UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO.: 20-CV-81205-Ruiz/Reinhart

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

vs.

COMPLETE BUSINESS SOLUTIONS GROUP, INC. d/b/a PAR FUNDING, *et al.*,

Defendants.
_____/

ORDER ON DEFENDANT MR. LAFORTE'S MOTION TO DISMISS (ECF No. 746) AND MOTION FOR SANCTIONS (ECF No. 776)

Defendant Joseph LaForte moves for sanctions based on alleged misconduct relating to the 30(b)(6) deposition of the SEC's representative. For the reasons discussed below, it is **ORDERED** that the Second Motion for Involuntary Dismissal and for Sanctions ("Motion to Dismiss") (ECF No. 746) and the Motion for Sanctions (ECF No. 776) are **DENIED.**

Judge Ruiz referred the Motion to Dismiss and the Motion for Sanctions to me for appropriate disposition.[1] I have reviewed the Motions and the SEC's singular

[1] "[M]agistrate judges have jurisdiction to enter sanctions orders for discovery failures that do not strike claims, completely preclude defenses, or generate litigation-ending consequences." *Collar v. Abalux, Inc.*, No. 16-CIV-20872, 2018 WL 3328682, at *13 (S.D. Fla. 2018) (J. Goodman) (citing Practice Before Federal Magistrates, § 16.06A (Mathew Bender 2010) ("discovery sanctions are generally

Response. ECF Nos. 746, 776, and 800. I held an oral argument on October 6, 2021. ECF No. 821. This matter is now ripe for decision.

I. MOTION TO DISMISS

In his Motion to Dismiss, Mr. LaForte seeks dismissal of all claims against him pursuant to Federal Rule of Civil Procedure 41(b) and monetary sanctions against SEC counsel Amy Riggle Berlin pursuant to 28 U.S.C. § 1927. *See generally* ECF No. 746. Rule 41 provides that if a plaintiff fails to comply with a court order or the Federal Rules, a defendant may move to dismiss the action or any claim against it. Fed. R. Civ. P. 41(b). Dismissal is only appropriate where there is a clear record of delay or willful contempt and lesser sanctions would be insufficient. *Kilgo v. Ricks*, 983 F.2d 189, 192 (11th Cir. 1993). The Eleventh Circuit has stated that: "dismissal with prejudice is plainly improper unless and until the district court finds a clear record of delay or willful conduct and that lesser sanctions are inadequate to correct such conduct." *Betty K Agencies, Ltd. v. M/V MONADA*, 432 F.3d 1333, 1339 (11th Cir. 2005). As it is the most extreme sanction imposed on a party, dismissal with

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viewed as non-dispositive matters committed to the discretion of the magistrate unless a party's entire claim is being dismissed")). To determine whether a sanction is dispositive or non-dispositive, the critical factor is what sanction the magistrate judge actually imposes, rather than the one requested by the party seeking sanctions. *Gomez v. Martin Marietta Corp.*, 50 F.3d 1511, 1519-20 (10th Cir. 1995) (rejecting argument that magistrate judge ruled on dispositive motion because litigant sought entry of a default judgment and explaining that "[e]ven though a movant requests a sanction that would be dispositive, if the magistrate judge does not impose a dispositive sanction," then the order is treated as not dispositive under Rule 72(a)); Wright, Miller & Marcus, Federal Practice and Procedure: Civil 2d § 3068.2, at 342-44 (West 1997).

prejudice under Rule 41(b) "is to be used *only* in extreme circumstances." *Boazman v. Econ. Lab., Inc.*, 537 F.2d 210, 212 (5th Cir. 1976) (emphasis added).

Similarly, 28 U.S.C. § 1927 provides for sanctions in the form of costs, expenses, and reasonable attorneys' fees when an attorney "unreasonably and vexatiously" "multiplies the proceedings." 28 U.S.C. § 1927. An award of sanctions under § 1927 requires a finding that the party being sanctioned acted in bad faith. *Schwartz v. Millon Air, Inc.*, 341 F.3d 1220, 1225 (11th Cir. 2003) ("A determination of bad faith is warranted where an attorney knowingly or recklessly pursues a frivolous claim or engages in litigation tactics that needlessly obstruct the litigation of non-frivolous claims."). *See also Clark v. United Parcel Serv., Inc.* 460 F.3d 1004, 1011 (8th Cir. 2006) (finding that § 1927 permits sanctions when an attorney's conduct "viewed objectively, manifests either intentional or reckless disregard of the attorney's duties to the court" (internal quotations omitted)).

