD 489, 21 FR Serv 2d 619 (criticized in Ex parte Maple Chase Co. (2002, Ala) 840 So 2d 147).

Although sanctions were imposed against defendants, sanctions were less harsh than originally requested by plaintiff; reduced severity was based in part upon defendants' opposition to motion, and therefore, because opposition was not substantially unjustified, order of costs and expenses was not appropriate. In re Anthracite Coal Antitrust Litigation (1979, MD Pa) 82 FRD 364, 1979-1 CCH Trade Cases P 62511, 27 FR Serv 2d 1079.

Although expenses and attorneys' fees are not ordinarily imposed against United States, such relief is proper, where, in response to order compelling discovery, Secretary of Labor stated that agency would decline to participate in discovery. Donovan v Gretna Machine & Ironworks, Inc.

(1984, ED La) 100 FRD 798, vacated on other grounds, remanded (1985, CA5 La) 769 F2d 1110 (criticized in Beverly Enters. v Herman (2000, DC Dist Col) 130 F Supp 2d 1, 79 CCH EPD P 40258).

Although policies of fairness and due process would dissuade court from entering default judgment against defendant for willful and deliberate failure to comply with discovery order, court would order, as appropriate civil sanction under Rule 37(b), that defendant pay all expenses incurred by plaintiff in connection with motion for default judgment in all proceedings necessary to resolve motion. Xaphes v Merrill Lynch, Pierce, Fenner & Smith, Inc. (1984, DC Me) 102 FRD 545, CCH Fed Secur L Rep P 91545, 39 FR Serv 2d 547.

Magistrate properly imposed $ 3,000 sanction on appellant for failure to comply with orders that it disclose trade secrets where, notwithstanding that discovery was limited by nondisclosure agreement, protective order, and ethical obligation of attorneys involved, appellant unilaterally imposed conditions which violated order granting complete access to documents by preventing appellee's lawyers from bringing materials into depository and taking notes on highly technical documents and by presence of appellant's attorney in depository itself, which prevented appellee's attorneys from freely discussing documents. St. Jude Medical, Inc. v Intermedics, Inc. (1985, DC Minn) 107 FRD 398, 40 FR Serv 2d 1455.

Plaintiff was entitled to expenses of bringing sanctions motion and for redeposing expert witnesses on subject of catalog which defendant failed to produce earlier despite repeated orders to do so. Manarin v Fairbanks Co. (1988, ND Ill) 122 FRD 513.

Monetary sanctions for discovery abuses would be imposed post-trial upon defendant, despite defendant's victory on merits, since enforcement of sanctions order is necessary to serve punishment and deterrence goals of rule and vindicate integrity of court and discovery process. Bankatlantic v Blythe Eastman Paine Webber, Inc. (1990, SD Fla) 130 FRD 153, affd (1992, CA11 Fla) 955 F2d 1467, 6 FLW Fed C 263, cert den *(1993) 506 US 1049, 113 S Ct 966, 122 L Ed 2d 122,* remanded sub nom BankAtlantic v Blythe Eastman Paine Webber, Inc. (1994, CA11 Fla) 12 F3d 1045, 28 FR Serv 3d 379, 7 FLW Fed C 1159 (criticized in Eaves v County of Cape May (2001, CA3 NJ) 239 F3d 527, 80 CCH EPD P 40589).

Sanctions of attorney's fees and expenses would be awarded for defendant's refusal to obey order for expedited production of documents pertaining to corporation on grounds that request was invalid because corporation was not party to litigation; defendant's arguments had been considered and rejected by court when it issued order. Constitution Bank v Levine (1993, ED Pa) 151 FRD 278.

Court would award defendants attorney's fees for plaintiff's failure to comply with discovery order where it concluded that dismissal was too severe; fact that court did not grant defendants' motion to dismiss did not establish that amount of attorney's fees incurred as result of plaintiff's failure to comply with discovery order was unreasonable, since attorney's fees necessarily incurred in preparing dismissal motion were incurred because of plaintiff's failure to comply with discovery. United States ex rel. P.W. Berry Co. v General Elec. Co. (1994, DC Or) 159 FRD 42.

Employment discrimination plaintiff must pay defendant $ 130 cost of court reporter, and is warned that his case will be dismissed if he fails to show up for deposition for third time, where

excuse that he was not entirely familiar with consequences of failing to appear is not particularly credible, because dismissal at this point is too harsh and plaintiff has indicated he will appear. Mercado v Division of N.Y. State Police (1998, SD NY) 989 F Supp 521, 40 FR Serv 3d 591.

It was not improper or unreasonable to apply Southern District (of New York) rates to litigation in Eastern District, at judge's discretion, even if litigation took place not in Brooklyn, a borough of New York City, but in Central Islip, a satellite courthouse of Eastern District, especially where defendants knew that they risked the imposition of attorney's fees in refusing to comply with court's discovery orders, and knew further that plaintiff was represented by attorneys from Southern District. Tokyo Electron Ariz., Inc. v Discreet Indus. Corp. (2003, ED NY) 215 FRD 60, 67 USPQ2d 1284, subsequent app (2006, CA2 NY) 189 Fed Appx 3.

Defendants were ordered to refrain from filing their proposed motion for *Fed. R. Civ. P. 37* monetary sanctions against plaintiff for failing to obey court order to reproduce documents lost by defendants' former counsel; court resolved defendants' complaints by holding that plaintiff was required to allow defendants access to documents and could not impose conditions on defendants prior to allowing access. Atkins v Fischer (2004, DC Dist Col) 2004 US Dist LEXIS 28478, motions ruled upon, sanctions allowed, in part (2005, DC Dist Col) 232 FRD 116, 63 FR Serv 3d 682.

In action brought by personal representatives of decedent, court granted plaintiff's motion for mistrial and attorneys' fees pursuant to *Fed. R. Civ. P. 37* for defendants failure to disclose evidence about decedent's murder that had been discovered in desk or cabinet of lead detective in decedent's murder investigation several days into trial because (1) lead detective was deposed three times as defendants' Fed. R. Civ. P. 30(b)(6) witness and had testified that file provided to plaintiffs contained all of information developed by police concerning case when, in fact, he had voluminous materials concerning statements made by informant about murder; (2) sheer volume of information belied defendants' position that informant was just another jailhouse informant seeking favors; (3) impact of new information, which linked two former officers with decedent's murder, could be of great significance to plaintiffs; (4) plaintiffs had made opening statement and questioned numerous witnesses before jury, ignorant of considerable volume of potential evidence being secreted in detective's desk drawer, and jury has been adjourned for over week, and plaintiffs had further discovery to undertake, so possibility of completing trial within time estimate originally given to jurors was remote; (5) although detective testified that he forgot that material was in his desk, statement was utterly unbelievable; and (6) court was satisfied that no lesser sanction would restore plaintiffs to position they would have been in had misconduct not occurred. Estate of Wallace v City of Los Angeles (2005, CD Cal) 229 FRD 163, 62 FR Serv 3d 409.

Magistrate's imposition of monetary sanctions under *Fed. R. Civ. P. 37(b)(2)* for failing to comply with discovery order was affirmed because magistrate's determination that there was no basis for direct appeal of order, issued pursuant to Fed. R. Civ. P. 72(a), and that defendants did not proffer any valid reason why they did not file objections to order, instead of attempting to bypass trial court by filing appeal with court of appeals, was eminently correct where court of appeals dismissed appeal for same reasons set forth by magistrate. Collett v Socialist Peoples' Libyan Arab Jamahiriya (2006, DC Dist Col) 448 F Supp 2d 92.

Corporation's motion for sanctions was granted to extent that request was based on obstructive conduct of manufacturer's counsel at deposition and on failure of Fed. R. Civ. P. 30(b)(6) witness to testify informatively on topic of manufacturer's customer support center in America because of four bases on which corporation sought sanctions, only one, conduct of manufacturer's counsel and Fed. R. Civ. P. 30(b)(6) witness at deposition, warranted any relief; therefore, pursuant to Fed. R. Civ. P. 30(d)(3) and/or *Fed. R. Civ. P. 37(b)(2)*, court ordered that manufacturer pay corporation one-half of cost of Fed. R. Civ. P. 30(b)(6) deposition, including one-half of attorney's fees which were attributed to services of attorney during that deposition. Tower Mfg. Corp. v Shanghai Ele Mfg. Corp. (2007, DC RI) 244 FRD 125, 69 FR Serv 3d 155.

Because patent assignee took lackadaisical approach to its discovery obligations under *Fed. R. Civ. P. 26*, sanctions of attorneys' fees and costs associated with bringing motion to compel were proper and warranted under *Fed. R. Civ. P. 37*. McKesson Info. Solutions LLC v Epic Sys. Corp. (2007, ND Ga) 495 F Supp 2d 1329, motion gr, request den, motion gr (2007, ND Ga) 2007 US Dist LEXIS 53437.

In case in which patent assignee sought attorneys' fees and costs related to its motion to compel alleged infringer to comply with N.D. Ga. Patent R. 4.2, motion for fees and costs was denied since issues confronted by motion to compel involved issues unique to U.S. District Court for Northern District of Georgia's Local Patent Rules; district court was unable to find any decision that addressed either sufficiency of disclosures under N.D. Ga. Patent Rule 4.2(a)(2) or interplay between N.D. Ga. Patent Rule 4 and N.D. Ga. Patent Rule 6, and record revealed that alleged infringer made some effort to identify and produce information sought by assignee; delay in producing source code documentation requested by assignee's expert resulted primarily from confusion over what documents, manuals, etc., actually constituted source code documentation. McKesson Info. Solutions LLC v Epic Sys. Corp. (2007, ND Ga) 495 F Supp 2d 1329.

Having prevailed on its *Fed. R. Civ. P. 37(b)(2)* sanction motion, arising from company's failure to produce key executive for deposition, card personalization equipment and software provider was entitled to recover costs and attorney's fees under R. 37(b)(2)(C) relating to its sanction motion; although company claimed that it made good faith effort to produce employee, fact remained that employee violated court order by failing to appear and that he was still company's managing agent at time he failed to appear for his scheduled deposition. Card Tech. Corp. v Datacard Inc. (2008, DC Minn) 249 FRD 567.

In suit concerning ownership of certain patents, *Fed. R. Civ. P. 37(b)* discovery sanctions consisting of ordering certain depositions and payment of attorneys' fees and costs were warranted because incomplete discovery responses were prejudicial, but more severe sanctions were not warranted since there had been no prior warnings from court and no showing of bad faith. Brigham Young Univ. v Pfizer, Inc. (2009, DC Utah) 262 FRD 637.

In case in which employer and individuals objected to magistrate judge's award of $ 30,059.51 to employee for reimbursement of her reasonable costs, including attorneys' fees, that arose from her efforts to obtain discovery, they repeated many of arguments previously asserted in their October 9, 2009 objections to bill of costs, employee should not be burdened with cost of

seeking to vindicate her legitimate discovery rights through litigation made necessary by employer's and individuals' unjustifiably incorrect discovery responses. Joza v WW JFK LLC (2010, ED NY) 16 BNA WH Cas 2d 1512, findings of fact/conclusions of law, judgment entered (2010, ED NY) 2010 US Dist LEXIS 94419.

In total, plaintiff filed one motion, two responses, one reply, and request for attorneys' fees, and each of filings was directly related to plaintiff's efforts to prepare and file memoranda associated with defendant's failures to respond to interrogatory and to comply with orders of court; hours itemized and amounts sought were reasonable, plaintiff's filings were supported by legal research and excerpts of discovery, and hours itemized did not include time spent attempting to resolve discovery dispute without need for resolution by court; moreover, filings were comprehensive and attorney's declaration, made under penalty of perjury, specified dates he worked on each filing and amount of time he devoted each day to filing, and provided detailed description of nature of work performed in connection with each filing; therefore, United States' fee application was granted and United States was awarded attorneys' fee in amount of $ 5,500. United States v Elsass (2012, SD Ohio) 110 AFTR 2d 6192.

Where court revoked debtor's discharge and imposed sanctions upon him pursuant to *Fed. R. Civ. P. 37*, made applicable by Fed. R. Bankr. P. 7037, for his failure to comply with trustee's requests for discovery, trustee's application for attorney's fees was granted because amounts requested were fair and reasonable, and, in light of debtor's obnoxious, oppressive, and obstructive behavior throughout course of administration of case, fee twice as large would have been well within reason. Rinn v Fraidin (In re Fraidin) (2008, BC DC Md) 2008 Bankr LEXIS 4491, corrected (2008, BC DC Md) 401 BR 725, adversary proceeding, subsequent app (2008, DC Md) 2008 US Dist LEXIS 115508, affd (2009, CA4 Md) *326 Fed Appx 145.*

Unpublished Opinions

Unpublished: District court did not abuse its discretion when it awarded $ 256,087.07 in attorneys' fees and costs to plaintiff's attorneys under *Fed. R. Civ. P. 37* because plaintiff's attorneys provided adequate and clear information to describe fees expended and defendants presented no evidence to show that requested fees were unreasonable, redundant, or excessive, given work performed and nature of case; plaintiff's attorneys explained justifications for fees and showed attention to proper billing, and despite their claim about redundancy and excessiveness of fee award, defendants failed to point to specific billing that was either redundant or excessive. Roush v Berosini (2007, CA9 Nev) 2007 US App LEXIS 2822.

Unpublished: In employment discrimination action filed against Secretary of Health and Human Services by applicant, because applicant provided no justification for her failure to appear at deposition, pursuant to *Fed. R. Civ. P. 37(b)*, Secretary was entitled to recover expenses for court reporter's services on day of scheduled deposition at which applicant failed to appear. Middlebrooks v Sebelius (2009, DC Md) 2009 US Dist LEXIS 71966.

### 7. Facts Established

### 287. Presumptions

As sanction under *Fed. R. Civ. P. 37(b)(2)*, company would be presumed to admit three facts relevant to card personalization equipment and software provider's bribery-based tortious

interference with prospective business advantage counterclaim: (1) provider alleged that company obtained governmental subcontract by agreeing to pay additional money to facilitate bribes to Nigerian officials; (2) provider filed sanction motion after it obtained motion to compel, but company's employee, who was its managing agent responsible for obtaining subcontract, failed to appear for scheduled deposition; (3) company's claimed good faith efforts to produce employee did not take away from fact that employee failed to appear for deposition; and (4) it would not violate due process to presume that company admitted three facts related to counterclaim, which might have been established if provider had been able to depose employee, namely: that company paid additional $ 3.5 million as commission, which was to be used for bribes; that company reasonably knew purpose of that payment; and that company knew that provider was pursuing subcontract and agreed to pay additional commission in order to obtain subcontract. Card Tech. Corp. v Datacard Inc. (2008, DC Minn) 249 FRD 567.

It may become duty of trial court to instruct jury to presume that contents of book, paper or document is such as affidavit of party obtaining order alleges it to be. Powers v Sumbler (1910) 83 Kan 1, 110 P 97; First Nat'l Bank v Smith (1893) 36 Neb 199, 54 NW 254, different results reached on reh on other grounds (1894) 39 Neb 90, 57 NW 996; Rankin v Northern Assurance Co. (1915) 98 Neb 172, 152 NW 324; Sallander v Prairie Life Ins. Co. (1923) 110 Neb 332, 193 NW 737.

Failure to obey order for production of documents may create presumption that papers contain statements as alleged by party obtaining order. McClure v McClintock (1912) 150 Ky 265, 150 SW 332, motion overr 150 Ky 773, 150 SW 849.

Failure to produce documents, as ordered by court, may create presumption as to existence or nonexistence of fact to be proved thereby, as alleged by party obtaining order. Amite Bank & Trust Co. v Standard Box & Veneer Co. (1933) 177 La 954, 149 So 532.

**288. Jurisdiction**

Former Rule 37(b)(2)(A) of Federal Rules of Civil Procedure does not violate due process when applied to enable District Court, as sanction for failure to comply with discovery order directed at establishing jurisdictional facts, to proceed on basis that personal jurisdiction over recalcitrant party has been established. Insurance Corp. of Ireland, Ltd. v Compagnie des Bauxites de Guinee (1982) 456 US 694, 72 L Ed 2d 492, 102 S Ct 2099, 34 FR Serv 2d 1 (criticized in United States v Kerley (2004, SD NY) 2004 US Dist LEXIS 12909).

Defendant insurers' persistent refusal to comply with court's discovery orders concerning issue whether court has in personam jurisdiction over insurers warrants imposition of sanction in form of finding that District Court has in personam jurisdiction over insurers. Transamerica Interway, Inc. v Commercial Union Assurance Co. (1983, SD NY) 97 FRD 419, 1984 AMC 2384, 35 FR Serv 2d 1570.

Sanctions in form of attorney's fees and of resolving jurisdictional issue in favor of plaintiff are imposed under Rules 11 and 37, where defendant first lied to court in affidavit regarding its contacts with forum state and continued to rely on false affidavit in face of court's order directing

that discovery proceed in good faith, because defendant clearly disobeyed court's order and filed affidavit in bad faith which contained matters not well grounded in fact. Boron v West Texas Exports, Inc. (1988, SD Fla) 680 F Supp 1532, affd without op (1989, CA11 Fla) *869 F2d 1500.*

In action by representatives of decedent's estate against political organizations, following magistrate's report and recommendation of exercise of personal jurisdiction over organizations, representatives' motion for sanctions under former *Fed. R. Civ. P. 37(b)(2)(A)* was granted where report properly recommended imposition of jurisdictional sanctions against organizations due to their failure to comply with orders related to jurisdictional discovery and independent evidence supporting personal jurisdiction over them, and representatives were entitled to award of fees and costs, pursuant to *Fed. R. Civ. P. 37(b)(2)*, for costs incurred by representatives due to organizations' failure to comply with jurisdictional discovery orders. Knox v PLO (2005, SD NY) 229 FRD 65, judgment entered (2005, SD NY) 230 FRD 383, magistrate's recommendation (2006, SD NY) 2006 US Dist LEXIS 51166, adopted, judgment entered (2006, SD NY) 2006 US Dist LEXIS 52320.

