UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CASE NO.: 20-CV-81205-RAR

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

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

Defendants.
_____/

PLAINTIFF SECURITIES AND EXCHANGE COMMISSION'S REPLY TO DEFENDANT LAFORTE'S OPPOSITION TO EXPEDITED MOTION TO PRECLUDE TRIAL TESTIMONY

Defendant LaForte's opposition to the Expedited Motion by Plaintiff Securities and Exchange Commission ("SEC" or "Commission") is a muddle of straw men, non sequiturs and attempted misdirection. What it is not, however, is a response to the two critical issues raised by the Commission in its Expedited Motion: 1) that LaForte's attempt to withdraw his Fifth Amendment assertion and testify substantively at trial after more than a year of repeated assertions, months after discovery has closed, and as another tactic in an extensive pattern by LaForte *and* his co-defendants of discovery abuses, is exactly the sort of conduct courts have warned about and sanctioned - by precluding trial testimony - in similar circumstances,[1] *See SEC v. Softpoint, Inc.,* 958 F. Supp. 846, 855 (S.D.N.Y. 1997); and, 2) the very real prejudice to the Commission when the lead defendant in a sprawling, multi-defendant case hides the ball throughout litigation and

[1] These discovery abuses continue apace by the defendants. This same date, the Commission filed an opposition to defendant McElhone's (LaForte's spouse) motion to amend admissions pointing out that: Ms. McElhone's motion would greatly prejudice the Commission, which would have to prove new facts, in a trial set to commence in a matter of weeks, without discovery and after having planned for a trial, filed its exhibits and witness lists, and made strategic decisions during discovery based on the Admissions. (ECF No. 973, p. 1)

discovery, only to conveniently change his mind about testifying as the consequences of his Fifth Amendment assertion (i.e., an adverse inference at trial) became clear.

1. LaForte's Attempted Withdrawal of His Fifth Amendment Assertion is Part of an Extended Pattern Designed to Seek an Unfair Advantage in the Litigation

In its Expedited Motion the Commission outlined how LaForte's attempted withdrawal of his Fifth Amendment assertion was part and parcel of a calculated pattern and fit neatly into the sort of manipulative, cat and mouse, behavior that courts have warned about. The behavior outlined by the Commission included:

- Failure to respond to interrogatories
- Failure to produce a single document in response to two requests for production
- Failure to produce a Court ordered accounting
- The disclosure of new witnesses on the eve of trial who were never disclosed in discovery
- In their exhibit lists and motions for summary judgment attempts to introduce documents, and declarations not previously produced, some from witnesses not previously disclosed
- LaForte did not give his expert witness the SEC's subpoena for documents until 2 months after it was served, the expert witness failed to produce all responsive documents and admitted to this during his deposition, and LaForte refused to permit the SEC to continue the expert's deposition after receipt of his responsive documents
- And, of course, as referenced above, the recent attempt by LaForte's co-defendant and spouse to "amend" (i.e., change) items previously admitted in discovery

Notably, LaForte's opposition is silent on almost all of the above,[2] and doesn't even attempt to explain why his attempted withdrawal isn't on all fours with the new witness disclosures, the

[2] The lone exception is a long-winded reference to document production, the gist of which is: "… it is not exactly clear what, if any, documents LaForte would have been able to produce to the SEC." Defendant's Response in Opposition (ECF No. 967, p. 4). That, of course, is a remarkable statement. The documents to be produced in response to a request for production are those in LaForte's possession or control. His feigned confusion of that obligation underscores that he continues to flout the rules of discovery.

production of previously undisclosed documents, and the extensive discovery abuses involving his expert witness. In fact, they all fit into the same pattern, and the gamesmanship is glaring. In addition, LaForte claims that with his eleventh hour epiphany he will shed his Fifth Amendment assertion, but since this supposed epiphany, he has produced no answers to interrogatories, no documents, no accounting, and no explanation for why he believes he can pick and choose for which discovery requests he can and can't make a Fifth Amendment assertion, and when.