Accordingly, in order to obtain relief under Rule 41(b) or § 1927, Mr. LaForte must show that Ms. Riggle Berlin acted in bad faith or was in willful contempt. Additionally, to obtain an involuntary dismissal, he must show that no lesser remedy would be sufficient. Mr. LaForte has not met these burdens.[2]

[2] Mr. LaForte carries the burden to show that the SEC acted in bad faith. *Tarasewicz v. Royal Caribbean Cruises Ltd.*, No. 14-CV-60885, 2016 WL 3944176, at *6 (S.D. Fla. Feb. 9, 2016) (J. Valla*), report and recommendation adopted* 2016 WL 3944178 (S.D. Fla. March 17, 2016 (J. Bloom) (declining to award sanctions based on the evidence submitted because "Defendants ha[d] not met the high burden required to demonstrate bad faith or fraud on the court").

A. *Insufficient Evidence of Bad Faith and Willful Contempt*

As evidence of Ms. Riggle Berlin's alleged bad faith and willful contempt, Mr. LaForte points primarily to Ms. Riggle Berlin's objections during the 30(b)(6) deposition. A complete review of the deposition transcript reveals that Ms. Riggle Berlin objected on two primary grounds: (1) that the question was outside the scope of the noticed deposition topics, or (2) that answering the question would violate various privileges including the attorney client privilege, work product privilege, deliberative process privilege, or investigative privilege. Ms. Riggle Berlin frequently instructed the witness not to answer the questions to which she objected on these grounds.

Importantly, Mr. LaForte did not move to compel answers to any of the questions to which Ms. Riggle Berlin objected. Instead, Mr. LaForte argues that these objections were so wholly inappropriate that they are, by themselves, evidence of Ms. Riggle Berlin's sanctionable conduct. I disagree. Although I will not opine as to whether the objections would be sustained, I do not find them to be so egregious, either on their own or in the context of past cases, as to be sufficient evidence of bad faith discovery violations.

As purported evidence of Ms. Riggle Berlin's bad faith and to show that her contempt was willful, Mr. LaForte cites to several previously-adjudicated cases in which the SEC argued that it need not provide a 30(b)(6) witness. ECF No. 746 at 10–13. Mr. LaForte encourages this Court to consider Ms. Riggle Berlin and the SEC's past behavior and arguments as evidence of its more recent bad faith in this case. *Id.*

However, as Ms. Riggle Berlin correctly notes, the SEC did not make the same arguments in this case. Whether the SEC has argued in the past that it should not have to produce a 30(b)(6) witness in a separate case is not evidence of a pattern of willful misconduct or bad faith in this case.

Of note, one of the cases Mr. LaForte cites is *SEC v. Kramer*, 778 F. Supp. 2d 1320 (M.D. Fla. 2011). There, Ms. Riggle Berlin, acting on behalf of the SEC, opposed the defendant's motion to compel a 30(b)(6) deposition by arguing, among other things, that the information the defendant sought qualified as protected attorney work product. *Id*. at 1326. The Court ultimately required the SEC to produce a 30(b)(6) witness. *Id*. at 1327 ("Rule 30(b)(6) expressly applies to a government agency and provides neither an exemption from Rule 30(b)(6) nor 'special consideration concerning the scope of discovery, especially when [the agency] voluntarily initiates an action.'") (quoting *S.E.C. v. Collins & Aikman Corp.*, 256 F.R.D. 403, 414 (S.D.N.Y. 2009). The *Kramer* Court thus determined that a blanket ban of a 30(b)(6) deposition is inappropriate on the grounds of privilege because the questions that may invoke privilege had yet to be asked. *Id*. at 1328. ("Permitting the Commission in this instance to assert a blanket claim of privilege in response to a Rule 30(b)(6) notice creates an unworkable circumstance in which a defendant loses a primary means of discovery without a meaningful review of his opponent's claim of privilege.").

The scenario Mr. LaForte and the SEC find themselves in here is wholly different than that of *Kramer*. I do not find Ms. Riggle Berlin's arguments in a separate case ten years ago to be evidence of bad faith or contempt, particularly when

here she did not argue that the SEC is exempt from Federal Rule of Civil Procedure 30(b)(6). Instead, the SEC designated a 30(b)(6) witness, prepared that witness to testify competently, and then objected on a question-by-question basis when Ms. Riggle Berlin believed the answer to the question would invade various privileges or was outside the scope.[3] In other words, the SEC followed the proper order of operations as outlined by the Court in *Kramer*.