**289. Privileged and confidential matters**

Order under Rule 37(b)(2) in action for negligence against government under Federal Tort Claims Act, to effect that, since government failed to produce documents as ordered under Rule 34, facts on issue of negligence would be taken as established in plaintiffs' favor, is improper where documents are privileged as containing military secrets. United States v Reynolds (1953) 345 US 1, 97 L Ed 727, 73 S Ct 528, 32 ALR2d 382.

In suit by newsman charging government officials with conspiracy to interfere with his work in which newsman refused to comply with court order to identify news source that provided him with information concerning subject matter of litigation, defendants' contention that plaintiff had contemporaneous knowledge of events and that statute of limitations had run would be taken to be established. Anderson v Nixon (1978, DC Dist Col) 3 Media L R 2050, 25 FR Serv 2d 220.

Because it is logical to assume, in civil action brought by SEC against individual alleged to have purchased securities on basis of inside information, that defendant's refusal to give voluntary waiver of Swiss bank secrecy protections is triggered by existence of sort of bank account which defendant has previously denied, drawing of adverse factual inference to effect that defendant has Swiss bank account constitutes appropriate remedy for defendant's refusal to execute waiver as directed by court order. SEC v Musella (1983, SD NY) *CCH Fed Secur L Rep P 99516, 38 FR Serv 2d 429.*

**290. --Executive privilege**

In proceeding involving foundation's status as tax-exempt corporation, where political intervention becomes issue in case; where defendant-IRS fails to comply with court's general discovery order that plaintiff-foundation be allowed prompt access to all documents relating to plaintiff's tax-exempt status in IRS hands and in possession of White House; where defendant fails to properly claim executive privilege; and where defendant otherwise hinders and delays discovery of information on crucial issue, alleged fact that plaintiff has been denied favorable

ruling because it has been "singled out for selective treatment for political, ideological and other improper reasons" may be taken as established. Center on Corporate Responsibility, Inc. v Shultz (1973, DC Dist Col) 368 F Supp 863, 74-1 USTC P 9118, 17 FR Serv 2d 1477, 33 AFTR 2d 368.

In suit for damages, government's failure to produce FBI documents relating to unlawful electronic surveillance of plaintiff not related to law enforcement but only for "intelligent purposes," without valid claim of executive privilege, results in court's accepting as established plaintiff's damage claims of loss of employment, of permanent impairment of ability to secure employment, of harm to name and reputation, and of mental pain and suffering. Black v Sheraton Corp. of America (1974, DC Dist Col) 371 F Supp 97, 18 FR Serv 2d 563.

**291. Willfulness, bad faith or fault**

District court's sanctioning defendant-government by deeming slip-and-fall plaintiff's facts established was not abuse of discretion given government's flagrant violations of its discovery obligations, its flouting district court's discovery order, and its blatant misrepresentation to court. Chilcutt v United States (1993, CA5 Tex) 4 F3d 1313, 27 FR Serv 3d 43, reh den (1993, CA5 Tex) 1993 US App LEXIS 34650 and cert den *(1994) 513 US 979, 130 L Ed 2d 367, 115 S Ct 460.*

District court did not abuse its discretion in accepting allegations of plaintiff's complaint as established where defendants willfully violated court's orders by repeatedly failing to designate representative to testify at discovery deposition, made no showing of any good faith attempt to designate available representative, failed to seek protective order and engaged in other dilatory tactics, and defendants' conduct severely prejudiced government's ability to make its case and lesser sanctions were ineffective. CFTC v Noble Metals Int'l (1995, CA9 Nev) 67 F3d 766, 95 CDOS 7490, 95 Daily Journal DAR 12869, 32 FR Serv 3d 1126, cert den *(1996) 519 US 815, 117 S Ct 64, 136 L Ed 2d 26* and (criticized in FTC v QT, Inc. (2006, ND Ill) 467 F Supp 2d 863, 2006-2 CCH Trade Cases P 75536).

As sanction for party's willful noncompliance with discovery order, court would deem all allegations of moving party's complaint against noncomplying party admitted and established. Volkart Bros., Inc. v M/V "Palm Trader" (1990, SD NY) 130 FRD 285, 1990 AMC 1567.

In class action suit challenging prison conditions, facts asserted in plaintiffs' complaint would be held as true given defendants' willful, repeated failure to comply with discovery orders, but default judgment would not be granted given important constitutional issues involved. Green v District of Columbia (1991, DC Dist Col) 134 FRD 1.

*Fed. R. Civ. P. 37* sanctions in form of adverse finding were appropriate against creditor because creditor's unwavering misconduct during discovery, including inexcusable non-production of certain escrow statements and misrepresentations by creditor's counsel, greatly impeded court's ability to reach quick and just decision on merits of case. Harmon v Lighthouse Capital Funding, Inc. (In re Harmon) (2011, BC SD Tex) 2011 Bankr LEXIS 323, judgment entered (2011, BC SD Tex) 444 BR 696.

**292. Miscellaneous**

Where, in action in which total disability is claimed, plaintiff refuses to comply with order for his physical examination, trial court does not abuse its discretion in finding facts without any proofs in accordance with defendant insurer's contention, and, having so found, rendering summary judgment against plaintiff. McMullen v Travelers Ins. Co. (1960, CA9 Cal) 278 F2d 834, 3 FR Serv 2d 653, cert den *(1960) 364 US 867, 5 L Ed 2d 89, 81 S Ct 110.*

Automobile manufacturer was subject to sanction for its failure to fully comply with court's order that it produce customer reports involving similar accidents, but sanction of striking manufacturer's affirmative defenses and establishing existence of product's defect was too severe for facts presented since, by providing that automobile's fuel pump was defective and continued to operate, sanction forced jury to find for plaintiffs. Baker v GMC (1996, CA8 Mo) 86 F3d 811, CCH Prod Liab Rep P 14648, 35 FR Serv 3d 504, reh, en banc, den (1996, CA8) 1996 US App LEXIS 18387 and revd on other grounds, remanded (1998) 522 US 222, 118 S Ct 657, 139 L Ed 2d 580, 98 CDOS 282, 98 Daily Journal DAR 383, 1998 Colo J C A R 163, 11 FLW Fed S 289 and vacated in part on other grounds, recalled, remanded (1998, CA8) 138 F3d 1225, petition den, in part, remanded (1998, CA8) 153 F3d 714, 41 FR Serv 3d 883.

In aerospace engineer's action brought with respect to denial of his security clearance, District Court's imposition of Rule 37(b)(2) sanctions whereby defendant could not deny or contradict plaintiff's allegations through introduction of evidence was permissible exercise of discretion, if order upon which sanctions were based was valid. Smith v Schlesinger (1975, App DC) 168 US App DC 204, 513 F2d 462, 20 FR Serv 2d 473.

Evidentiary sanctions are more appropriate than remedial sanctions for destruction of evidence; it is fair to construe evidence most strongly against party responsible for its destruction by taking as established in favor of opposing party facts which evidence might prove and by precluding other particular evidence from introduction at trial. United States v Nassau County (1979, ED NY) 28 FR Serv 2d 165.

In action by plaintiffs involving contract dispute with Coca-Cola Company (Company) where District Court had previously ordered Company to disclose formulas for several Coca-Cola products and Company subsequently informed court that it would not comply with that order, District Court agreed with plaintiffs that sanctions were appropriate under Rule 37(b)(2), but declined to enter default judgment as requested, instead determining that for purposes of this litigation, certain facts that could have been proven by formula evidence would be considered established and court further ordered that company not attempt to rebut any fact thus established. Coca-Cola Bottling Co. v Coca-Cola Co. (1986, DC Del) 110 FRD 363, 230 USPQ 1, 4 FR Serv 3d 1273.

Sanctions against government defendant in civil rights case were warranted for its failure in 6-year period to answer plaintiff's interrogatories despite four court orders and numerous motions by plaintiff, for its failure to reply to plaintiff's various requests for document production, admissions, motions for judgment on pleadings or motions for default; although default judgment would not be ordered because of court's strong preference for resolution on merits,

facts in plaintiff's complaint would be deemed established against government, government would not be allowed to interpose any defense against factual allegations of plaintiff's complaint, to present evidence or arguments refuting, rebutting, or contradicting any matter deemed admitted in plaintiff's request for admissions, or to amend its answer to raise any defense or assert any claim against plaintiff. Callwood v Zurita (1994, DC VI) 31 VI 157, 158 FRD 359, 31 FR Serv 3d 597.

## IV. FAILURE TO DISCLOSE OR TO SUPPLEMENT EARLIER RESPONSE [RULE 37(c)(1)]

### A. In General

#### 293. Generally

While *FRCP 37(c)(1)* did not authorize sanctions for *FRCP 26(e)(2)* violations at time of trial, district court erred in not considering its inherent authority to sanction. Toth v Grand Trunk R.R. (2002, CA6 Mich) 306 F3d 335, 59 Fed Rules Evid Serv 756, 54 FR Serv 3d 374, 2002 FED App 321P.

*Fed. R. Civ. P. 37(c)(1)* itself recognizes that in addition to or in lieu of preclusion sanction, court, on motion and after affording opportunity to be heard, may impose other appropriate sanctions. Design Strategy, Inc. v Davis (2006, CA2 NY) 469 F3d 284, 25 BNA IER Cas 466, 153 CCH LC P 60286, 66 FR Serv 3d 550.

Reference in *FRCP 37(c)(1)* to "other appropriate sanctions," as well as court's inherent power to sanction, extend to expert witness who appears on behalf of party in civil case. Doblar v Unverferth Mfg. Co. (1999, DC SD) 185 FRD 258.

Once party is fully on notice of its discovery obligations to supplement under *Fed. R. Civ. P. 26(e)*, if party acts contrary to counsel's instructions or to court's order, it acts at its own peril and is subject to sanctions. Zubulake v UBS Warburg LLC (2004, SD NY) 229 FRD 422, 94 BNA FEP Cas 1, 85 CCH EPD P 41728.

#### 294. Discretion of court, generally

Plain text of *Fed. R. Civ. P. 37(c)(1)* provides that if appropriate motion is made and hearing has been held, court does have discretion to impose other, less drastic, sanctions. Design Strategy, Inc. v Davis (2006, CA2 NY) 469 F3d 284, 25 BNA IER Cas 466, 153 CCH LC P 60286, 66 FR Serv 3d 550.

District court abused its discretion in imposing sanctions pursuant to its inherent powers for discovery violations where *Fed. R. Civ. P. 37* squarely addressed appropriate sanctions for discovery violations, and there was no need to resort to inherent powers. ClearValue, Inc. v Pearl River Polymers, Inc. (2009, CA FC) 560 F3d 1291.

Although applicant alleged that district court erred in allowing United States Attorney General to use certain individual as witness at remedy hearing in violation of *Fed. R. Civ. P. 37(c)(1)*, Attorney General Holder did not include individual in his initial disclosure, her identity nevertheless became known to applicant during discovery; because individual's identity was

made known to applicant, there was no obligation to supplement disclosures pursuant to *Fed. R. Civ. P. 26(e)(1)(A)* and therefore district court did not err in allowing individual to testify at equitable relief hearing. Kapche v Holder (2012, App DC) 677 F3d 454, 26 AD Cas 1, 15 CCH Accommodating Disabilities Decisions P 15-47.

Applicability of sanctions for failure to supply written report of expert as required by *FRCP 26(a)(2)(B)* falls within sound discretion of trial court. Lithuanian Commerce Corp. v Sara Lee Hosiery (1997, DC NJ) 177 FRD 245, 49 Fed Rules Evid Serv 84, vacated in part on other grounds, summary judgment gr, in part, summary judgment den, in part (1998, DC NJ) 179 FRD 450.

Imposition of sanctions under *Fed. R. Civ. P. 37(c)(1)* is discretionary. Semi-Tech Litig. LLC v Bankers Trust Co. (2004, SD NY) 219 FRD 324, summary judgment gr, in part, summary judgment den, in part,, judgment entered (2005, SD NY) 353 F Supp 2d 460, affd in part and revd in part on other grounds (2006, CA2 NY) 450 F3d 121.

Although more detailed response might have been called for pursuant to *Fed. R. Civ. P. 26(a)(1)(A)* in disclosing two witnesses who might have information about former employee's racial discrimination claim against former employer, failure to provide such information was harmless; trial court in its discretion could find that former employee should not be sanctioned for not providing more information regarding two witnesses, as any error in not doing so was harmless under *Fed. R. Civ. P. 37(c)(1)*, as one witness had been identified in initial disclosure and other witness had been identified during deposition, and former employer had ample time to depose both of those witnesses if it had wanted to do so. Collins v SET Enters. (2012, ND Ill) 891 F Supp 2d 1028.

Unpublished Opinions

Unpublished: District court found employer's nondisclosure of witness and his declaration was harmless, and it reopened discovery to permit EEOC to depose witness; that decision fell within trial court's discretion. EEOC v Thompson Contr., Grading, Paving, & Utils., Inc. (2012, CA4 NC) 2012 US App LEXIS 25635.

Unpublished: District court found employer's nondisclosure of witness and his declaration was harmless, and it reopened discovery to permit EEOC to depose witness; that decision fell within trial court's discretion. EEOC v Thompson Contr., Grading, Paving, & Utils., Inc. (2012, CA4 NC) 2012 US App LEXIS 25635.

Unpublished: Appellant restaurant owners did not object below to submission of their liquor license records for judicial notice based upon assertion that those records were not disclosed under *Fed. R. Civ. P. 26*, thus, district court was deprived of opportunity to consider whether to deny licensee's motion for judicial notice on that basis or impose some alternative sanction under *Fed. R. Civ. P. 37(c)(1)*, and, while those records were not identified in appellee event licensee's initial disclosure, owners received notice of records when licensee filed its motion for judicial notice, to which owners failed to respond; it was not abuse of discretion to not exclude those documents. Joe Hand Promotions, Inc. v Chios, Inc. (2013, CA5 Tex) 2013 US App LEXIS 10464.

**295. Other particular cases**

While *FRCP 37(c)(1)* did not authorize sanctions for *FRCP 26(e)(2)* violations at time of trial, district court erred in not considering its inherent authority to sanction; but, there was no showing of substantial prejudice, as earlier disclosure of railcar repair records would not have assisted plaintiff conductor in his personal injury action against defendant railroad for injuries caused by defective railcar lever because records refuted existence of defective operating lever. Toth v Grand Trunk R.R. (2002, CA6 Mich) 306 F3d 335, 59 Fed Rules Evid Serv 756, 54 FR Serv 3d 374, 2002 FED App 321P.

Employer's claim that its former employee failed to produce copy of prior complaint was discovery issue that employer should have addressed earlier either by way of motion to compel or request for sanctions under *Fed. R. Civ. P. 37(c)*, rather than at trial. Monteagudo v Asociacion de Empleados del Estado Libre Asociado (2009, CA1 Puerto Rico) 554 F3d 164, 105 BNA FEP Cas 494, 91 CCH EPD P 43436.

In patient's medical malpractice suit against doctor regarding laser eye surgery, where district court found negligence and jury awarded damages, doctor's argument that patient made discovery violations by failing to disclose pre-existing eye condition was rejected because (1) doctor never sought sanctions, and (2) there was no evidence of deliberate falsehood, bad faith, or fault, but rather only unclear testimony of kind that juries routinely sort out. Wallace v McGlothan (2010, CA7 Ind) 606 F3d 410.

In pension fund's action under 29 USCS § 1145 to recover contributions based on construction company's Florida job sites, district court's ruling on fund's *Fed. R. Civ. P. 59(e)* motion, which found evidence of enforceable Florida collective bargaining agreement (CBA), was remanded to determine company's outstanding *Fed. R. Civ. P. 37(c)(1)* motion, which challenged use of evidence related to Florida CBA in light of fund's discovery violations, since district court did not actually make decision regarding sanctions. Flynn v Dick Corp. (2007, App DC) 481 F3d 824, 154 CCH LC P 10818, reh den (2007, App DC) 2007 US App LEXIS 14882 and reh, en banc, den (2007, App DC) 2007 US App LEXIS 14880.

Employees' *Fed. R. Civ. P. 54(b)* motion for reconsideration of court's order denying their motion for class certification pursuant to *Fed. R. Civ. P. 23(a)* was denied because: (1) employees' motion for reconsideration was based entirely on revised class definition supported by their counsel's summary of surveys completed by plan participants; (2) employees acknowledged that completed surveys had been in their possession since beginning of case; (3) employees claimed that surveys were not produced during discovery because they were protected from disclosure by attorney-client privilege; (4) employees failed to explain how surveys met standards for protection under attorney-client privilege, and employees did not submit surveys for in camera determination by court; and (5) absent substantial justification for their failure to produce surveys in violation of *Fed. R. Civ. P. 26(a)*, employees could not have based their class certification motion on undisclosed documents under *Fed. R. Civ. P. 37(c)(1)*. Herman v Cent. States Southeast & Southwest Areas Pension Fund (2003, ND Ill) 31 EBC 1364.