Further evidence is found in the Declaration of attorney Futerfas that accompanied Defendant's response (ECF No. 967, Exhibit 4). As outlined in the Declaration, on behalf of LaForte and his spouse, McElhone, at a November 2 meet and confer conference, defense counsel raised the issue of the adverse inference that might result from their Fifth Amendment assertions. The issue was part of the Commission's intended *in limine* motions. The realization that his Fifth Amendment assertion might have adverse consequences - i.e., an instruction by the Court to the jury as to an adverse inference they could draw - clearly is part of what prompted LaForte's epiphany.[3] Allowing him to withdraw his assertion and testify once the risk of an adverse inference became real would mean he had successfully dodged all of his discovery obligations without any consequence.

In sum, LaForte's conduct up to, including, and even after his attempted withdrawal of his assertion, is the sort of manipulative, cat and mouse, tactic that should not be countenanced. And,

[3] The Declaration also claims that Commission counsel during the course of the November 2 conference stated something to the effect that if someone "wishes" to change their mind and testify, the SEC would request a deposition before trial. Three things about that. One, Commission counsel are adamant that the idea of LaForte testifying at trial without asserting the Fifth Amendment, and the idea of a deposition of him (or anyone else) before trial, never was discussed. The notion that counsel for the Commission would suggest that a defendant might "[wish] to change their mind and testify" is, on its face, absurd. Two, the email chain attached to Defendant's Response (Exhibit 1) is compelling evidence that the first time the idea of LaForte testifying was raised was in LaForte's counsel's November 10 email. Three, the November 2 discussion is completely irrelevant, except for pointing to LaForte's concern about an adverse inference. Even accepting the version of the discussion offered by Futerfas, nothing about LaForte potentially withdrawing his Fifth Amendment assertion was mentioned. By anyone.

of course, LaForte's conduct has real world consequences in litigation; here, as discussed below, the very real unfairness to the Commission, and the unfair advantage that would be obtained by LaForte.

2. Unfair Prejudice to the Commission

The chronology of LaForte's "decision" to testify and the Commission's response is laid out in Exhibit 1 to the Defendant's Response (ECF No. 967, Exhibit 1), but the chronology of the exhibit is garbled. It is corrected here, as follows:

November 10

7:53pm: LaForte's counsel sends Commission counsel an email that says, among other things: I don't want this to wait any longer — Joe LaForte has decided he wants to testify.

9:18pm: Commission counsel responds: We would like to take Mr LaForte's deposition November 17.

November 11

10:16am: LaForte counsel emails: Got it. I've conveyed this to the client and the others. We'll get back to you asap.

2:53pm: Commission counsel emails: I am writing to confer pursuant to the Local Rules. We believe the Court should preclude the testimony of Mr. LaForte at trial. It is not simply a matter of deposing him, which would not cure the prejudice to the SEC. Among other things, Mr. LaForte asserted the 5th amendment in response to the written discovery we propounded during the discovery period, and discovery has ended.

2:58pm: LaForte counsel emails: Okay. I can call you tomorrow afternoon to discuss. Let me know what time works for you. For now, we are letting you know that we are free on the 17th for the deposition.

5:44pm: Commission counsel emails: Thank you. We will not be noticing his deposition. Per my below message, we will seek to preclude Mr. LaForte's testimony.

There is no mystery to the chronology. On the evening of November 10, having heard for the first time about LaForte's "decision," Commission counsel immediately established a potential

placeholder for a deposition. By the next afternoon, the Commission determined that a) a deposition would not remedy the unfair prejudice to the Commission, b) LaForte's eleventh hour change of heart was part of a larger pattern designed to gain an unfair strategic advantage, and, c) the appropriate remedy to address (a) and (b) was this Expedited Motion to preclude LaForte's testimony.