At oral argument, I asked Mr. LaForte's counsel whether she could point to any cases in which the SEC agreed to sit for a 30(b)(6) deposition, as they did here, but nevertheless took the position that certain questions did not have to be answered because they were outside the scope or intruded into various privileges. *See* Hr'g Tr. 14:7–11, Oct. 6, 2021.[4] Mr. LaForte's counsel cited to *SEC v. Merkin*, No. 11–23585–CIV, 2012 WL 5449464 (S.D. Fla. Aug. 13, 2012) (J. Goodman). *Id.* at 12–23. In *Merkin*, the SEC

[3] To be clear, I am referring to the second 30(b)(6) designee, Elisha Frank. The SEC's first designee was Raymond Andjich. According to the SEC, during his deposition on July 9, 2021, Mr. Andjich, despite spending "about 40 hours preparing to testify about the topics noticed for the deposition," experienced an "involuntary problem impacting his ability to recall and testify accurately that day." ECF No. 800 at 6. Mr. LaForte has not provided sufficient evidence of its allegation the Mr. Andjich was simply unprepared and provided unfavorable testimony for the SEC. In fact, a review of the deposition transcript reveals no such "unfavorable testimony" and instead is evidence of the SEC's prompt willingness to ameliorate the issues that arose from the first 30(b)(6) deposition. Ms. Riggle Berlin offered concrete solutions to Mr. Andjich's inability to testify such as providing a different 30(b)(6) witness, offering to pay the Court Reporter costs for the second deposition, and not counting Mr. Andjich's deposition towards Mr. LaForte's allotted seven hours.

[4] The transcript for the October 6, 2021, oral argument can be found at ECF No. 834.

(although not represented by Ms. Riggle Berlin in that instance) sat for a 30(b)(6) deposition. During the deposition, the SEC objected to specific questions as outside the scope of the noticed topics or requiring privileged information and instructed the designee not to answer. *Id.* at 1. The defendant objected to the SEC's instruction to its 30(b)(6) designee not to answer. *Id.* The Court reviewed the questions at issue and found that "[a]lmost all of the disputed questions [were] either beyond the scope of the deposition . . ., speculative, problematic because they would require the disclosure of privileged information and/or unduly argumentative," but there were eight questions to which the defendant was entitled to receive answers. *Id.* at *1–2. Ultimately, the Court did not award attorney's fees to either party because the dispute was basically "a wash." *Id.* at *2.

The eight questions to which the Court overruled the SEC's objections and required them to answer are not akin to those objected to in the 30(b)(6) deposition presently in dispute. Furthermore, in *Merkin*, the Court was asked to evaluate the questions and responses on a question-by-question basis to determine whether the SEC should have to answer the question. Again, I was not asked to do that analysis here, and thus cannot say whether, like in *Merkin*, the SEC's objections should be overruled and its answers to the questions should be compelled. Instead, I merely decline to find an inference of bad faith in this case from the fact that, nine years ago, the SEC's objections to eight case-specific deposition questions were overruled.

In conclusion, I do not find that Ms. Riggle Berlin's objections at the 30(b)(6) deposition, even when viewed in conjunction with the SEC's prior actions and arguments in other cases, are evidence of bad faith or willful contempt in *this* case.

Regarding Ms. Riggle Berlin's objections as to scope, I was not asked to determine whether those objections should be sustained or overruled. It seems Ms. Riggle Berlin had one interpretation of the scope noticed deposition topics, and Mr. LaForte had another. Those two interpretations clearly did not align. However, having not been asked to resolve the disputed interpretations, I cannot find Ms. Riggle Berlin's interpretation to be unreasonable; thus, her objections to the questions as being outside the scope of her understanding of the noticed topics, is not evidence of bad faith. Moreover, attached to the SEC's Response were several e-mails in which Ms. Riggle Berlin tried to engage Mr. LaForte in a conferral about the scope of the noticed deposition topics. ECF No. 800-2. Whether the parties could have (or should have) come to a meeting of the minds regarding the scope of the noticed deposition topics prior to beginning Ms. Frank's deposition is not before me. Regardless, I find the e-mails attached to the SEC's Response to be evidence of Ms. Riggle Berlin's good faith attempt to confer and, at the very least, put Mr. LaForte on notice that there may be a disagreement between the parties as to the scope of the topics as noticed. That is not evidence of bad faith.