Former employee brought her motion under *Fed. R. Civ. P. 37(c)(1)* which authorized sanctions against party who failed to disclose information required under *Fed. R. Civ. P. 26(a)* or (e)(1) or

to amend prior response as required by Rule 26(e)(2); employee claimed that former employer's and its counsel's misleading representations during two conferences imposed economic harm on employee and were sanctionable under Rule 37(c)(1); on its face subdivisions (a)(1), (e)(1) and (e)(2) of Rule 26 were not applicable to oral representations to court; thus, it was improper to bring Rule 37(c)(1) motion for alleged oral misrepresentations to court. Quinby v WestLB AG (2005, SD NY) 87 CCH EPD P 42273 (criticized in Treppel v Biovail Corp. (2006, SD NY) 233 FRD 363).

Pursuant to 26 USCS § 6330(d), court reviewed determination of IRS hearing officer's ruling that taxpayer did not meet reasonable cause criteria for abatement of penalties pursuant to 26 USCS § 6724, found it unfair to exclude taxpayer's affidavit regarding financial hardship solely on basis of *Fed. R. Civ. P. 37(c)(1)* without first giving taxpayer opportunity to attempt to justify its failure to disclose, and denied U.S.' motion for summary affirmance because whether taxpayer's financial hardship constituted reasonable cause for abatement was legitimate issue, and court could not say that IRS' s position was so clearly correct as matter of law that there was no substantial question regarding outcome of appeal. Burt, Inc. v IRS (2006, ND Ind) 98 AFTR 2d 6929.

Where nonparty argued that certain expert declarations should have been excluded under *Fed. R. Civ. P. 37* at hearing on fairness of settlement agreement in class action lawsuit because settlement parties failed to comply with mandatory disclosure requirements of *Fed. R. Civ. P. 26(a)(2)*, objection was rejected because Rule 26 was trial-oriented discovery rule, and in addition objector was nonparty who had no absolute right to discovery. UAW v GMC (2006, ED Mich) 235 FRD 383, findings of fact/conclusions of law, settled, dismd (2006, ED Mich) 2006 US Dist LEXIS 14890.

Motion for *Fed. R. Civ. P. 37(c)* sanctions, for failure timely to disclose witness and to supplement discovery disclosures and responses as required by *Fed. R. Civ. P. 26(e)*, was granted because holding back information was deliberate attempt to gain strategic advantage from non-disclosure and violated letter and spirit of court's orders and rules of civil procedure. Maine v Kerramerican, Inc. (2007, DC Me) 480 F Supp 2d 343.

In employment discrimination case, employer moved to strike photographs of employee with his former supervisor at Buddhist Temple for failure to comply with disclosure requirements of *Fed. R. Civ. P. 26(a)(1)(B)*; because employee did not respond to employer's motion to strike, court was unaware whether employee intended to use pictures for sole purpose of impeaching supervisor's testimony; therefore, employee did not meet burden necessary under *Fed. R. Civ. P. 37(c)* in order for him to use pictures for purposes other than impeachment. Murdick v Catalina Mktg. Corp. (2007, MD Fla) 496 F Supp 2d 1337.

In action for wrongful denial of health insurance coverage for liver transplant, insurance company was not entitled under *Fed. R. Civ. P. 37(c)* to strike insured's expert disclosures; expert report under *Fed. R. Civ. P. 26(a)(2)(B)* was not required because treating physicians' opinions regarding insured's symptoms prior to treatment were derived from their treatment and care of insured. Kim v Time Ins. Co. (2008, SD Tex) 267 FRD 499.

Doctoral candidate was not entitled to sanctions under *Fed. R. Civ. P. 37(c)(1)* regarding university's alleged concealment of documents because motion made after jury verdict was

clearly untimely under unreasonable delay standard and even if motion were timely, university's conduct did not warrant sanctions under totality of circumstances. Long v Howard Univ. (2008, DC Dist Col) 561 F Supp 2d 85.

In False Claims Act case, exclusion was not warranted under *Fed. R. Civ. P. 37(c)(1)* of government's supplementation of discovery responses; supplemental expert disclosures were timely under *Fed. R. Civ. P. 26(e)(2)*, and timing of disclosure of grand jury testimony was substantially justified under Fed. R. Crim. P. 6(e)(3)(E)(i) and *Fed. R. Civ. P. 26(a)(3)(B)*. United States v Hawley (2008, ND Iowa) 562 F Supp 2d 1017.

Because employee did not disclose certain letters until more than seven months after close of discovery, employer asked court to sanction employee under *Fed. R. Civ. P. 37*; this motion for summary judgment; however, *Fed. R. Civ. P. 26(e)* allowed employee to supplement discovery production as soon as possible, as long as it was timely, which happened in instant case. Malozienc v Pac. Rail Servs. (2008, ND Ill) 572 F Supp 2d 939.

In Fair Labor Standards Act overtime collective action brought by employees, mortgage bankers, against employers, magistrate judge properly applied *Fed. R. Civ. P. 37(c)(1)* in granting employees' motion to strike because 122 sworn job statements and six declarations submitted by employers were fact discovery and should have been disclosed prior to deadline for fact discovery. Henry v Quicken Loans Inc. (2009, ED Mich) 15 BNA WH Cas 2d 1180.

Insureds' discovery conduct was not substantially justified under *Fed. R. Civ. P. 37(c)* because insureds testified during Fed. R. Civ. P. 30(b)(6) deposition that they had not searched for requested room folios; months later, their attorney had never looked at database from which insureds made their discovery productions, and, thus, he had no basis to conclude that room folios were contained therein or had been produced. Bray & Gillespie Mgmt. LLC v Lexington Ins. Co. (2009, MD Fla) 259 FRD 591.

In plaintiff consumer's action against defendant advertiser under Telephone Consumer Protection Act of 1991 alleging unsolicited advertisement "fax blasting," while advertiser had not previously produced Database in manner consumer desired, report had contained field that appeared every bit as important as neglected field as to certain recipients that may have provided consent to receiving faxed advertisements; thus, it appeared advertiser attempted to comply with its discovery obligations in good faith and sanctions under *Fed. R. Civ. P. 37(c)(1)* were denied. Gene & Gene, LLC v BioPay, LLC (2009, MD La) 269 FRD 621, revd, remanded (2010, CA5 La) 2010 US App LEXIS 22381.

In action involving coverage dispute under all-risks policy, insurance company was not entitled under *Fed. R. Civ. P. 37(c)* to exclude from evidence spreadsheet attached as exhibit to insured mining company's declaration in opposition to summary judgment; although fourth box of spreadsheet that described damages mining company allegedly suffered because of highwall collapse was omitted from initial disclosure, there was no violation of *Fed. R. Civ. P. 26* because mining company effectively supplemented initial disclosure, which resulted from formatting problem, by providing corrected document to insurance company together with explanation of reason for correction. Zurich Am. Ins. Co. v Coeur Rochester, Inc. (2010, DC Nev) 720 F Supp 2d 1223.

In wrongful death suit, although default was not warranted, pursuant to *Fed. R. Civ. P. 37(c)*, sanctions of payment of certain discovery costs and costs of sanctions motion as well as permitting plaintiff widow to inform jury that certain evidence was withheld in violation of discovery orders was properly imposed on defendants and their counsel because there were numerous discovery violations, including failures to disclose and intentional withholding of discovery information and false statements made during discovery. Tom v S.B., Inc. (2012, DC NM) 280 FRD 603.

Regardless of whether creditor's nondisclosure of class action, to which bankruptcy debtors were found to be subject and which resulted in dismissal of debtors' counterclaims against creditor, was intentional, as it appeared, or reckless disregard of insurer's obligations under federal rules of civil, bankruptcy, and multi-district litigation procedure, creditor's misconduct was clearly sanctionable; class action was pending for several years before bankruptcy proceeding commenced, debtors' claims clearly fell within scope of class action, as creditor eventually admitted in asserting settlement of class action as defense, and nondisclosure of same claims to respective courts resulted in substantial and unwarranted expense and tremendous waste of judicial resources. Blue Cross & Blue Shield of N.C. v Jemsek Clinic, P.A. (In re Jemsek Clinic, P.A.) (2010, BC WD NC) 441 BR 756.

Airplane insurer argued that because airplane manufacturer failed to accurately disclose its intention to invoke Idaho law, it was prohibited by *Fed. R. Civ. P. 37(c)(1)* from actually invoking Idaho law; this argument was rejected because there was no violation of *Fed. R. Civ. P. 26(e)(1)(A)*. United States Aviation Underwriters, Inc. v Pilatus Bus. Aircraft, LTD (2009, CA10 Colo) 582 F3d 1131.

Unpublished Opinions

Unpublished: District court did not abuse its discretion in denying former employee's *Fed. R. Civ. P. 60(b)* motion for relief from his disability discrimination judgment and his *Fed. R. Civ. P. 37* motion for sanctions because employee failed to demonstrate that either alleged fraud or misconduct prevented him from fully and fairly presenting his case because discovery of "new" telework policies was irrelevant to his disability discrimination claim because it would not have affected appellate court's conclusion that working from home was not reasonable accommodation request, and appellate court previously held that employee could not have maintained his job responsibilities while working from home. Kiburz v Sec'y, United States Dep't of Navy (2011, CA3 Pa) 2011 US App LEXIS 20103.

### B. Particular Sanctions

### 1. In General

### 296. Claims or defenses precluded

District court did not abuse its discretion in excluding plaintiff's non-expert damage theories in its business tort action against defendant because plaintiff repeatedly admitted that it did not properly supplement its answers to defendant's discovery interrogatories, non-disclosure was

neither substantially justified nor harmless, and record showed that defendant properly objected to introduction of evidence. MicroStrategy Inc. v Business Objects, S.A. (2005, CA FC) 429 F3d 1344, 77 USPQ2d 1001, reh den, reh, en banc, den (2006, CA FC) 2006 US App LEXIS 2929.

Patentee was properly sanctioned under *Fed. R. Civ. P. 37(c)(1)* and precluded from asserting infringement counter-claim against stock exchange where patentee unjustifiably delayed in supplementing its interrogatory answers and counter-claim would unfairly prejudice stock exchange's trial preparation. AMEX, LLC v Mopex, Inc. (2002, SD NY) 215 FRD 87.

District court denied tractor manufacturer's *Fed. R. Civ. P. 37(c)(1)* motion, which sought to preclude patent holders from relying upon claims and products that were named in their supplementary interrogatory responses, because manufacturer was not prejudiced by any delays arising from supplementary responses since (1) holders had filed their last supplementary response just before closure of fact discovery; (2) start of trial was still almost year away; (3) manufacturer could remedy any prejudice by moving to reopen fact discovery and/or moving to extend expert discovery; and (4) manufacturer's cries of prejudice were not believable in face of its simultaneous attempt to add brand-new defense 11 days after filing its motion to preclude. Int'l Truck & Engine Corp. v Caterpillar, Inc. (2004, ND Ind) 73 USPQ2d 1754.

Because there was no justification whatsoever for government's failure to appropriately inform defendants, by formal supplementation of its interrogatory responses, of its intention to rely on 650 additional racketeering acts to support its Racketeer Influenced and Corrupt Organizations Act claims, defendants' request to strike additional 650 racketeering acts was granted. United States v Philip Morris USA, Inc. (2004, DC Dist Col) 219 FRD 198.

In federal employee's Title VII suit against Department of Treasury, employee's incomplete, unsigned, and belated responses to discovery requests warranted imposition of sanctions under *Fed. R. Civ. P. 37(c)(1)*, including payment of attorney fees and preclusion of certain evidence, but sanction of dismissal was too harsh. Walls v Paulson (2008, DC Dist Col) 250 FRD 48, dismd (2008, DC Dist Col) 2008 US Dist LEXIS 48021.

Alternative sanctions referenced in *Fed. R. Civ. P. 37(c)*, including dismissal of claims, are primarily intended to apply when party fails to disclose evidence helpful to opposing party. Norden v Samper (2008, DC Dist Col) 544 F Supp 2d 43, 20 AD Cas 929.

In record producer's lawsuit against music company, contending that it engaged in unfair competition by tortiously interfering with its record distribution contract, pursuant to *Fed. R. Civ. P. 37(c)(1)*, record producer was precluded from seeking lost profits because it failed to disclose this claim during discovery, as required by *Fed. R. Civ. P. 26(a)(1)(A)(iii)*. 24/7 Records, Inc. v Sony Music Entm't, Inc. (2008, SD NY) 566 F Supp 2d 305.

Although parties in patent infringement action disputed whether defendant's assertion of on-sale bar defense under 35 USCS § 102(b) was timely, preclusion of on-sale bar defense was not warranted under *Fed. R. Civ. P. 37(c)(1)* because plaintiffs did not show any actual harm or prejudice they would face if on-sale bar defense were allowed; plaintiffs did not cite to any particular discovery they were unable to complete, and plaintiffs were able to respond to

defendant's summary judgment motion on issue. UCB, Inc. v KV Pharm. Co. (2010, DC Del) 692 F Supp 2d 419.

Pursuant to *Fed. R. Civ. P. 37(c)(1)*, all evidence related to offer-for-sale claim of patent infringement was precluded where result of patentees' failure to disclose basis for offer-for-sale damages was to lead city and contractor to believe that such claim was not at issue in case. City of Aurora v PS Sys. (2010, DC Colo) 720 F Supp 2d 1243.

Invalidity defenses that were not disclosed in supplemental responses as required by *Fed. R. Civ. P. 26(e)(2)* were subject to exclusion under *Fed. R. Civ. P. 37(c)(1)* to extent that inadequate notice was prejudicial to patent holder. Abbott Labs. v Sandoz, Inc. (2010, ND Ill) 743 F Supp 2d 762.

*Fed. R. Civ. P. 26(a)(1)(A)(iii)* required assembly and museum to provide, at outset of discovery, computation of each category of damages it claimed, and *Fed. R. Civ. P. 26(e)* required them to supplement their disclosures in timely manner once they learned that they were incomplete; however, assembly and museum never disclosed computation of damages under its increased costs theory, and they did not even explain nature of that theory until ordered by court to make pretrial disclosures; assembly and museum failed to show that their failure to make earlier disclosure was substantially justified or harmless, and therefore court precluded them from seeking those damages pursuant to *Fed. R. Civ. P. 37(c)(1)*. Armenian Assembly of Am., Inc. v Cafesjian (2010, DC Dist Col) 746 F Supp 2d 55, findings of fact/conclusions of law, judgment entered (2011, DC Dist Col) 2011 US Dist LEXIS 7438.

Unpublished Opinions

Unpublished: In retailer's action against supplier for breach of contract, district court did not abuse its discretion in excluding retailer's lost profits and storage costs from consideration under *Fed. R. Civ. P. 37(c)(1)*; retailer should have, but did not, disclose those damages to supplier as required under *Fed. R. Civ. P. 26(a)(1)(A)(iii)*. Big Lots Stores, Inc. v Luv N' Care, LTD (2008, CA6 Ohio) 2008 FED App 745N.

Unpublished: Local governments were properly precluded from presenting evidence of damages for alleged failure of online travel companies to pay back hotel occupancy taxes, since governments failed to disclose computation of damages and governments were not excused from disclosing computation until computation was verifiably final. City of Rome v Hotels.com, L.P. (2013, CA11 Ga) 2013 US App LEXIS 24745.

**297. Dismissal**

In personal injury action by husband, conjugal partnership, and wife against city, insurer, and engineering firm for injuries sustained by husband in fall on city sidewalk that was under repair, action was properly dismissed for discovery misconduct under *Fed. R. Civ. P. 37(c)*; during extensive discovery, husband did not reveal prior similar injuries and lawsuits, husband's claim that he forgot these matters and that opponents did not ask right questions indicated pattern of deceit, and district court properly considered lesser alternatives; however, remand was required of dismissal of wife's action for separate findings as to her culpability in fraud. Hull v Municipality of San Juan (2004, CA1 Puerto Rico) 356 F3d 98, 63 Fed Rules Evid Serv 553.

Although patentees' decision to withhold certain test results was sanctionable, it did not warrant sanction of dismissal. ClearValue, Inc. v Pearl River Polymers, Inc. (2009, CA FC) 560 F3d 1291.

Wife's loss of consortium claim was dismissed as discovery sanction pursuant to *Fed. R. Civ. P 37(c)* because her actions were egregious; wife stated she had no intent to remarry even though she and her alleged husband had taken part in ceremony complete with bridesmaids, music and exchange of wedding vows, wife continued to deny that any form of wedding ceremony occurred at her home after deceased had died, and witness testified that wife asked him to testify at his deposition that no wedding had occurred. Carter v General Car & Truck Leasing Sys. (2001, ND Iowa) 218 FRD 180.

Alternative sanctions referenced in *Fed. R. Civ. P. 37(c)*, including dismissal of case, are primarily intended to apply when party fails to disclose evidence helpful to opposing party. Norden v Samper (2008, DC Dist Col) 544 F Supp 2d 43, 20 AD Cas 929.