Again, the timing of the withdrawal, and the prejudice it carries, speaks for itself. It comes well after the close of discovery, less than four weeks before a lengthy trial will commence, and without any time for the Commission even to begin to remedy the disruption and prejudice it would create.[4] As a result, the risk of prejudice and unfairness to the Commission is substantial, exacerbated by the fact that LaForte's testimony would not just involve his own conduct; he is one of multiple co-defendants. LaForte's testimony would not, and really could not, be limited to matters about himself. That means that, on the eve of trial the Commission - having conducted discovery in good faith and prepared the case without the benefit of knowing the content of the privileged matter - would be placed at a disadvantage not only as to LaForte, but to every other Defendant in the case as well. All because he supposedly changed his mind.

LaForte's Response cites a series of cases that are inapposite for numerous reasons, and fail to address the circumstances present here, for example: eve of trial attempted withdrawal; well past the close of discovery; multiple defendants; jury, not bench trial or summary judgment motion; etc. Tellingly, LaForte does not address, in fact he doesn't mention anywhere in his Response, the case cited by the Commission that is most on point, *Gutierrez-Rodriguez v. Cartagena,* 882 F.2d 553 (1st Cir. 1989). LaForte's avoidance is not an accident. The Court's rationale resonates strongly:

[4] LaForte's suggestion that he simply agree to sit for a deposition now is wholly impractical and would not even approach addressing the prejudice the Commission has and will continue to suffer by his attempted withdrawal.

> The district court's decision to bar [Defendant] from testifying at trial due to his previous refusal to testify during discovery is supported by ample precedent.
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> > The Federal Rules contemplate that there be "full and equal mutual discovery in advance of trial" so as to prevent surprise, prejudice and perjury. "It is an effective means of detecting and exposing false, fraudulent, and sham claims and defenses." 4 Moore, Federal Practice ¶ 26.02[2] at 1034-35. The court would not tolerate nor indulge a practice whereby a defendant by asserting the privilege against self-incrimination during pre-trial examination and then voluntarily waiving the privilege at the main trial surprised or prejudiced the opposing party.
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> *Duffy v. Currier,* 291 F. Supp. 810, 815 (D.Minn. 1968); *accord Rubenstein v. Kleven,* 150 F. Supp. 47, 48 (D.Mass. 1957), *aff'd on other grounds,* 261 F.2d 921 (1st Cir. 1958) (defendant's claim of privilege during deposition precluded his testimony as to certain evidence at trial); *Costanza v. Costanza,* 66 N.J. 63, 328 A.2d 230, 232 (1974); see also *Bramble v. Kleindienst,* 357 F. Supp. 1028, 1035 (D.Colo. 1973) (applying same sanction to a plaintiff), aff'd, 498 F.2d 968 (10th Cir. 1974), *cert. denied,* 419 U.S. 1069, 95 S.Ct. 656, 42 L.Ed.2d 665 (1974); *8 C. Wright A. Miller, Federal Practice and Procedure* § 2018, at 149 (1970) ("[I]f a party is free to shield himself with the privilege during discovery, while having the full benefit of his testimony at trial, the whole process of discovery could be seriously hampered."). We find these cases persuasive.
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> We find the principles enunciated by the *Williams* Court instructive in the case at bar. [Defendant] made his decision not to give deposition testimony on August 24, 1987 and held that position throughout the next six months prior to trial. The district court's decision to bar [Defendant's] testimony did not burden his due process rights, it merely forced him to abide by his decision and protected plaintiff from any unfair surprise at trial. A defendant may not use the fifth amendment to shield herself from the opposition's inquiries during discovery only to impale her accusers with surprise testimony at trial. [cites omitted]

Gutierrez-Rodriguez, 882 F.2d 553, 576-77 (1st Cir. 1989).

For all of the foregoing reasons, the Commission asks the Court to grant its motion to preclude LaForte from testifying at trial in light of his repeated invocations of his Fifth Amendment privilege throughout discovery.

November 18, 2021

Respectfully submitted

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served this 18th day of November 2021 via cm-ecf on all defense counsel in this case.

s/ Martin F. Healey
Martin F. Healey