Mr. LaForte also argues that Ms. Riggle Berlin acted in bad faith by instructing the witness not to answer questions to which she objected as outside the scope of the noticed topics. I find that argument unpersuasive. Mr. LaForte argues

that this kind of instruction is prohibited by the Federal Rules of Civil Procedure. At the September 10, 2021 discovery hearing (as well as in my Standing Discovery Order), I specifically notified Mr. LaForte and the other Defendants that I allow for such conduct in a 30(b)(6) deposition. Discovery Hearing Sep. 10, 2021, at 29:40–30:00; Hr'g Tr. 64:11–17, Oct. 6, 2021.

Mr. LaForte also argues that sanctions are appropriate because the SEC has not provided a privilege log for its objections at the 30(b)(6) deposition. I disagree. Under the Local Rules, no privilege log is required in support of deposition objections. Local Rule 26.1(e)(2) states that a privilege log is required when a party asserts a privilege over answers to interrogatories and requests for production. S.D. Fla. Local R. 26.1(e)(2). Local Rule 26.1(f) describes the proper procedure when a party invokes a privilege during a deposition. It provides:

> (1) Where a claim of privilege is asserted during a deposition and information is not provided on the basis of such assertion, upon request the attorney or deponent asserting the privilege shall state the specific nature of the privilege being claimed unless divulgence of such information would cause disclosure of privileged information.
>
> (2) After a claim of privilege has been asserted, unless divulgence of requested information would cause disclosure of privileged information, the attorney or party seeking disclosure shall have reasonable latitude during the deposition to question the witness to establish other relevant information concerning the assertion of the privilege, including questions about the topics set forth in Local Rule 26.1(e)(2)(B)(ii) above.

S.D. Fla. Local R. 26.1(f)(1)–(2).

Accordingly, after Ms. Riggle Berlin stated the specific nature of the privilege she was claiming, Mr. LaForte certainly was entitled to conduct further questioning to obtain the same information he would glean from a privilege log. He did not. Ms.

Riggle Berlin did not act in bad faith or willful contempt by specifically identifying the privilege she was invoking as to each question, nor do I find that she acted in bad faith by failing to provide defense counsel with a privilege log.

Based on a full review of the record and evidence before me, I do not find that there is a clear record of delay or willful contempt on the part of the SEC that would justify issuing sanctions pursuant to Rule 41(b). *Betty K Agencies*, 432 F.3d at 1339. I also do not find that any of Ms. Riggle Berlin's actions or arguments were made in bad faith so as to justify sanctions pursuant to § 1927. Mr. LaForte did not present sufficient evidence to show that Ms. Riggle Berlin knowingly or recklessly engaged in litigation tactics that "needlessly obstruct[ed] the litigation." *Schwartz*, 341 F.3d at 1225.

B. *A Lesser Remedy is Sufficient*

Even assuming *arguendo* that Mr. LaForte had shown that Ms. Riggle Berlin acted in bad faith or willful contempt so as to justify sanctions of some kind, in order to grant involuntary dismissal, I would also need to find that lesser sanctions are inadequate to correct such conduct. *Betty K Agencies*, 432 F.3d at 1339 ("[D]ismissal with prejudice is plainly improper unless and until the district court finds a clear record of delay or willful conduct and that lesser sanctions are inadequate to correct such conduct."). As it is the most extreme sanction imposed on a party, dismissal with prejudice under Rule 41(b) "is to be used *only* in extreme circumstances." *Boazman*, 537 F.2d at 212. I find that there is an appropriate lesser sanction that would correct such conduct: an order to compel better answers to the deposition questions and, if

necessary, reconvening of the deposition at the SEC's expense. Thus, even upon a finding that Ms. Riggle Berlin's actions were sanctionable, the appropriate sanction is not involuntary dismissal.

I decline to award any sanctions pursuant to Federal Rule of Civil Procedure 41(b) or 28 U.S.C. § 1927. Therefore, Mr. LaForte's Motion to Dismiss (ECF No. 746) is **DENIED.**

II. MOTION FOR SANCTIONS

For largely the same alleged discovery violations described in the Motion to Dismiss, in the Motion for Sanctions, Mr. LaForte asks the Court to sanction the SEC by dismissing the case pursuant to Federal Rules of Civil Procedure 37(c) and 37(d)(1)(A)(i). ECF No. 776. Alternatively, Mr. LaForte requests that the Court issue sanctions in the form of (1) precluding the SEC from taking a position contrary to the corporate representatives' deposition testimony, or (2) precluding the SEC from admitting any evidence or testimony about topics for which it raised a privilege objection or would not testify about at the 30(b)(6) deposition. *Id.* at 18–19; Hr'g Tr. 31:5–37:10, Oct. 6, 2021. For the reasons set forth below, I do not find sanctions are warranted under either Rule 37(c) or 37(d)(1)(A)(i).