Where creditor failed to disclose class action to which bankruptcy debtors were found to be subject and settlement of which resulted in dismissal of debtors' counterclaims against creditor, dismissal of creditor's claims against debtors was warranted in addition to payment of all of debtors' attorney fees and costs since intentional or reckless nondisclosure resulted in substantial and unwarranted expense and tremendous waste of judicial resources. Blue Cross & Blue Shield of N.C. v Jemsek Clinic, P.A. (In re Jemsek Clinic, P.A.) (2010, BC WD NC) 441 BR 756.

Unpublished Opinions

Unpublished: Equipment manufacturer's claims against engine supplier based on engine failures were properly dismissed either as discovery sanction or as sua sponte entry of summary judgment; manufacturer failed to supplement its discovery to provide evidence of damages pertaining to specific engines at issue, and without such evidence manufacturer would not have been able to prevail at trial. Rayco Mfg. v Deutz Corp. (2012, CA6 Ohio) 2012 FED App 962N.

Unpublished: In Title VII of Civil Rights Act of 1964 case, in which pro se former employee appealed district court's *Fed. R. Civ. P. 37* dismissal of her complaint with prejudice after district court accepted employer's assertion that she had failed to provide adequate initial disclosures under *Fed. R. Civ. P. 26*, at no time had employer explained how employee's disclosures failed to satisfy narrow rules it said she violated, nor had employer cited any legal authority to support its position; as result, district court's order, which accepted employer's position uncritically, did not explain how employee violated Rule 26(a)(1). Robinson v Champaign Unit 4 Sch. Dist. (2011, CA7 Ill) 2011 US App LEXIS 4686.

**298. Miscellaneous**

In school desegregation case in which defendants failed to supplement their answers to interrogatories as to fact witnesses until five days before trial, court did not abuse its discretion by continuing trial for one week so that plaintiffs could depose newly disclosed witnesses and

imposing costs of those depositions on defendants, since there was ample evidence of defendant's bad faith, presentation of lengthy witness list on eve of trial was prejudicial, noncompliance with court's orders needed to be deterred, and less drastic sanctions would not have been effective. Belk v Charlotte-Mecklenburg Bd. of Educ. (2001, CA4 NC) 269 F3d 305, reh, en banc, den (2001, CA4) 274 F3d 814, cert den *(2002) 535 US 986, 152 L Ed 2d 465, 122 S Ct 1537* and cert den *(2002) 535 US 986, 152 L Ed 2d 465, 122 S Ct 1538.*

District court did not abuse its discretion, by sanctioning plaintiff in antitrust action for its discovery violations, because opportunity to submit briefs was "opportunity to be heard" within meaning of *Fed. R. Civ. P. 37(c)(1)*, and district court plainly stated that plaintiff was being sanctioned for failing to properly disclose its experts' opinions. Paladin Assocs. v Montana Power Co. (2003, CA9 Wash) 328 F3d 1145, 2003 Daily Journal DAR 5104, 2003-1 CCH Trade Cases P 74029, 56 FR Serv 3d 1201.

Sanction for nondisclosure of its expert's interview notes was too severe; any (slight) harm to defendant caused by plaintiff's violation of *Fed. R. Civ. P. 26* could have been fully compensated by judge's granting defendant continuance to enable it to conduct any additional discovery warranted by information revealed by interview notes and requiring plaintiff to reimburse defendant for expense of such additional discovery and for any other litigation expenses caused by plaintiff's failure to make timely and complete disclosure of notes under *Fed. R. Civ. P. 37(c)(1)*. Fid. Nat'l Title Ins. Co. v Intercounty Nat'l Title Ins. Co. (2005, CA7 Ill) 412 F3d 745, 62 FR Serv 3d 250.

In insurance case, expert reports had to be provided for employee witnesses under *Fed. R. Civ. P. 26(a)(2)(B)* because, despite employer's contention that they would serve primarily as fact witnesses, their opinion testimony about adequacy of their performance would be more than recital of facts; insurer's argument against reports was reasonable, however, so insured was not entitled to strike expert designations under *Fed. R. Civ. P. 37(c)(1)*. McCulloch v Hartford Life & Accident Ins. Co. (2004, DC Conn) 223 FRD 26 (criticized in Adams v Gateway, Inc. (2006, DC Utah) 2006 US Dist LEXIS 14413) and (criticized in, questioned in Bowling v Hasbro, Inc. (2006, DC RI) 2006 US Dist LEXIS 58910).

Report of expert for former employee and his wife in action concerning pension benefits failed to satisfy requirements for expert reports under *Fed. R. Civ. P. 26(a)(2)(B)* and Daubert under *Fed. R. Evid. 702* where (1) report did not contain expert's qualifications to give testimony, namely identification of his employment history, publications, or other cases in which he had testified, or indication of his compensation; (2) report did not provide any indication of how estimates or what his conclusions based on those estimates would have been; (3) there was no way to determine whether expert was qualified to render expert opinions proposed in report in absence of statement of his qualifications; and (4) there were clear analytical gaps in expert's opinions, rendering it impossible to judge reliability of expert's methods and testimony. Thus, pursuant to *Fed. R. Civ. P. 37(c)(1)*, employee and his wife were ordered either to supplement expert's report and to bear reasonable expenses and costs associated with defendants' preparation to depose expert, deposition itself, and any renewed motion to strike expert's testimony, or have expert report and testimony struck. Pell v E.I. Dupont De Nemours & Co. (2005, DC Del) 231 FRD 186, 63 FR Serv 3d 222, findings of fact/conclusions of law (2006, DC Del) 39 EBC 1270.

Although employee failed to disclose identities of persons with knowledge of past discrimination at employer's business, exclusion of witnesses was too drastic sanction under *Fed. R. Civ. P. 37*; granting of continuance and allowance of employer to depose those individuals was proper sanction. Jackson v Fed. Express Corp. (2006, ND Tex) 98 BNA FEP Cas 736.

Where plaintiff violated *Fed. R. Civ. P. 26(a)(2)(A)* and Fed. R. Civ. P. 33 by failing to disclose existence of five experts on issue of damages and failing to answer interrogatory that sought identity of any expert witnesses expected to be called at trial, court, instead of precluding witnesses from testifying at trial, vacated previous order preventing defendant from designating liability expert and also permitted defendant to add its own expert on issues of damages. Vigilant Ins. v E. Greenwich Oil Co. (2006, DC RI) 234 FRD 20, 64 FR Serv 3d 264.

In civil suit alleging, inter alia, breach of contract and violation of environmental laws, even if working notes that defendant's experts failed to retain were subject to *Fed. R. Civ. P. 26* disclosure, there were no grounds for adverse inference that was required for spoliation--that inference that required more than negligent loss, and there was no showing that destroyed notes would have been relevant to some issue at trial, or that experts or counsel knew of relevance. McDonald v Sun Oil Co. (2006, DC Or) 423 F Supp 2d 1114, 62 Envt Rep Cas 1613, judgment entered (2006, DC Or) 2006 US Dist LEXIS 42286 and (criticized in Aviall Servs. v Cooper Indus. (2006, ND Tex) 63 Envt Rep Cas 1623) and (criticized in Differential Development-1994, Ltd. v Harkrider Distrib. Co. (2007, SD Tex) 470 F Supp 2d 727, 37 ELR 20014).

Following district court's entry of summary judgment in favor of corporation based on findings that statutes of limitations barred city from recovering certain response costs incurred between 1989 and 1994 and that certain response costs incurred after 1994 were not "necessary," city was precluded from asserting claim against corporation for consultant costs under 42 USCS § 9607(a), part of Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 USCS §§ 9601 et seq., and under Wash. Rev. Code § 70.105D.080 of Model Toxics Control Act, Wash. Rev. Code §§ 70.105D.010 et seq.; under *Fed. R. Civ. P. 37(c)(1)*, city was precluded from seeking recovery of those costs because city violated obligation to disclose to corporation that it was seeking response costs for work done by consultant, city was not substantially justified in failing to disclose information about additional costs, and city's failure was not harmless because it deprived corporation of opportunity to conduct discovery regarding expenses and thereafter to challenge their recoverability as part of its previous motion for summary judgment. City of Moses Lake v United States (2007, ED Wash) 472 F Supp 2d 1220.

In insured's action seeking to enforce insurance contract, insurer was liable for monetary sanctions pursuant to *Fed. R. Civ. P. 26(g)(3)* and *37(c)(1)* for making incorrect certifications regarding its responses to insured's request for electronically-stored information and for failing to supplement its initial electronic log disclosures in timely manner as required by *Fed. R. Civ. P. 26(e)*; insured did not establish substantial justification for its failures. R & R Sails, Inc. v Ins. Co. (2008, SD Cal) 251 FRD 520.

In former employee's gender discrimination suit, her former employer was entitled to discovery sanctions under *Fed. R. Civ. P. 37(c)(1)* due to employee's withholding of her laptop computer,

which contained information relevant to her damages claim, because employee offered no reasonable explanation for her failure to produce computer at earlier date, and even if her failure to produce it earlier was not intentional, it was grossly negligent; employer was entitled to its fees and expenses incurred in obtaining information from computer. Tse v UBS Fin. Servs. (2008, SD NY) 568 F Supp 2d 274, 103 BNA FEP Cas 671.

In former employee's gender discrimination suit, her former employer was not entitled to discovery sanctions under *Fed. R. Civ. P. 37(c)(1)* due to employee's use of damages chart, which contained inaccurate information and which was not timely disclosed to employer, because any prejudice caused by chart was harmless with respect employee's economic damages while on business development plan, and those damages were otherwise adequately supported by employee's testimony and documentary evidence. Tse v UBS Fin. Servs. (2008, SD NY) 568 F Supp 2d 274, 103 BNA FEP Cas 671.

In patent infringement suit, sanction was appropriate because patentee's failure to disclose consultant's role in performing its pre-filing investigation was neither justified nor harmless; payment of expenses, rather than exclusion, was appropriate sanction. Int'l Automated Sys., Inc. v IBM (2009, DC Utah) 595 F Supp 2d 1197.

Although court lacked subject matter jurisdiction over patent infringement action because inventor was employee and thus did not own invention, which required court to dismiss action pursuant to *Fed. R. Civ. P. 12(h)(3)* as consequence of lack of standing under Rule 12(b)(1), monetary sanctions could properly be imposed under *Fed. R. Civ. P. 37(c)(1)* based on defense's failure to supplement, under *Fed. R. Civ. P. 26(e)*, their Rule 26(a) disclosures with employment agreement. ESN, LLC v Cisco Sys. (2009, ED Tex) 685 F Supp 2d 631, motion to strike gr, in part, motion gr (2010, CA FC) 2010 US App LEXIS 15492, decision reached on appeal by (2010, CA FC) 2010 US App LEXIS 20954.

In absence of harm to party, district court may not invoke severe exclusionary penalty provided for by *Fed. R. Civ. P. 37(c)(1)*; accordingly, defendant's untimely expert designation did not, on its own, merit severe sanction of exclusion; in addition to or in lieu of preclusion sanction, court may impose other appropriate sanctions, and in instant case, more moderate sanction of fees and expenses is appropriate; therefore, as sanction for defendant's untimely expert designation and after conclusion of trial or other disposition in action, plaintiff could, pursuant to *Fed. R. Civ. P. 37(c)(1)*, submit request for costs and expenses, including attorney's fees, relating to preparing and arguing its motion to strike. BASF Corp. v Sublime Restorations, Inc. (2012, DC Mass) 880 F Supp 2d 205.

Unpublished Opinions

Unpublished: In jail inmate's *42 USCS § 1983* action against county officials, district court did not abuse its discretion in excluding inmate's expert designation under *Fed. R. Civ. P. 37(c)(1)* on ground that inmate did not make timely or adequate expert disclosure; inmate's expert designation was six months late and did not conform to Federal Rules of Civil Procedure. Loggins v Franklin County (2007, CA6 Ohio) 218 Fed Appx 466, 2007 FED App 169N.

Unpublished: Because district court did not abuse its discretion in determining that, pursuant to *Fed. R. Civ. P. 37(c)(1)*, appellant was not prejudiced by corporation's discovery violations, and

district court already imposed substantial monetary sanctions against corporation, appellant was not entitled to additional sanctions. Mar Com, Inc. v F/V Hickory Wind (2008, CA9 Alaska) 2008 US App LEXIS 8343.

Unpublished: District court did not abuse its discretion under *Fed. R. Civ. P. 26(g)*, *37(c)*, and district court's inherent powers in failing to enter judgment against Navy in employee's discrimination suit as sanction for Navy's failure to produce certain documents before trial, and instead ordering new trial, as error was not committed in bad faith. Jinks-Umstead v Winter (2008, App DC) 2008 US App LEXIS 10063.

Unpublished: In breach of contract case in which two builders appealed entry of summary judgment against them, they unsuccessfully argued that district court should have stricken companies' claimed damages for their assumption of trade payables as sanction for companies' failure to supplement their responses; companies correctly noted that builders could show no prejudice as they had always been on notice about nature of damages sought. CBRE Realty Fin. Trs, LLC v McCormick (2011, CA4 Md) 2011 US App LEXIS 4356.

Unpublished: In employee's suit for workers' compensation benefits from general contractor, general contractor was properly sanctioned for withholding information about its workers' compensation insurance policy; employee incurred attorney's fees and expenses unnecessarily. Rhodes v Davis (2011, CA11 Ala) 2011 US App LEXIS 8583.

**2. Prohibition of Use of Information or Witness as Evidence**

**a. In General**

**299. Generally**

Purpose of *FRCP 37(c)(1)*, which provides sanction of exclusion for failure to make disclosure or to supplement responses as required by *FRCP 26(a)*, is to encourage timely disclosure of expert witnesses and to curb dilatory litigation tactics. Continental Lab. Prods., Inc. v Medax Int'l, Inc. (2000, SD Cal) 195 FRD 675.

Under *Fed. R. Civ. P. 37(c)(1)*, preclusion will be ordered only in rare cares. Semi-Tech Litig. LLC v Bankers Trust Co. (2004, SD NY) 219 FRD 324, summary judgment gr, in part, summary judgment den, in part,, judgment entered (2005, SD NY) 353 F Supp 2d 460, affd in part and revd in part on other grounds (2006, CA2 NY) 450 F3d 121.

**300. Discretion of court**

In exercising its broad discretion to determine whether nondisclosure of evidence is substantially justified or harmless for purposes of *FRCP 37(c)(1)* exclusion analysis, district court should be guided by following factors: (1) surprise to party against whom evidence would be offered; (2) ability of that party to cure surprise; (3) extent to which allowing evidence would disrupt trial; (4) importance of evidence; and (5) nondisclosing party's explanation for its failure to disclose evidence. S. States Rack & Fixture, Inc. v Sherwin-Williams Co. (2003, CA4 SC) 318 F3d 592, CCH Prod Liab Rep P 16502, 60 Fed Rules Evid Serv 603, 54 FR Serv 3d 998.

Notwithstanding mandatory language of *FRCP 37(c)(1)*, rule vests courts with discretion in its provision that no sanction should be imposed if there was substantial justification for nondisclosure, or if nondisclosure was harmless. ABB Air Preheater v Regenerative Envtl. Equip. Co. (1996, DC NJ) 167 FRD 668, 39 USPQ2d 1202.

Whether failure to disclose information is harmless (*FRCP 37(c)(1)*) largely depends upon whether omission caused other parties to suffer prejudice; that determination is left to broad discretion of court. U.S. Axminster v Chamberlain (1997, ND Miss) 176 FRD 532.

Decision to exclude expert testimony for failure to comply with *FRCP 26(a)(2)(B)* is within discretion of trial court. Fitz, Inc. v Ralph Wilson Plastics Co. (1999, DC NJ) 184 FRD 532, 44 FR Serv 3d 1138.

Fact that *FRCP 37(c)(1)* provides that court may impose certain sanctions "in lieu of" exclusion of evidence conveys measure of discretion in determining whether to bar evidence based upon party's failure to comply with disclosure requirements of *FRCP 26(a)*. Tolerico v Home Depot (2002, MD Pa) 205 FRD 169.

Unpublished Opinions

Unpublished: District court did not abuse its discretion under *Fed. R. Civ. P. 37(c)(1)* when it refused to allow amputee's witness to testify during lawsuit amputee filed against property owned by L.L.C., which claimed that property was not accessible to individuals who were disabled, in violation of Title III of Americans with Disabilities Act, 42 USCS §§ 12181-12189; amputee had not disclosed witness as fact witness or expert witness during discovery, as required by *Fed. R. Civ. P. 26*, and he did not show court that his failure to comply with Rule 26 was substantially justified or harmless. Pinero v 4800 W. Flagler L.L.C. (2011, CA11 Fla) 2011 US App LEXIS 12485.

**301. Automatic and mandatory nature of sanction**

Exclusion of non-disclosed evidence is automatic and mandatory under R. 37(c)(1) unless non-disclosure was justified or harmless and, where exclusion of evidence will result in dismissal of case, sanction must be one that reasonable jurist, apprised of all circumstances, would chose as proportionate to infraction. Dickenson v Cardiac & Thoracic Surgery of E. Tenn, P.C. (2004, CA6 Tenn) 388 F3d 976, cert den *(2005) 544 US 961, 125 S Ct 1731, 161 L Ed 2d 602* and cert den *(2005) 544 US 961, 125 S Ct 1731, 161 L Ed 2d 602.*

*FRCP 37(c)(1)* is self-executing, and exclusion of undisclosed information is automatic; thus, there is no need for opposing party to make motion to compel disclosure as authorized by former *FRCP 37(a)(2)(A)* in order to compel further disclosure, as predicate for imposition of sanction of exclusion. 1st Source Bank v First Resource Fed. Credit Union (1996, ND Ind) 167 FRD 61.