A. *Federal Rule of Civil Procedure 37(c)*

"In addition to the Court's inherent authority to punish bad faith conduct, the Court also has the authority under Federal Rule of Civil Procedure 37 to sanction parties failing to disclose or supplement discovery responses[,]" as required by Federal Rules of Civil Procedure 26(a) and 26(e). *Forte v. Otis Elevator Co.*, No. 14-

CV-20360, 2015 WL 12778437, at *2 (S.D. Fla. Feb. 12, 2015) (J. Ungaro). The traditional remedy for failure to disclose, supplement, or admit is that the party committing the sanctionable conduct is not permitted "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." Fed. R. Civ. P. 37(c)(1). However, Rule 37(c)(1)(C) provides that "in addition to or instead of this sanction, the court, on motion and after giving an opportunity to be heard[,] . . . may impose other appropriate sanctions, including any of the orders listed in Rule 37(b)(2)(A)(i)-(vi)." The remedies listed at 37(b)(2)(A)(i)-(vi) are as follows:

> (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[.]

Mr. LaForte argues that the SEC and Ms. Riggle Berlin's alleged discovery violations justify "dismissing the action or proceeding in whole or in part" pursuant to Rule 37(b)(2)(A)(v). In order to impose the extreme sanction of a dismissal under Rule 37(b), the court must find that (1) the violation was the result of willful or bad faith conduct, (2) that the moving party was prejudiced by the disobedient party's

failure, and (3) that a lesser sanction would fail to punish the violation adequately or ensure compliance with future court orders. *Siegmund v. Xuelian Bian*, No. 16-62506-CIV, 2019 WL 473739, at *2 (S.D. Fla. Feb. 6, 2019) (J. Louis) (citing *Immuno Vital, Inc. v. Telemundo Grp., Inc.*, 203 F.R.D. 561, 571 (S.D. Fla. 2001) (J. Moore)). *See also Phipps v. Blakeney*, 8 F.3d 788, 790 (11th Cir.1993) ("Dismissal with prejudice is the most severe Rule 37 sanction," but it "may be appropriate when a plaintiff's recalcitrance is due to willfulness, bad faith or fault.").

As an initial matter, I find that the facts supporting the instant Motion for Sanctions do not warrant the dismissal of the SEC's claims. As discussed above, there is no evidence that the SEC or Ms. Riggle Berlin acted willfully or in bad faith. Additionally, I do not find persuasive Mr. LaForte's argument regarding the prejudice Defendants have and will suffer as a result of the alleged misconduct (*see* Hr'g Tr. 30:6–31:3), nor do I find that dismissal is the only sanction that would sufficiently punish or ensure future compliance.

I do not find that any of the lesser sanctions Mr. LaForte requests are appropriate under Rule 37(c) because I am not convinced that Rule 37(c) applies in this context at all. At oral argument Mr. LaForte clarified his position that Rule 37(c) applies because Ms. Riggle Berlin's conduct during the 30(b)(6) deposition demonstrates that the SEC did not comply with Rule 26(a). Hr'g Tr. 25:3–27:13. According to Mr. LaForte, by asserting a privilege and not identifying what exactly is privileged through a privilege log, the SEC is essentially generating the presumption that there is additional evidence that has not been disclosed to

Defendants or identified in a privilege log. *Id*. at 26:7–13. I disagree that such a presumption is reasonable. Additionally, I do not find that Mr. LaForte has made a factual showing that these undisclosed documents or evidence exist and that the Defendants do not already have them.[5] Therefore, I do not find that the SEC has violated Rule 26(a) or (e) so as to justify sanctions pursuant to Rule 37(c). So, by the transitive property, no sanctions are warranted under Rule 37(b)(2)(A).