Notwithstanding mandatory language of *FRCP 37(c)(1)*, rule vests courts with discretion in its provision that no sanction should be imposed if there was substantial justification for nondisclosure, or if nondisclosure was harmless. ABB Air Preheater v Regenerative Envtl. Equip. Co. (1996, DC NJ) 167 FRD 668, 39 USPQ2d 1202.

Sanction of exclusion under *FRCP 37(c)(1)* is automatic and mandatory unless party to be sanctioned can show that its violation of *FRCP 26(a)* was either justified or harmless. Ohime v Foresman (1999, ND Ind) 186 FRD 507, 44 FR Serv 3d 408.

Sanction of exclusion under *FRCP 37(c)(1)* for failure to make disclosure or to supplement responses as required by *FRCP 26(a)* is automatic and mandatory unless party to be sanctioned can show that its violation of *FRCP 26(a)* was either justified or harmless. Continental Lab. Prods., Inc. v Medax Int'l, Inc. (2000, SD Cal) 195 FRD 675.

Because plaintiff insured--which sought payment under its business interruption insurance coverage--did not produce hotel room folios within time required by court's order, and because that failure was neither substantially justified nor harmless, *Fed. R. Civ. P. 37(c)(1)* automatically precluded insured from using these documents in support of motion, at hearing, or at trial. Bray & Gillespie Mgmt. LLC v Lexington Ins. Co. (2009, MD Fla) 259 FRD 591.

**302. Substantial justification for failure**

In exercising its broad discretion to determine whether nondisclosure of evidence is substantially justified or harmless for purposes of *FRCP 37(c)(1)* exclusion analysis, district court should be guided by following factors: (1) surprise to party against whom evidence would be offered; (2) ability of that party to cure surprise; (3) extent to which allowing evidence would disrupt trial; (4) importance of evidence; and (5) nondisclosing party's explanation for its failure to disclose evidence. S. States Rack & Fixture, Inc. v Sherwin-Williams Co. (2003, CA4 SC) 318 F3d 592, CCH Prod Liab Rep P 16502, 60 Fed Rules Evid Serv 603, 54 FR Serv 3d 998.

Sanctions order against attorneys could not stand, although the district judge's factual findings and credibility determinations were left intact, because the district court failed to apply the "substantial justification" standard to sanctions under *Fed. R. Civ. P. 26(g)* and *37(c)(1)*; court's opinion did not explain why general objections to discovery requests were improper. Grider v Keystone Health Plan Cent., Inc. (2009, CA3 Pa) 580 F3d 119.

*Fed. R. Civ. P. 37(c)(1)* is similar to *Fed. R. Civ. P. 26(g)* in that it expressly includes the "substantial justification" standard; a district court may impose sanctions where a party without substantial justification fails to disclose information required by certain enumerated subsections of Rule 26. Grider v Keystone Health Plan Cent., Inc. (2009, CA3 Pa) 580 F3d 119.

Substantial justification, for purposes of *FRCP 37(c)*, requires justification to degree that could satisfy reasonable person that parties could differ as to whether party was required to comply with disclosure request; proponent's position must have reasonable basis in law and fact, and test is satisfied if there exists genuine dispute concerning compliance. Fitz, Inc. v Ralph Wilson Plastics Co. (1997, DC NJ) 174 FRD 587, 39 FR Serv 3d 416; Chapple v Alabama (1997, MD Ala) 174 FRD 698, 39 FR Serv 3d 631.

Preclusion is appropriate unless: (1) there is substantial justification for failure; (2) failure to make disclosure is harmless; or (3) prejudice may be remedied by party; *Fed. R. Civ. P. 37(c)(1)* penalties should not apply if offending party's failure to disclose is substantially justified. Equant Integrations Servs. v United Rentals (N. Am.), Inc. (2002, DC Conn) 2002 US Dist LEXIS 26657, motion to strike gr, in part (2003, DC Conn) 217 FRD 113, 56 FR Serv 3d 736.

Substantial justification for purposes of *FRCP 37(c)(1)*, which calls for exclusion of evidence that should have been disclosed pursuant to *FRCP 26(a)* unless nondisclosing party provides substantial justification for its failure, is justification to degree that could satisfy reasonable person that parties could differ as to whether party was required to comply with disclosure request; test of substantial justification is satisfied if there exists genuine dispute concerning compliance. Tolerico v Home Depot (2002, MD Pa) 205 FRD 169.

In adversary proceeding in which (1) towing company had failed to meet any discovery deadlines for initial disclosures or designation of experts as required by *Fed. R. Civ. P. 26(a)* and (e)(1); (2) towing company filed motion to vacate summary judgment and/or for new trial; (3) towing company attached affidavits in support of its motion; and (4) corporate creditor moved to strike affidavits, pursuant to *Fed. R. Civ. P. 37(c)(1)*, bankruptcy court did not abuse its discretion in striking towing company's affidavits; record reflected complete absence of substantial justification by towing company for missing discovery deadlines. Paradise Towing, Inc. v CIT Group/Sales Fin., Inc. (2005, WD Tex) 368 BR 569.

Witness's affidavit was not excluded from evidence pursuant to *Fed. R. Civ. P. 37(c)(1)* because it appeared that plaintiff shoppers' failure to disclose affidavit and contact information before close of discovery was substantially justified; witness's affidavit stated that her telephone number was unlisted and that she understood that shoppers' attorneys had been trying to reach her for quite some time, but that she did not make herself available to give her statement until shortly after close of discovery. Hunter v Buckle, Inc. (2007, DC Kan) 488 F Supp 2d 1157.

Because late disclosure of family photographs and document from related probate case violated *Fed. R. Civ. P. 26(a)(1)(A)(ii)*, and plaintiffs neither offered justification for late disclosure, nor did they attempt to meet their burden of showing that late disclosure was harmless, plaintiffs' use of those materials was prohibited by *Fed. R. Civ. P. 37(c)(1)*. Forbes v 21st Century Ins. Co. (2009, DC Ariz) 258 FRD 335.

As plaintiffs' disclosure of witness and their ninth supplemental disclosure were untimely in violation of *Fed. R. Civ. P. 26(a)(1)(A)(I)*, plaintiffs' use of witness and documents were prohibited. Forbes v 21st Century Ins. Co. (2009, DC Ariz) 258 FRD 335.

Although plaintiff failed to disclose damages calculation as required by *Fed. R. Civ. P. 26(a)(1)(A)(iii)*, exclusion of testimony concerning calculation under *Fed. R. Civ. P. 37(c)(1)* was not warranted since nondisclosure was substantially justified; tax returns upon which calculation was based were not produced by defendants until after discovery was closed and only two weeks before trial, testimony was required for fair and accurate determination of damages, and defendants were not prejudiced by nondisclosure of documents in their possession. West v Hsu (In re Advanced Modular Power Sys.) (2009, BC SD Tex) 413 BR 643.

### 303. Harmless failure

In exercising its broad discretion to determine whether nondisclosure of evidence is substantially justified or harmless for purposes of *FRCP 37(c)(1)* exclusion analysis, district court should be guided by following factors: (1) surprise to party against whom evidence would be offered; (2)

ability of that party to cure surprise; (3) extent to which allowing evidence would disrupt trial; (4) importance of evidence; and (5) nondisclosing party's explanation for its failure to disclose evidence. S. States Rack & Fixture, Inc. v Sherwin-Williams Co. (2003, CA4 SC) 318 F3d 592, CCH Prod Liab Rep P 16502, 60 Fed Rules Evid Serv 603, 54 FR Serv 3d 998.

*Fed. R. Civ. P. 37(c)(1)* does not require witness preclusion for untimely disclosure if missing deadline is harmless. Rowland v Am. Gen. Fin., Inc. (2003, CA4 Va) 340 F3d 187, 92 BNA FEP Cas 734, 61 Fed Rules Evid Serv 1596.

In context of harm analysis under *Fed. R. Civ. P. 37(c)(1)*, findings are not always required; however, there is implicit expectation of focused consideration of harmlessness. Gagnon v Teledyne Princeton, Inc. (2006, CA1 Mass) 437 F3d 188.

In action brought by Securities and Exchange Commission (SEC) against chief financial officer of corporation arising out of officer's fraudulent accounting practices, district court did not err in allowing SEC to introduce expert's testimony via video of his deposition because expert was officer's own expert, and SEC was not required to disclose his identity under *Fed. R. Civ. P. 26(a)(2)(A)* during discovery as officer's legal team had his report and was at his deposition, and even if SEC should have identified expert during discovery as its own witness, error was harmless under *Fed. R. Civ. P. 37(c)(1)* given expert's status as officer's expert. SEC v Koenig (2009, CA7 Ill) 557 F3d 736, CCH Fed Secur L Rep P 95077.

Whether failure to disclose information is harmless (*FRCP 37(c)(1)*) largely depends upon whether omission caused other parties to suffer prejudice. U.S. Axminster v Chamberlain (1997, ND Miss) 176 FRD 532.

In order to exclude expert testimony for failure to comply with *FRCP 26(a)(2)(B)*, opposing party must be prejudiced; failure to comply is only harmless when there is no prejudice to party entitled to disclosure. Fitz, Inc. v Ralph Wilson Plastics Co. (1999, DC NJ) 184 FRD 532, 44 FR Serv 3d 1138.

Preclusion is appropriate unless: (1) there is substantial justification for failure; (2) failure to make disclosure is harmless; or (3) prejudice may be remedied by party. Equant Integrations Servs. v United Rentals (N. Am.), Inc. (2002, DC Conn) 2002 US Dist LEXIS 26657, motion to strike gr, in part (2003, DC Conn) 217 FRD 113, 56 FR Serv 3d 736.

Party's misconduct is harmless for purposes of *FRCP 37(c)(1)*, which calls for exclusion of evidence that should have been disclosed pursuant to *FRCP 26(a)* unless failure to make required disclosure is harmless, if it involves honest mistake, coupled with sufficient knowledge by other party of material that has not been produced. Tolerico v Home Depot (2002, MD Pa) 205 FRD 169.

Argument that declarations be stricken from use at summary judgment, and their testimony be foreclosed at trial, because neither declarant was disclosed pursuant to *Fed. R. Civ. P. 26(a)(1)(A)* or in response to relevant discovery, was rejected because although disclosure took place only one day before defendant hospital filed its dispositive motion, this allowed plaintiff hospital--which had prior knowledge of declarants--sufficient time to formulate its

response to dispositive motion, with new information included; therefore, failure to disclose was harmless or justified, and sanctions were not required pursuant to *Fed. R. Civ. P. 37(c)(1)*. Heartland Surgical Specialty Hosp., LLC v Midwest Div., Inc. (2007, DC Kan) 527 F Supp 2d 1257, CCH Bankr L Rptr P 75957, 2007-2 CCH Trade Cases P 75957, motion gr, in part, motion den, in part, motion gr, costs/fees proceeding, request den (2007, DC Kan) 2007 US Dist LEXIS 80182.

In Fair Labor Standards Act case brought by employees against employer, compliance action report issued to employer by United States Department of Labor, which employer failed to disclose under *Fed. R. Civ. P. 26(a)*, was not excluded under *Fed. R. Civ. P. 37(c)(1)* because failure to produce report was clearly harmless; employees possessed report and could not claim surprise or prejudice. Kautsch v Premier Communs. (2008, WD Mo) 13 BNA WH Cas 2d 1289.

Although plaintiffs did not provide any explanation for their failure to disclose their expert's supplemental declaration until 14 months after close of discovery in their patent infringement action (and therefore, failure was not substantially justified), court considered evidence because failure was harmless; declaration, far from creating genuine issue of material fact, provided substantial support for defendant's claim of noninfringement. Schindler Elevator Corp. v Otis Elevator Co. (2008, SD NY) 586 F Supp 2d 231.

Fast-food restaurant franchisor was not entitled to sanctions under *Fed. R. Civ. P. 37(c)(1)* after counsel for disabled plaintiffs in action under Americans with Disabilities Act, 42 USCS §§ 12101 et seq., failed to turn over potential class members' contact information in timely manner; striking declarations of witnesses and precluding reliance on witnesses in plaintiffs' class certification motion would be far too harsh where franchisor suffered no substantial harm. Castaneda v Burger King Corp. (2009, ND Cal) 264 FRD 557.

In consumer's suit alleging strict products liability, consumer's failure to identify treating dentist as expert witness under *Fed. R. Civ. P. 26(a)(2)* was harmless because defendants had adequate notice that dentist could be called as witness and, in fact, already took dentist's deposition. Silverstein v P&G Mfg. Co. (2009, SD Ga) 700 F Supp 2d 1312.

In action in which employee alleged that he was terminated as result of employer's excessive concern about its workers' compensation costs, employee's failure to identify injured worker by name as required by *Fed. R. Civ. P. 26(a)(1)(A)* was substantially harmless and did not require exclusion of evidence under *Fed. R Civ. P. 37(c)(1)* because employer knew injured worker's name and had ample opportunity to obtain testimony from him. Leavitt v SW&B Constr. Co., LLC (2011, DC Me) 765 F Supp 2d 263, 24 AD Cas 878.

In action under Americans with Disabilities Act, employee was not entitled under *Fed. R. Civ. P. 37(c)(1)* to strike exhibit identified by employer in its pretrial disclosure filing; although employer failed to disclose exhibit as required under *Fed. R. Civ. P. 26(a)*, (e), such failure was harmless because employee had sufficient amount of time to examine document and prepare for its potential use at trial by employer. Norton v Assisted Living Concepts, Inc. (2011, ED Tex) 786 F Supp 2d 1173, 24 AD Cas 1061, 79 FR Serv 3d 777.

In discrimination case, employer's failure to timely disclose employee's personnel records was harmless and therefore did not justify prohibiting use of employee's deposition testimony under *Fed. R. Civ. P. 37(c)(1)* and *26(g)(3)*; subjects addressed in documents, including attendance and work performance issues, were ones with which employee had unique familiarity. Been v N.M. Dep't of Info. Tech. (2011, DC NM) 815 F Supp 2d 1222.

Vendor did not fail to disclose information presented by its witness's declaration in its answers to discovery; rather, Chapter 7 trustee's counsel simply failed to ask witness what he knew with respect to *11 USCS § 547(c)(2)(C)* (amended 2005) issue in any detail at witness's deposition; thus, there was no basis on which to exclude declaration under *Fed. R. Civ. P. 37(c)(1)*. Webster v Fujitsu Consulting, Inc. (NETtel Corp.) (2007, BC DC Dist Col) 369 BR 50.

Although surety failed to identify consultant as witness in litigation against bankruptcy debtor, exclusion of consultant's testimony under *Fed. R. Civ. P. 37(c)(1)* was not warranted since debtor identified consultant as potential witness in debtor's own disclosures, and thus nondisclosure was harmless. Hartford Fire Ins. Co. v Sambrano (In re Sambrano) (2010, BC WD Tex) 440 BR 702.

Although surety failed to provide calculation of damages in surety's initial disclosures in litigation against bankruptcy debtor, exclusion of evidence of damages under *Fed. R. Civ. P. 37(c)(1)* was not warranted since surety provided requisite information in its proof of claim in bankruptcy case, and thus nondisclosure was harmless. Hartford Fire Ins. Co. v Sambrano (In re Sambrano) (2010, BC WD Tex) 440 BR 702.

Unpublished Opinions

Unpublished: Plaintiff subcontractor's *Fed. R. Civ. P. 26(e)(1)(A)* violation was harmless under *Fed. R. Civ. P. 37(c)(1)* because although defendant contractor was surprised by new witness's testimony, trial continued undisturbed and record contained abundant evidence of racial animus aside from new witness's testimony, including testimony of prior employee for contractor about his termination, racially charged dinner celebrating subcontractor's termination, and direction by one supervisor, who had made racially derogatory remarks, to accounting department to stop paying subcontractor for work already completed. Worldwide Network Servs., LLC v DynCorp Int'l, LLC (2010, CA4 Va) 2010 US App LEXIS 2914.

Unpublished: Denial of sanctions for employer's failure to supplement responses to employee's interrogatories was not abuse of discretion; employee sought to strike evidence regarding co-worker's training that had not been disclosed in interrogatory responses, but district court found that failure to supplement was harmless because employee had been supplied with training guides and policies and had not deposed co-worker about training. Smith v UPS (2011, CA9 Nev) 2011 US App LEXIS 10225.

Unpublished: In breach of contract case, defendant's failure to identify 10 witnesses in defendant's *Fed. R. Civ. P. 26* disclosures did not warrant preclusion of witnesses' testimony, as failure was harmless under *Fed. R. Civ. P. 37(c)(1)*; plaintiff had learned of witnesses during pretrial conference and had waited two years to object; during that two-year period, plaintiff had

repeatedly expressed assent to proposed witness list and had made no effort to depose or further inquire as to witnesses. G.O.D., Inc. v USF Corp. (2007, DC NJ) 2007 US Dist LEXIS 73866.

**304. Prejudice**

Whether failure to disclose information is harmless (*FRCP 37(c)(1)*) largely depends upon whether omission caused other parties to suffer prejudice. U.S. Axminster v Chamberlain (1997, ND Miss) 176 FRD 532.

Exclusion of evidence as sanction for failure to supply written report of expert as required by *FRCP 26(a)(2)(B)* is severe sanction, and is inappropriate unless failure is in bad faith or resultant prejudice to opposing party cannot be cured. Lithuanian Commerce Corp. v Sara Lee Hosiery (1997, DC NJ) 177 FRD 245, 49 Fed Rules Evid Serv 84, vacated in part on other grounds, summary judgment gr, in part, summary judgment den, in part (1998, DC NJ) 179 FRD 450.

In order to exclude expert testimony for failure to comply with *FRCP 26(a)(2)(B)*, opposing party must be prejudiced; failure to comply is only harmless when there is no prejudice to party entitled to disclosure. Fitz, Inc. v Ralph Wilson Plastics Co. (1999, DC NJ) 184 FRD 532, 44 FR Serv 3d 1138.

Preclusion is appropriate unless: (1) there is substantial justification for failure; (2) failure to make disclosure is harmless; or (3) prejudice may be remedied by party. Equant Integrations Servs. v United Rentals (N. Am.), Inc. (2002, DC Conn) 2002 US Dist LEXIS 26657, motion to strike gr, in part (2003, DC Conn) 217 FRD 113, 56 FR Serv 3d 736.

Seller of children's drinking cups was not entitled to exclude under *Fed. R. Civ. P. 37(c)* certain photographs offered in patent infringement suit by plaintiffs, assignee and licensee of patents relating to disposable spill-resistant "sippy cups"; although photographs were not timely disclosed under *Fed. R. Civ. P. 26*, seller was not prejudiced because photographs depicted cross-section of seller's own cups. First Years, Inc. v Munchkin, Inc. (2008, WD Wis) 575 F Supp 2d 1002.

Defendant failed to provide timely supplementation of its responses to two interrogatories, defendant failed to show that such failure was substantially justified, and plaintiffs made substantial showing of unfair prejudice occasioned by such failure, so references at issue were stricken from summary judgment record, *Fed. R. Civ. P. 37(c)(1)*. Pigott v Sanibel Dev., LLC (2008, SD Ala) 576 F Supp 2d 1258.

Court refused to strike three declarations pursuant to *Fed. R. Civ. P. 37(c)* on ground that plaintiffs failed to identify three individuals as potential witnesses, as required by *Fed. R. Civ. P. 26(e)*; there was no evidence that failure to disclose witnesses prejudiced defendants. Arista Records LLC v Lime Group LLC (2010, SD NY) 715 F Supp 2d 481, 96 USPQ2d 1437, injunction gr (2010, SD NY) 2010 US Dist LEXIS 115675.

In action where employee alleged race discrimination based upon pay, employee established prima facie case of comparability by offering two coworkers; one coworker was not excluded

under *Fed. R. Civ. P. 37* because employer was not prejudiced by failure to identify him in discovery responses; as to another coworker, employer's stated reasons for challenged personnel action were suspect, and genuine issues of fact lingered; employee met his burden of showing such weaknesses and implausibilities in employer's proffered reasons for compensating him at lower rate than second coworker that reasonable factfinder could have deemed those reasons unworthy of credence and could have found that race discrimination was real reason for challenged personnel action. Sharpe v Global Sec. Int'l (2011, SD Ala) 766 F Supp 2d 1272.

Although surety failed to identify forensic accountant as witness in litigation against bankruptcy debtor, exclusion of accountant's testimony under *Fed. R. Civ. P. 37(c)(1)* was not warranted since prejudice to debtor was not likely in view of fact that accountant was only permitted to testify as fact witness, rather than expert witness. Hartford Fire Ins. Co. v Sambrano (In re Sambrano) (2010, BC WD Tex) 440 BR 702.

Surety's failure to identify employee of surety as witness in litigation against bankruptcy debtor warranted exclusion of employee's testimony under *Fed. R. Civ. P. 37(c)(1)* since discovery was closed before employee was identified, and thus allowing testimony would be prejudicial to debtor. Hartford Fire Ins. Co. v Sambrano (In re Sambrano) (2010, BC WD Tex) 440 BR 702.

Although surety failed to identify records of bankruptcy debtor's construction company in surety's initial disclosures in litigation against debtor, exclusion of records under *Fed. R. Civ. P. 37(c)(1)* was not warranted since certain of records were produced by debtor during discovery, and prejudice to surety from exclusion of records was not outweighed by prejudice to debtor who was presumably familiar with records as principal of company. Hartford Fire Ins. Co. v Sambrano (In re Sambrano) (2010, BC WD Tex) 440 BR 702.

Unpublished Opinions

Unpublished: District court did not abuse its discretion in determining that, pursuant to *Fed. R. Civ. P. 37(c)(1)*, appellant was not prejudiced by corporation's discovery violations because appellant was aware of corporation's theory of case but failed to call key witness to rebut corporation's theory that witness approved specific work items for fishing vessel; because district court did not err in conducting its Rule 37(c)(1) analysis, appellant was not entitled to new trial. Mar Com, Inc. v F/V Hickory Wind (2008, CA9 Alaska) 2008 US App LEXIS 8343.

Unpublished: District court did not abuse its discretion in admitting a city's copy of a 911 calls tape and denying an arrestee's request to admit his copy because (1) there was no evidence submitted that the city forged the 911 call tape; (2) the arrestee was not prejudiced by the district court's refusal to permit him to enter a tape of the second call into evidence because his wife testified that she did not report to the 911 dispatch that the arrestee assaulted her; and (3) the arrestee failed to disclose his copy of the 911 calls to either the city or to the police officers, and did not list his copy as an exhibit. Lips v City of Hollywood (2009, CA11 Fla) 2009 US App LEXIS 21384.

Unpublished: District court did not abuse its discretion by excluding certain testimony about costs incurred in connection with selling quilt at issue in copyright infringement action because

spreadsheets were summary evidence culled from underlying data that defendants had not produced; given proximity to trial, lack of any compelling excuse for failure to produce such documentation, and prejudice to plaintiff that would have resulted from allowing witness to testify to costs that plaintiff had no means of verifying or disputing, district court acted within its discretion in granting plaintiff's motion in limine. Kam Hing Enters. v Wal-Mart Stores, Inc. (2010, CA2 NY) 2010 US App LEXIS 184.

Unpublished: District court did not abuse its discretion by denying taxpayers' motion for discovery sanctions under *Fed. R. Civ. P. 37(c)(1)* and admitting late-discovered evidence, mail listing of final partnership administrative adjustment (FPAA) establishing proper notice of their partnership's proceedings, because there was no prejudice or surprise to taxpayers who were well aware, early in litigation and based on government's response to their production request and 60-day discovery extension, that it had records suggesting that it mailed FPAA to their correct address; they did not show how their case could have been presented in more positive light had they gained access to mail listing earlier in proceedings; and any prejudice was cured when they were granted additional time to conduct depositions. Canterna v United States (2008, CA3 Pa) 2008-2 USTC P 50476.

**305. Bad faith**

Although "bad-faith" violation of *Fed. R. Civ. P. 26* is not required in order to exclude evidence pursuant to *Fed. R. Civ. P. 37*, it can be taken into account as part of party's explanation for its failure to comply. Design Strategy, Inc. v Davis (2006, CA2 NY) 469 F3d 284, 25 BNA IER Cas 466, 153 CCH LC P 60286, 66 FR Serv 3d 550.

Under Ninth Circuit law, when sanction amounts to dismissal of claim, district court is required to consider whether claimed noncompliance involved willfulness, fault, or bad faith, and also to consider availability of lesser sanctions; Ninth Circuit has reaffirmed existence of that requirement when district court conducts harmlessness inquiry required under *Fed. R. Civ. P. 37(c)(1)*. R & R Sails, Inc. v Ins. Co. of Pa. (2012, CA9 Cal) 673 F3d 1240.

Although district did not abuse its discretion in finding that plaintiff failed to meet its obligations under *Fed. R. Civ. P. 26(a)(1)* and *26(e)(1)*, district court did not make findings sufficient to support its preclusion of invoices under *Fed. R. Civ. P. 37(c)(1)* because preclusion dealt fatal blow to plaintiff's entire Brandt fees claim and its request for punitive damages; when sanction amounted to dismissal of claim, district court was required to consider whether claimed noncompliance involved willfulness, fault, or bad faith, and also to consider availability of lesser sanctions, and it did not appear that district court conducted that inquiry. R & R Sails, Inc. v Ins. Co. of Pa. (2012, CA9 Cal) 673 F3d 1240.

Precluding testimony from expert under *FRCP 37(c)(1)* is drastic remedy and should only be applied in cases where party's conduct represents flagrant bad faith and callous disregard of federal rules. McNerney v Archer Daniels Midland Co. (1995, WD NY) 164 FRD 584, 68 CCH EPD P 44205.

Exclusion of evidence as sanction for failure to supply written report of expert as required by *FRCP 26(a)(2)(B)* is severe sanction, and is inappropriate unless failure is in bad faith or

resultant prejudice to opposing party cannot be cured. Lithuanian Commerce Corp. v Sara Lee Hosiery (1997, DC NJ) 177 FRD 245, 49 Fed Rules Evid Serv 84, vacated in part on other grounds, summary judgment gr, in part, summary judgment den, in part (1998, DC NJ) 179 FRD 450.

In federal employee's discrimination and retaliation suit, employee's request for imposition of sanctions under *Fed. R. Civ. P. 37(c)* on ground that her employer failed to disclose existence of witness who might testify on issue of whether employee's suit was timely filed was denied because (1) primary sanction sought by employee, exclusion of new timeliness evidence, was mooted by court's conclusion that even with witness's evidence, employer did not succeed on its timeliness argument; and (2) employer acted in good faith in offering further evidence on timeliness issue where court had opined that employer's evidence on this issue was lacking. Nuskey v Hochberg (2009, DC Dist Col) 657 F Supp 2d 47.

### 306. Burden of proof

With respect to sanctioning party that fails to disclose expert reports, as required by *FRCP 26(a)(2)(B)*, offending party has burden of showing either that substantial justification excuses disclosure or that failure to disclose is harmless. Palmer v Rhodes Mach. (1999, ND Okla) 187 FRD 653.

For purposes of *FRCP 37(c)(1)*, which calls for exclusion of evidence that should have been disclosed pursuant to *FRCP 26(a)* unless nondisclosing party provides substantial justification for its failure or failure to make required disclosure is harmless, nonproducing party shoulders burden of proving substantial justification for its conduct or that failure to produce was harmless. Tolerico v Home Depot (2002, MD Pa) 205 FRD 169.

Plaintiff had burden of proving she had substantial justification for late expert witness filing or that it was harmless. Pauls v Green (2011, DC Idaho) 816 F Supp 2d 961.

### 307. Waiver or loss of right to seek sanction

District court did not abuse its discretion in allowing witness to testify, even though defendants had failed to provide expert witness report required by U.S. Dist. Ct., S.D. Fla., R. 16.1(K) and *Fed. R. Civ. P. 26(a)(2)(B)*, where witness had no connection to specific events underlying case apart from his preparation for trial, he merely reviewed police reports and depositions provided by counsel and offered expert opinions on level of force exhibited by plaintiff and appropriateness of officers' response; based on assertion by plaintiff's counsel that plaintiff had no problem with witness testifying if defendants provided summary of testimony, and providing those documents by defendant, district court could have reasonably concluded that plaintiff had withdrawn his objection. Prieto v Malgor (2004, CA11 Fla) 361 F3d 1313, 63 Fed Rules Evid Serv 1069, 58 FR Serv 3d 198, 17 FLW Fed C 275 (criticized in Adams v Gateway, Inc. (2006, DC Utah) 2006 US Dist LEXIS 14413).

Expert's testimony was properly relied upon in summary judgment order when objecting opposing party both examined expert witness at his deposition, and itself cited to witness's deposition transcript in its own summary judgment motion; therefore, disclosure lapse was

"harmless" and objecting opposing party waived its *Fed. R. Civ. P. 37(c)* argument. *Goodworth Holdings, Inc. v Suh (2002, ND Cal) 239 F Supp 2d 947.*

**308. Expert witness testimony exclusion**

District court's decision to exclude expert testimony pursuant to *Fed. R. Civ. P. 37(c)(1)*, as sanction for discovery misconduct, is reviewed on appeal for abuse of discretion. Dickenson v Cardiac & Thoracic Surgery of E. Tenn, P.C. (2004, CA6 Tenn) 388 F3d 976, cert den *(2005) 544 US 961, 125 S Ct 1731, 161 L Ed 2d 602* and cert den *(2005) 544 US 961, 125 S Ct 1731, 161 L Ed 2d 602.*

In arrestee's action claiming deprivation of his *U.S. Const. amend. IV* rights under *42 USCS § 1983*, district court abused its discretion in denying arrestee's motion in limine seeking to bar under *Fed. R. Civ. P. 37(c)(1)* testimony of police officers' witness who was expert on gang-related activities; witness fell squarely in category of witnesses to which *Fed. R. Civ. P. 26(a)(2)(B)* applied and, therefore, should not have been permitted to testify without providing written expert report. Torres v City of L.A. (2008, CA9 Cal) 540 F3d 1031.

Decision to exclude expert testimony for failure to comply with *FRCP 26(a)(2)(B)* is within discretion of trial court. Fitz, Inc. v Ralph Wilson Plastics Co. (1999, DC NJ) 184 FRD 532, 44 FR Serv 3d 1138.

Exclusion of expert testimony based on party's failure to properly and timely designate experts, as required by *FRCP 26(a)(2)(B)*, is governed by explanation for failure to identify witness, importance of testimony, potential prejudice in allowing testimony, and availability of continuance to cure such prejudice. Seymour v Consolidated Freightways (1999, SD Miss) 187 FRD 541, 44 FR Serv 3d 1309, subsequent app (2001, CA5 Miss) *273 F3d 1102.*

In U. S. District Court for Southern District of New York, courts use four-part test to determine whether to exclude untimely expert testimony under *Fed. R. Civ. P. 37(c)(1)* that considers: (1) surprise or prejudice suffered by moving party; (2) ability of that party to cure prejudice; (3) whether waiver of rule against calling unlisted witnesses is appropriate; and (4) whether there is bad faith or willfulness in failing to comply with court order. Equant Integrations Servs. v United Rentals (N. Am.), Inc. (2002, DC Conn) 2002 US Dist LEXIS 26657, motion to strike gr, in part (2003, DC Conn) 217 FRD 113, 56 FR Serv 3d 736.

If party does not disclose expert pursuant to *Fed. R. Civ. P. 26(a)*, (e), then that party cannot rely on that expert at trial or in opposing motion for summary judgment, *Fed. R. Civ. P. 37(c)*. Swanson v Senior Res. Connection (2003, SD Ohio) 254 F Supp 2d 945.

Developers were entitled to sanctions under *Fed. R. Civ. P. 37(c)* of attorneys' fees and exclusion of expert testimony for county's summary judgment motion, because county failed to make required disclosures of experts' testimony, pursuant to *Fed. R. Civ. P. 26(a)* and N.D. Ga. R. 26.2. Hallmark Developers v Fulton County (2004, ND Ga) 2004 US Dist LEXIS 30616, judgment entered (2005, ND Ga) 386 F Supp 2d 1369, affd (2006, CA11 Ga) 466 F3d 1276, 20 FLW Fed C 37.

Defendant's *Fed. R. Civ. P. 37* motion to strike two workers' *Fed. R. Civ. P. 26(a)(2)* disclosure or to preclude expert testimony was denied because, taken together, workers' amended disclosure met R. 26(a)(2)(B) requirements since (1) workers did not have to produce report in connection with testimony of one individual who was not retained or specially employed by workers to provide expert testimony and who was not employee or agent of workers or their counsel; (2) deposition testimony of one expert, which was given in prior suit, could be incorporated into that expert's report; (3) although workers could simply list experts' publications, they could not list number of cases in which those experts had previously testified without providing some identifying information about cases, such as case names, jurisdiction involved, or trial dates; and (4) workers' disclosure was partially deficient as to one expert because they did not disclose facts and data on which that expert's opinion was based. Lewis v PDV Am., Inc. (2007, ND Ill) 247 FRD 544, summary judgment gr, partial summary judgment den, as moot (2008, ND Ill) 2008 US Dist LEXIS 6756.

Although manufacturer suffered some prejudice, treating physician's testimony was not stricken under *Fed. R. Civ. P. 37* because witness was deemed to be timely disclosed (since he was identified and his opinions were made available) as expert for *Fed. R. Civ. P. 26(a)(2)(A)* purposes; however, witness's expert report was not timely disclosed and it was stricken; striking report did not preclude his "fact opinion" testimony as he was hybrid witness from whom no Rule 26(a)(2)(B) disclosures were required for opinions relevant to that capacity; however, scope of testimony was circumscribed. Farris v Intel Corp. (2007, DC NM) 493 F Supp 2d 1174.

Court refused, pursuant to *Fed. R. Civ. P. 37(c)(1)*, to strike that portion of expert's affidavit concerning his qualifications because that information was allegedly not disclosed in expert's report or his curriculum vitae; report and curriculum vitae were detailed and clearly reflected expert's expertise in areas in which he offered opinions. Raytheon Aircraft Co. v United States (2008, DC Kan) 75 Fed Rules Evid Serv 1114, judgment entered, findings of fact/conclusions of law (2008, DC Kan) 556 F Supp 2d 1265, 38 ELR 20141.