B. *Federal Rule of Civil Procedure 37(d)(1)(A)(i)*

Rule 37(d)(1) provides that the "court where the action is pending may, on motion, order sanctions if: (i) a party ... fails, after being served with proper notice, to appear for ... deposition." Fed. R. Civ. P. 37(d)(1)(A). Rule 37(d) has also been interpreted to permit sanctions against a corporation who produces an unprepared Rule 30(b)(6) witness. See *QBE Ins. Corp. v. Jorda Enter., Inc.*, 277 F.R.D. 676, 690 (S.D. Fla. Jan. 30, 2012) (J. Goodman) ("The failure to properly designate a Rule 30(b)(6) witness can be deemed a nonappearance justifying the imposition of sanctions."); *Maronda Homes, Inc. v. Progressive Express Ins. Co.*, No. 6:14–cv–1287–Orl–31TBS, 2015 WL 2169234, at *3 (M.D. Fla. May 8, 2015) ("If a corporate representative physically appears at a deposition, but is completely unprepared to provide testimony on the noticed topics, courts have found a failure to appear under Rule 37(d)(1)(A)(i).") (citing *Cont'l Cas. Co. v. First Fin. Emp. Leasing, Inc.*, No. 8:08–cv–2372–T–27GW, 716 F. Supp. 2d 1176, 1193 (M.D.Fla.2010)).

[5] The SEC contends that it has voluntarily produced to Defendants *all* documents that are in the SEC's litigation file for this case and will continue to do so. ECF No. 800-3 at 1 FN 2; Hr'g Tr. 38:17–22; 46:4–8, October 6, 2021.

A number of sanctions are available for failure to appear at a duly noticed deposition including preclusion of testimony, striking of pleadings, and entry of default, and "any of the orders listed in Rule 37(b)(2)(A)(i)—(vi)." Fed. R. Civ. P. 37(d)(3). Rule 37 also authorizes the Court to impose on 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." Fed. R. Civ. P. 37(b)(2)(c); *see also* Fed. R. Civ. P. 37(d)(3). "Rule 37 sanctions are imposed not only to prevent unfair prejudice to the litigants but also to insure the integrity of the discovery process." *Aztec Steel Co. v. Fla. Steel Corp.*, 691 F.2d 480, 482 (11th Cir. 1982). A district court has substantial discretion in deciding whether and how to impose sanctions under Rule 37. *See Chudasama v. Mazda Motor Corp.*, 123 F.3d 1353, 1366 (11th Cir. 1997).

I find there is insufficient evidence of the SEC's 30(b)(6) witness' unpreparedness. The SEC stated in its Response and at the hearing that it spent upwards of forty hours preparing Ms. Frank to testify as to the noticed deposition topics. ECF No. 800 at 7; Hr'g Tr. 44:21–22; 47:22–23, Oct. 6, 2021. I have no evidence to the contrary. A thorough review of the deposition transcript shows not that the witness failed to answer the questions because she was unprepared, but that she did not answer because she was advised by counsel not to answer pursuant to reasonable objections as to scope and privilege. Following counsel's instruction not to answer a

question is not, by itself, enough to indicate or prove that the witness was unprepared to testify.

Moreover, I do not find the fact that the first designee's deposition had to be suspended and a new witness designated to be evidence of sanctionable conduct. "If it becomes obvious that the deposition representative designated by the corporation is deficient, the corporation is obligated to provide a substitute." *Brazos River Auth. v. GE Ionics, Inc.*, 469 F.3d 416, 433 (5th Cir. 2006) (citing *Marker v. Union Fid. Life Ins. Co.*, 125 F.R.D. 121, 126 (M.D.N.C. 1989)). That is precisely what occurred in this case.

In light of my finding that Mr. LaForte has failed to provide sufficient evidence to establish that the SEC's 30(b)(6) witness was unprepared to testify as to the noticed deposition topics, a conclusion that includes my own independent analysis of the entire transcript of Ms. Frank's deposition, I find that sanctions pursuant to Rule 37(d) are not warranted. Thus, Mr. LaForte's Motion for Sanctions (ECF No. 776) is **DENIED**.

III. CONCLUSION

For the foregoing reasons, I find that there is insufficient evidence to warrant sanctions pursuant to Federal Rules of Civil Procedure 41(b), and 37(c), 37(d), or 28 U.S.C. § 1927. Accordingly, Mr. LaForte's Motion to Dismiss and Motion for Sanctions (ECF Nos. 746, 776) are **DENIED**.

DONE and ORDERED in Chambers at West Palm Beach, Palm Beach County, in the Southern District of Florida, this 20th day of October 2021.

BRUCE E. REINHART
UNITED STATES MAGISTRATE JUDGE

cc: Counsel of Record