Even if witness's training and experience could have qualified her as expert in another case, she was not expert on prohibition matter under *Fed. R. Evid. 702* since untrained layman could understand addition, subtraction, multiplication, and division displayed in estimate without assistance of expert; accordingly, court denied entity's motion in limine to exclude estimate and witness's testimony under *Fed. R. Civ. P. 26(a)(2)* and *Fed. R. Civ. P. 37(c)*, and also denied corporation's alternative motion to extend discovery deadlines. Qwest Corp. v Elephant Butte Irrigation Dist. (2008, DC NM) 616 F Supp 2d 1110.

Pursuant to N.D. Ga. R. 26.2(C) and *Fed. R. Civ. P. 37(c)(1)*, court declined to rely on declaration as to insolvency and reasonably equivalent value, which it found to be improper supplemental expert report submitted out of time, in violation of requirements in *Fed. R. Civ. P. 26(a)(2)*, far after close of discovery and with no possibility for cross examination. Kipperman v Onex Corp. (2009, ND Ga) 411 BR 805.

Defendant had not shown that its failure was substantially justified, and information was obviously important and prejudicial to plaintiffs; expert's opinion, that house could have been rebuilt in ten months, was therefore stricken. Woodworth v Erie Ins. Co. (2010, WD NY) 743 F Supp 2d 201.

Unpublished Opinions

Unpublished: Where plaintiff doctor argued district court abused its discretion by refusing to allow testimony of his expert witnesses, but it was clear that he was untimely in designating expert witnesses as required by pre-trial order and failure to comply was not substantially justified or harmless as provided by *Fed. R. Civ. P. 37(c)(1)*, it was not error to refuse to allow experts to testify; while experts had testified during arbitration proceeding with defendant hospital, that testimony had been on different issues than they would have been asked to testify on in federal proceedings. Grain v Trinity Health (2011, CA6 Mich) 2011 FED App 462N.

Unpublished: Under *Fed. R. Civ. P. 37*, district court properly permitted testimony of expert, as testimony did not exceed scope of expert's report in contravention of *Fed. R. Civ. P. 26*; report had complied with Rule 26 requirements, testimony did not warrant preclusion, and final pre-trial order put plaintiff on notice of defendant's defense. Lorme v Delta Air Lines, Inc. (2007, CA2) 2007 US App LEXIS 24701.

Unpublished: In breach of contract case, artist's expert's opinion, which was not included in his earlier expert report, was not admissible by means of affidavit filed in opposition to record company's motion for summary judgment. Franconero v UMG Recordings, Inc. (2013, CA2 NY) 2013 US App LEXIS 20765.

Unpublished: When homeowners sued builder for negligence and breach of contract, builder was not allowed, under *Fed. R. Civ. P. 37(c)(1)*, to present damages experts at trial because builder did not timely provide experts' reports, as required by *Fed. R. Civ. P. 26(a)(2)(B)*, since materials that were provided did not disclose (1) experts' qualifications, apart from reference to one expert's "38 years of experience" and client list, (2) other cases in which experts testified in last four years, or (3) experts' compensation. Adams v J. Meyers Builders, Inc. (2009, DC NH) 2009 DNH 181.

Unpublished: When homeowners sued builder for negligence and breach of contract, builder was not allowed, under *Fed. R. Civ. P. 37(c)(1)*, to present damages experts at trial because builder did not meet builder's burden to show that builder's failure to timely present experts' reports was substantially justified or harmless as builder's harmlessness claim that builder provided sufficient information to comply with intent of *Fed. R. Civ. P. 26(a)(2)(B)* failed, since Rule itself stated what information was sufficient to comply with Rule's intent, and that information was not provided. Adams v J. Meyers Builders, Inc. (2009, DC NH) 2009 DNH 181.

Unpublished: When homeowners sued builder for negligence and breach of contract, builder was not allowed, under *Fed. R. Civ. P. 37(c)(1)*, to present damages experts at trial because builder did not meet builder's burden to show that builder's failure to timely present experts' reports was harmless by arguing that homeowners did not object prior to moving in limine to exclude witnesses' testimony, as applicable scheduling order did not require such objection. Adams v J. Meyers Builders, Inc. (2009, DC NH) 2009 DNH 181.

Unpublished: In employee's action under Federal Tort Claims Act, 28 USCS §§ 2671 et seq., arising from motor vehicle accident, new expert witnesses were excluded under *Fed. R. Civ. P.*

*37(c)(1)*; late disclosure of witnesses was not substantially justified when employee was aware of her medical condition before close of fact discovery, and allowing witnesses would result in delay and prejudice to Government. Roberts v United States (2012, DC NJ) 2012 US Dist LEXIS 86762.

Unpublished: Expert's opinion, filed with plaintiff debtors' summary judgment motion, was excluded because issue opined upon, whether mortgage loan was properly conveyed to trust, had no bearing on determination of party entitled to enforce note Lo Sia v BAC Home Loasn Servicing (In re Lo Sia) (2013, BC DC NJ) 2013 Bankr LEXIS 3559.

## Research References & Practice Aids

**Related Statutes &** Rules:

Award of costs to prevailing party in civil action by or against United States, *28 USCS § 2412*.

Sanctions on account of misleading or unsigned pleadings, *USCS* Rules of Civil Procedure, Rule 11.

General provisions regarding discovery, *USCS* Rules of Civil Procedure, Rule 26.

Protective orders, *USCS* Rules of Civil Procedure, Rule 26(c).

Deposition upon oral examination, USCS Rules of Civil Procedure, Rule 30.

Sanction affecting special notice of oral deposition, USCS Rules of Civil Procedure, Rule 30(b)(2).

Requirement that corporation or other organization designate deponent, USCS Rules of Civil Procedure, Rule 30(b)(6).

Payment of expenses because of failure to attend taking of deposition or to serve subpoena, USCS Rules of Civil Procedure, Rule 30(g).

This rule is referred to in USCS Rules of Civil Procedure, Rule 30(d).

Depositions upon written questions, USCS Rules of Civil Procedure, Rule 31.

Service of notice and written questions, USCS Rules of Civil Procedure, Rule 31(a).

Interrogatories to parties, USCS Rules of Civil Procedure, Rule 33.

Production of documents and things and entry upon land for inspection and other purposes, USCS Rules of Civil Procedure, Rule 34.

Physical and mental examination of persons, USCS Rules of Civil Procedure, Rule 35.

Requests for admissions by party, USCS Rules of Civil Procedure, Rule 36.

**Federal Procedure:**

1 Moore's Federal Practice (Matthew Bender 3d ed.), ch 1, Scope and Purpose § 1.05.

1 Moore's Federal Practice (Matthew Bender 3d ed.), ch 5, Service and Filing of Pleadings and Other Papers § 5.33.

1 Moore's Federal Practice (Matthew Bender 3d ed.), ch 6, Computing and Extending Time; Time for Motion Papers § 6.07.

2 Moore's Federal Practice (Matthew Bender 3d ed.), ch 7, Pleadings Allowed; Form of Motions and Other Papers § 7.03.

2 Moore's Federal Practice (Matthew Bender 3d ed.), ch 8, General Rules of Pleading § 8.02.

2 Moore's Federal Practice (Matthew Bender 3d ed.), ch 11, Signing of Pleadings, Motions, and Other Papers; Representations to the Court; Sanctions §§ 11.24, 11.25, 11.42.

3 Moore's Federal Practice (Matthew Bender 3d ed.), ch 16, Pretrial Conferences; Scheduling; Management §§ 16.33, 16.36, 16.72, 16.73, 16.75, 16.77, 16.90-16.92, 16.94.

6 Moore's Federal Practice (Matthew Bender 3d ed.), ch 26, Duty to Disclose; General Provisions Governing Discovery §§ 26.06, 26.07, 26.102, 26.108, 26.131, 26.132, 26.145, 26.151, 26.152, 26.154, 26.22-26.24, 26.27, 26.41.

6 Moore's Federal Practice (Matthew Bender 3d ed.), ch 28, Persons Before Whom Depositions May Be Taken § 28.16.

7 Moore's Federal Practice (Matthew Bender 3d ed.), ch 30, Depositions by Oral Examination §§ 30.03, 30.21, 30.25, 30.43, 30.51.

7 Moore's Federal Practice (Matthew Bender 3d ed.), ch 31, Depositions by Written Questions § 31.17.

7 Moore's Federal Practice (Matthew Bender 3d ed.), ch 32, Using Depositions in Court Proceedings § 32.43.

7 Moore's Federal Practice (Matthew Bender 3d ed.), ch 33, Interrogatories to Parties §§ 33.06, 33.100, 33.140-33.143, 33.171, 33.172, 33.41, 33.62.

7 Moore's Federal Practice (Matthew Bender 3d ed.), ch 34, Producing Documents, Electronically Stored Information, and Tangible Things, or Entering onto Land, for Inspection and Other Purposes §§ 34.02, 34.03, 34.11, 34.13, 34.14, 34.16.

7 Moore's Federal Practice (Matthew Bender 3d ed.), ch 35, Physical and Mental Examinations § 35.06.

7 Moore's Federal Practice (Matthew Bender 3d ed.), ch 35, Physical and Mental Examinations § 35.11.

7 Moore's Federal Practice (Matthew Bender 3d ed.), ch 36, Requests for Admission § 36.11.

7 Moore's Federal Practice (Matthew Bender 3d ed.), ch 37, Failure to Make Disclosures or to Cooperate in Discovery; Sanctions §§ 37.02 et seq.

7 Moore's Federal Practice (Matthew Bender 3d ed.), ch 37A, Discovery of Computer-Based Information §§ 37A.10, 37A.11, 37A.20, 37A.27, 37A.43, 37A.44, 37A.50, 37A.51, 37A.53-37A.57.

8 Moore's Federal Practice (Matthew Bender 3d ed.), ch 41, Dismissal of Actions § 41.52.

9 Moore's Federal Practice (Matthew Bender 3d ed.), ch 53, Masters §§ 53.23, 53.31, 53.32.

10 Moore's Federal Practice (Matthew Bender 3d ed.), ch 54, Judgment; Costs §§ 54.71, 54.171.

10 Moore's Federal Practice (Matthew Bender 3d ed.), ch 55, Default; Default Judgment §§ 55.02, 55.03, 55.11, 55.32, 55.50.

13 Moore's Federal Practice (Matthew Bender 3d ed.), ch 69, Execution § 69.04.

13 Moore's Federal Practice (Matthew Bender 3d ed.), ch 71.1, Condemning Real or Personal Property § 71.1.04.

13 Moore's Federal Practice (Matthew Bender 3d ed.), ch 71, Enforcing Relief for or Against a Nonparty § 71.04.

14 Moore's Federal Practice (Matthew Bender 3d ed.), ch 81, Applicability of the Rules in General; Removed Actions § 81.07.

14 Moore's Federal Practice (Matthew Bender 3d ed.), ch 83, Rules By District Courts; Judge's Directives § 83.02.

16 Moore's Federal Practice (Matthew Bender 3d ed.), ch 107, Removal § 107.41.

16 Moore's Federal Practice (Matthew Bender 3d ed.), ch 108, Territorial Jurisdiction: Jurisdiction Over Persons and Property § 108.140.

17A Moore's Federal Practice (Matthew Bender 3d ed.), ch 124, The Erie Doctrine and Applicable Law § 124.07.

18 Moore's Federal Practice (Matthew Bender 3d ed.), ch 131, Claim Preclusion and Res Judicata § 131.30.

18 Moore's Federal Practice (Matthew Bender 3d ed.), ch 132, Issue Preclusion and Collateral Estoppel § 132.03.

19 Moore's Federal Practice (Matthew Bender 3d ed.), ch 202, Final Judgments §§ 202.02, 202.07.

19 Moore's Federal Practice (Matthew Bender 3d ed.), ch 203, Interlocutory Orders § 203.10.

29 Moore's Federal Practice (Matthew Bender 3d ed.), ch 701, History of Admiralty Practice §§ 701.04, 701.05.

30 Moore's Federal Practice (Matthew Bender 3d ed.), ch 801, Federal Law Governing Attorney Conduct § 801.04.

30 Moore's Federal Practice (Matthew Bender 3d ed.), ch 802, Structure of Rules Governing Attorney Conduct in Federal District Courts §§ 802.22, 802.23.

30 Moore's Federal Practice (Matthew Bender 3d ed.), ch 807, Introduction to the Common Law of Lawyering: The Inherent Power of the Federal Courts to Regulate the Conduct of Attorneys §§ 807.01, 807.02.

30 Moore's Federal Practice (Matthew Bender 3d ed.), ch 809, Investigation and Discovery in Civil Cases §§ 809.01, 809.02, 809.06, 809.07.

2 Weinstein's Federal Evidence (Matthew Bender 2nd ed.), ch 402, Relevant Evidence Generally Admissible; Irrelevant Evidence Inadmissible § 402.04.

5 Weinstein's Federal Evidence (Matthew Bender 2nd ed.), ch 900, Discovering and Admitting Computer-Based Evidence § 900.05.

6 Weinstein's Federal Evidence (Matthew Bender 2nd ed.), ch 1007, Testimony or Written Admission of Party § 1007.07.

1 Federal Rules of Evidence Manual (Matthew Bender) §§ 201.02, 402.02.

3 Jayson & Longstreth, Handling Federal Tort Claims (Matthew Bender), ch 16, Practice and Procedure: Pretrial, Trial, and After Trial §§ 16.05, 16.10.

4 Administrative Law (Matthew Bender), ch 23, Discovery and Production of Evidence § 23.03.

**Am Jur:**

3C Am Jur 2d, Aliens and Citizens § 2504.

4 Am Jur 2d, Appellate Review § 132.

9 Am Jur 2d, Bankruptcy §§ 605, 853.

23 Am Jur 2d, Depositions and Discovery §§ 8,13, 81, 91, 198, 205, 207-216, 224, 225, 227, 230, 231, 233-236, 238-242.

30 Am Jur 2d, Executions and Enforcements of Judgments § 616.

32 Am Jur 2d, Federal Courts §§ 133, 141.

32B Am Jur 2d, Federal Courts §§ 1844, 1845.

35 Am Jur 2d, Federal Tax Enforcement §§ 113, 817.

45C Am Jur 2d, Job Discrimination § 2283.

46 Am Jur 2d, Judgments §§ 249, 253.

48B Am Jur 2d, Labor and Labor Relations §§ 2713, 2737, 3403, 3416.

54 Am Jur 2d, Monopolies, Restraints of Trade, and Unfair Trade Practices § 527.

61A Am Jur 2d, Pleading §§ 591, 595.

62B Am Jur 2d, Private Franchise Contracts § 576.

**Am Jur Trials:**

21 Am Jur Trials, Employment Discrimination Action Under Federal Civil Rights Acts, p. 1.

21 Am Jur Trials, Franchise Litigation, p. 453.

75 Am Jur Trials, Age Discrimination in Employment Action Under ADEA, p. 363.

77 Am Jur Trials, Copyright Infringement Litigation, p. 449.

82 Am Jur Trials, Defending Against Claim of Ineffective Assistance of Counsel, p. 1.

82 Am Jur Trials, Handling Aviation Disaster Cases, p. 243.

83 Am Jur Trials, Compensation on Dissolution of Marriage for Spousal Contributions to Education, p. 197.

99 Am Jur Trials, The Use of Discovery in Product-Related Burn Injury Cases, p. 141.

105 Am Jur Trials, Employer Liability for Employee Misuse of Internet, p. 1.

117 Am Jur Trials, Litigating Claims Involving Foodborne Pathogens, p. 1.

117 Am Jur Trials, Litigation Regarding Antidepressant Medications, p. 485.

118 Am Jur Trials, Medications Used for Treatment of Sexual Dysfunction, p. 1.

118 Am Jur Trials, Civil Trials Involving Password-Protected Electronic Evidence, p. 85.

119 Am Jur Trials, Litigating the Right of Publicity: Your Client's Face Was on the News, Now It's on T-Shirts and Video Games, p. 343.

**Am Jur Proof of Facts:**

33 Am Jur Proof of Facts 3d, Civil Discovery Sanctions in the Federal Courts, p. 459.

64 Am Jur Proof of Facts 3d, Topic: Proof of Objections to Discharge of Individual Debtor Under *11 U.S.C.A. § 727(A)* [*11 USCS § 727(A)*] and Fed. R. Bankr. P. 7001 in a Liquidation Bankruptcy Case Under Chapter 7 of the Bankruptcy Code [*11 USCS §§ 701* et seq.], p. 113.

88 Am Jur Proof of Facts 3d, Establishing Liability for Infringement of a Plant Patent, p. 75.

89 Am Jur Proof of Facts 3d, Establishing the Defense of Issue Preclusion in a Subsequent Patent Infringement Suit, p. 1.

90 Am Jur Proof of Facts 3d, Establishing Liability for Unfair Competition, p. 95.

117 Am Jur Proof of Facts 3d, Proof of Claim Involving Use of Hormone Replacement Therapy Medications, p. 109.

117 Am Jur Proof of Facts 3d, Copyright and Trade Dress Infringement of Holiday Merchandise, p. 195.

125 Am Jur Proof of Facts 3d, Spoliation of Electronic Evidence, p. 93.

126 Am Jur Proof of Facts 3d, Sanctions for Spoliation of Electronic Evidence, p. 1.

126 Am Jur Proof of Facts 3d, Managing Metadata in Litigation Matters, p. 281.

**Intellectual Property:**

7 *Chisum on Patents (Matthew Bender), ch 20*, Remedies § 20.03.

8 *Chisum on Patents (Matthew Bender), ch 21*, Jurisdiction and Procedure in Patent Litigation § 21.02.

3 Gilson on Trademarks (Matthew Bender), ch 9, Trademark Inter Partes Litigation § 9.02.

**Criminal Law and Practice:**

1A Criminal Defense Techniques (Matthew Bender), ch 17, Competence To Stand Trial § 17.06.

3A Criminal Defense Techniques (Matthew Bender), ch 70, Prisoners' Rights Litigation § 70.03.

1 Business Crime (Matthew Bender), ch 2, Parallel Civil and Criminal Proceedings § 2.03.

6 Business Crime (Matthew Bender), ch 38, Representing Businesses Abroad: Jurisdiction and Extradition § 38.03.

**Bankruptcy:**

9 Collier on Bankruptcy (Matthew Bender 16th ed.), ch 1018, Contested Involuntary Petitions; Contested Petitions Commencing Ancillary Cases; Proceedings to Vacate Order for Relief; Applicability of Rules in Part VII Governing Adversary Proceedings P 1018.02.

10 Collier on Bankruptcy (Matthew Bender 16th ed.), ch 7026, General Provisions Governing Discovery PP 7026.03, 7026.08.

10 Collier on Bankruptcy (Matthew Bender 16th ed.), ch 7034, Production of Documents and Things and Entry upon Land for Inspection and Other Purposes P 7034.03.

10 Collier on Bankruptcy (Matthew Bender 16th ed.), ch 7037, Failure to Make Discovery: Sanctions PP 7037.01-7037.07.

10 Collier on Bankruptcy (Matthew Bender 16th ed.), ch 7055, Default P 7055.02.

1 Collier Bankruptcy Practice Guide, ch 14, Involuntary Proceedings PP 14.23, 14.30.

2 Collier Bankruptcy Practice Guide, ch 36, Examinations PP 36.02, 36.08.

3 Collier Bankruptcy Practice Guide, ch 40, Contempt P 40.05.

6 Collier Bankruptcy Practice Guide, ch 110, Discovery PP 110.02-110.04, 110.12, 110.14, 110.19-110.23.

**Corporate and Business Law:**

8 Antitrust Laws and Trade Regulation, 2nd Edition (Matthew Bender), ch 168, Discovery in Antitrust Actions § 168.05.

2 Antitrust Counseling and Litigation Techniques (Matthew Bender), ch 14, Litigating International Antitrust Cases: The Practitioner's Viewpoint § 14.04.

3 Antitrust Counseling and Litigation Techniques (Matthew Bender), ch 22, Discovery in Antitrust Cases §§ 22.02, 22.03, 22.05.

3 Antitrust Counseling and Litigation Techniques (Matthew Bender), ch 23B, Class Actions § 23B.08.

3 Antitrust Counseling and Litigation Techniques (Matthew Bender), ch 24, Criminal Rights in Civil Antitrust Litigation: Grand Jury Secrecy and the Right Against Self-Incrimination §§ 24.04, 24.05.

7 Securities Law Techniques (Matthew Bender), ch 109, The Attorney-Client Privilege and the Work-Product Doctrine § 109.08.

**Labor and Employment:**

4 Larson on Employment Discrimination, ch 82, Appellate Review § 82.03.

5 Larson on Employment Discrimination, ch 97, Attorney's Fees and Costs § 97.05.

1 Labor and Employment Law (Matthew Bender), ch 15, Procedure in Unfair Labor Practice Cases § 15.15.

4 Labor and Employment Law (Matthew Bender), ch 92, Pre-Trial Procedures § 92.01.

4 Labor and Employment Law (Matthew Bender), ch 95, Judicial Review § 95.03.

2 National Labor Relations Act: Law and Practice (Matthew Bender), ch 15, Procedure in Unfair Labor Practice Cases § 15.15.

**Annotations:**

Mandamus as appropriate remedy to control action of federal court in civil case--Supreme Court cases. 57 L Ed 2d 1203.

Supreme Court's views as to requisites for award of attorneys' fees. 77 L Ed 2d 1540.

Preclusive Effect of Prior Judgment, Verdict, or Conviction of Assault and Battery in Proceeding to Determine Nondischargeability of Debt or Claim Under *§ 523(a)(6) of Bankruptcy Code* (*11 U.S.C.A. § 523(a)(6)* [*11 USCS § 523(a)(6)*]), or Predecessor Statute, Barring Discharge of Liability for Willful and Malicious Injury. 26 ALR Fed 2d 507.

Discovery in Federal Arbitration Proceedings Under Discovery Provision of Federal Arbitration Act (FAA), 9 U.S.C.A. § 7 [9 USCS § 7], and Federal Rules of Civil Procedure, as Permitted by Fed. R. Civ. P. 81(a)(6)(B). 45 ALR Fed 2d 51.

Construction and Application of Collateral-Order Doctrine--Supreme Court Cases. 54 ALR Fed 2d 107.

Judicial qualification of provision of Rule 41(b) of Federal Rules of Civil Procedure that dismissal for failure to prosecute or to comply with federal rules or court order, and certain other dismissals, operate as adjudication upon merits. 5 ALR Fed 897.

Propriety of dismissal of action with prejudice, under Rule 41(b) of Federal Rules of Civil Procedure, upon ground of plaintiff's failure to comply with order of court. 15 ALR Fed 407.

Propriety of dismissal for failure of prosecution under Rule 41(b) of Federal Rules of Civil Procedure. *20 ALR Fed 488.*

Appealability of discovery order as "final decision" under *28 USCS § 1291*. 36 ALR Fed 763.

Default judgments against the United States under Rule 55(e) of the Federal Rules of Civil Procedure. 55 ALR Fed 190.

What constitutes substantial justification of government's position so as to prohibit awards of attorneys' fees against government under Equal Access to Justice Act (*28 USCS § 2412(d)(1)(A)*). 69 ALR Fed 130.

Appealability, under *28 USCS § 1291*, of order awarding or denying attorneys' fees. 73 ALR Fed 271.

Inherent power of Federal District Court to impose monetary sanctions on counsel in absence of contempt of court. 77 ALR Fed 789.

What conduct constitutes multiplying proceedings unreasonably and vexatiously so as to warrant imposition of liability on counsel under 28 USCS § 1927 for excess costs, expenses, and attorney fees. 81 ALR Fed 36.

Modification of protective order entered pursuant to Rule 26(c), Federal Rules of Civil Procedure. 85 ALR Fed 538.

Imposition of sanctions under Rule 16(f), Federal Rules of Civil Procedure, for failing to obey scheduling or pretrial order. 90 ALR Fed 157.

Sanctions for failure to make discovery under *Federal Civil Procedure* Rule 37 as affected by defaulting party's good faith efforts to comply. 134 ALR Fed 257.

Propriety of exclusion of expert testimony as sanction under *Federal Civil Procedure* Rule 37(b)(2)(B) for violation of discovery order. 151 ALR Fed 561.

Sanctions available under Rule 37, Federal Rules of Civil Procedure, other than exclusion of expert testimony, for failure to obey discovery order not related to expert witness. 156 ALR Fed 601.

Electronic Spoliation of Evidence. 3 ALR6th 13.

Attorney's conduct in delaying or obstructing discovery as basis for contempt proceedings. 8 ALR4th 1181.

Sanctions against defense in criminal case for failure to comply with discovery requirements. 9 ALR4th 837.

Dismissal of state court action for failure or refusal of plaintiff to obey request or order for production of documents or other objects. 27 ALR4th 61.

Judgment in favor of plaintiff in state court action for defendant's failure to obey request or order to answer interrogatories or other discovery questions. 30 ALR4th 9.

Dismissal of state court action for failure or refusal of plaintiff to appear or answer questions at deposition or oral examination. 32 ALR4th 212.

Propriety of allowing state court civil litigant to call expert witness whose name or address was not disclosed during pretrial discovery proceedings. 58 ALR4th 653.

Who has possession, custody, or control of corporate books or records for purposes of order to produce. 47 ALR3d 676.

Failure of party or his attorney to appear at pretrial conference. 55 ALR3d 303.

Dismissal of state court action for failure or refusal of plaintiff to answer written interrogatories. 56 ALR3d 1109.

Construction and application of state statute or rule subjecting party making untrue allegations or denials to payment of costs or attorneys' fees. 68 ALR3d 209.

Dismissal of action for failure or refusal of plaintiff to obey court order. 4 ALR2d 348.

Taxation of costs and expenses in proceedings for discovery or inspection. 76 ALR2d 953.

What constitutes "proper case" within meaning of provision of Rule 19(a) of Federal Rules of Civil Procedure that when person who should join as plaintiff refuses to do so, he may be made involuntary plaintiff "in a proper case." 20 ALR Fed 193 .

Propriety of allowing state court civil litigant to call nonexpert witness whose name or address was not disclosed during pretrial discovery proceedings, 63 ALR4th 712 .

**Texts:**

4 Computer Law (Matthew Bender), ch 5, General Evidentiary Principles § 5.03.

4 Computer Law (Matthew Bender), ch 9, Procedure § 9.01.

5 Energy Law & Transactions (Matthew Bender), ch 140, Discovery §§ 140.02-140.04.

1A Environmental Law Practice Guide (Matthew Bender), ch 6B, Document Retention Issues in Environmental Law § 6B.13.

2 Environmental Law Practice Guide (Matthew Bender), ch 11, Government Searches and Private Inspections § 11.07.

2 Environmental Law Practice Guide (Matthew Bender), ch 11B, Environmental Litigation § 11B.06.

2A Environmental Law Practice Guide (Matthew Bender), ch 12A, Citizen Suits § 12A.12.

3 Frumer & Friedman, Products Liability (Matthew Bender), ch 17, Discovery in Products Liability Litigation §§ 17.01, 17.03.

3 Frumer & Friedman, Products Liability (Matthew Bender), ch 18, Evidence in Products Liability Litigation § 18.07.

3 Frumer & Friedman, Products Liability (Matthew Bender), ch 22, Automotive Products Liability Law § 22.10.

6 Treatise on Environmental Law (Matthew Bender), ch 14, Attorneys' Fees in Environmental Litigation §§ 14.01, 14.03.

**Law Review Articles:**

Epstein; Corcoran; Krieger; Carr. An Up-Date on Rule 37 Sanctions After National Hockey League v. Metropolitan Hockey Clubs, Inc. 3 Am J Trial Advoc 413, 1979/1980.

Note, Civil procedure--Arkansas and the amended federal discovery rule. 24 Ark L Rev 535, 1970/1971.

Golinsky. Discovery Abuse: The Second Circuit's Imposition of Litigation-Ending Sanctions for Failures to Comply with Discovery Orders: Should Rule 37(B)(2) Defaults and Dis-missals be Determined by a Roll of the Dice? 62 Brooklyn L Rev 585, Summer, 1996.

Erichson. Court-Ordered Confidentiality in Discovery. 81 Chi-Kent L Rev 357, 2006.

Erichson. Symposium: Secrecy in Litigation: Court-Ordered Confidentiality in Dis-covery. 81 Chi-Kent L Rev 357, 2006.

Note, Federal discovery rules: Effects of the 1970 amendments. 8 Colum JL & Soc Prob 623, 1971/1972.

Rosenberg. Sanctions to effectuate pretrial discovery. 58 Colum L Rev 480, 1958.

Note, Proposed 1967 amendments to federal discovery rules. 68 Colum L Rev 271, 1968.

Lewis. New Rules for Electronic Discovery, so Now What?: Daubert's Impact on Determining What is not Reasonably Accessible. 10 Comp L Rev & Tech J 239, Summer, 2006.

Slawotsky. Rule 37 Discovery Sanctions--The Need for Supreme Court Or-dered National Uniformity. 104 Dick L Rev 471, Spring, 2000.

Redish. Electronic Discovery and the Litigation Matrix. 51 Duke LJ 561, November 2001.

Sanchirico. Evidence Tampering. 53 Duke LJ 1215, February, 2004.

Panzer. New federal discovery rules in civil cases. 37 DC Bar J 49, 1970.

Swanson. Jurisdictional Discovery Under the Foreign Sovereign Immunities Act. 13 Emory Int'l L Rev 445, Fall 1999.

Manning; Hogan. State or Federal Court? The Commencement or Removal of Civil Cases in New York. 1999 Fed Cts L Rev 5, 1999.

Note, Federal Rules of Civil Procedure--class actions--discovery--claims of absent members of class dismissed for failure to respond to interrogatories. 40 Fordham L Rev 969, 1971/1972.

Dickerson. Deposition Dilemmas: Vexatious Scheduling and Errata Sheets. 12 Geo J Legal Ethics 1, Fall, 1998.

Williams. Authority of federal agencies to impose discovery sanctions: The FTC--A case in point. 65 Geo LJ 739, 1976/1977.

Developments in the law--Discovery. 74 Harv L Rev 940, 991, 1960/1961.

Kroll; Maciszewski. Pretrial discovery: Change in the federal rule. 7 Hawaii Bar J 48, 1970.

Freije. The Use of Discovery Sanctions in Administrative Agency Adjudication. 59 Ind LJ 113, 1983/1984.

Sales. Discovery problems in aviation litigation. 38 J Air L & Com 101, 1972.

Lang; Clancy; Flesher. Spoliation of Evidence: The Continuing Search for a Rem-edy and Implications for Aviation Accident Investigations. 60 J Air L & Com 997, May, 1995/June, 1995.

Stern. Untangling a Tangled Web Without Trial: Using the Court's Inherent Powers and Rules to Deny a Perjuring Litigant His Day in Court. 66 J Air L & Com 1251, Summer 2001.

Thomas; Goheen; Vasos. Changes in Federal Rules of Civil Procedure relating to depositions, interrogatory practice, and request. 40 J Kan BA 127, 1971.

Johnston. Discovery in Illinois and Federal Courts. 15 J Marshall L Rev 1, 1982.

Sisk. The Essentials of the Equal Access to Justice Act: Court Awards of Attorney's Fees for Unreasonable Government Conduct (Part Two). 56 La L Rev 1, Fall 1995.

Krupp. Rule 37: Sanctions for Discovery Resistance. 7 Litig 32, 1980/1981.

Swartz. New federal rules on discovery. 55 Mass LQ 345, 1971.

Daniels. Discovery--Power to Impose Sanctions for Failure to Make Discovery on Jurisdictional Issues. 13 Mem St UL Rev 109, 1982/1983.

Savrin; Purdie. Trial Practice and Procedure. 53 Mercer L Rev 1611, Sum-mer, 2002.

Becker. Discovery of Information and Documents from a Litigant's Former Em-ployees: Synergy and Synthesis of Civil Rules, Ethical Standards, Privilege Doctrines, and Com-mon Law Principles. 81 Neb L Rev 868, 2003.

Allman. Rule 37(f) Meets Its Critics: The Justification for a Limited Preservation Safe Harbor for ESI. 5 Nw J Tech. & Intell Prop 1, Fall, 2006.

Francis. What you need to know to resolve discovery disputes, 8 Prac Litig 75, March 1997.

Mayer. Prescribing cooperation: the mandatory pretrial disclosure requirement of proposed Rules 26 and 37 of the Federal Rules of Civil Procedure. 12 Rev Litig 77, Fall 1992.

Strassberg. Privilege Can Be Abused: Exploring the Ethical Obligation to Avoid Frivolous Claims of Attorney-Client Privilege. 37 Seton Hall L Rev 413, 2007.

Sofaer. Sanctioning Attorneys for Discovery Abuse Under the New Federal Rules: On the Limited Utility of Punishment. 57 St John's L Rev 680, 1982/1983.

Kaufman. Judicial Reform in the Next Century. 29 Stan L Rev 1, 1976/1977.

Crist. Preserving the Duty to Preserve: The Increasing Vulnerability of Electronic Information. 58 SC L Rev 7, Fall 2006.

Bough. Spitting in a Judge's Face: The 8th Circuit's Treatment of Rule 37 Dismissal and Default Discovery Sanctions. 43 SD L Rev 36, 1998.

A symposium on the 1993 amendments to the Federal Rules of Civil Procedure. 29 Tort & Ins LJ 467, Spring 1994.

Terry. A Critical Analysis of the Formulation and Content of the 1993 Amendments to the Federal Rules of Civil Procedure. 63 U Cin L Rev 869, 1995.

Kennedy; Lantin; York. Professionalism: Dealing With Unprofessional Conduct in Bankruptcy. 36 U Mem L Rev 575, Spring 2006.

Mark. Federal Discovery Stays. 45 U Mich JL Reform 405, Winter 2012.

Discovery Abuse Under the Federal Rules: Causes and Cures. 92 Yale LJ 352, 1982/1983.

## Forms

1 Bender's Federal Practice Forms, Forms 6:10, 6:12, 6:20, Federal Rules of Civil Procedure.

5 Bender's Federal Practice Forms, Form 16:1, Federal Rules of Civil Procedure.

5 Bender's Federal Practice Forms, Forms 26:42, 26:101, 26:106, 26:170, Federal Rules of Civil Procedure.

8 Bender's Federal Practice Forms, Forms 34:10, 34:11, 34:20, 34:30, 34:40, 34:41, 34:43, 34:51, 34:120, 34:146, 34:181, 34:263, Federal Rules of Civil Procedure.

8 Bender's Federal Practice Forms, Form 37:1 et seq., Federal Rules of Civil Procedure.

9 Bender's Federal Practice Forms, Form 45:60, Federal Rules of Civil Procedure.