No. 21-14468

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Consumer Financial Protection Bureau,

Plaintiff-Appellant,

v.

Universal Debt Solutions, LLC, et al.,
Defendants-Appellees.

On Appeal from the United States District Court
for the Northern District of Georgia
Hon. Richard W. Story, Case No. 1:15-cv-00859-RWS

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STATEMENT REGARDING ORAL ARGUMENT

Appellant Consumer Financial Protection Bureau requests that the Court conduct oral argument because the Bureau believes that argument will assist the Court in understanding the numerous legal and factual issues in this case.

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STATEMENT OF SUBJECT-MATTER AND APPELLATE JURISDICTION

The district court had subject-matter jurisdiction over this matter because it was brought under a federal consumer financial law, 12 U.S.C. § 5564(f), presented a federal question, 28 U.S.C. § 1331, and was brought by an agency of the United States, *id.* § 1345.

The district court entered final judgment on October 20, 2021, ECF No. 718, and the Bureau timely filed a notice of appeal on December 17, 2021, ECF No. 721.[1] This Court has appellate jurisdiction under 28 U.S.C. § 1291 to review the final order and all preceding non-final orders.

[1] Documents filed in the proceeding before the district court are referred to as "ECF No. xx."

STATEMENT OF THE ISSUES

1. Did the district court abuse its discretion in sanctioning the Bureau for "fail[ing] to obey" the court's discovery orders where the Bureau made all reasonable efforts to comply with the court's instructions, even when those instructions were unclear, indeterminate, or outside the court's authority?

2. Did the district court abuse its discretion in sanctioning the Bureau for its witness "fail[ing] . . . to appear" for depositions in which the witness appeared and testified for over thirty hours, on the grounds that the witness testified that the Bureau had identified no facts that it considered exculpatory and used memory aids to provide comprehensive answers in response to questions that did not call for a "human touch"?

3. Did the district court abuse its discretion in imposing, with no prior warning or reprimand, the drastic sanction of dismissal rather than some lesser sanction that would have sufficed to achieve the court's objective for the Rule 30(b)(6) depositions?

INTRODUCTION

In 2015, the Bureau filed a complaint against eighteen defendants for engaging in or substantially assisting a fraudulent debt collection scheme. In this scheme, debt collectors threatened and harassed consumers into paying "phantom debt"—*i.e.*, debt that the consumers did not owe or that the debt collectors had no

authority to collect. The success of this scheme depended on five entities—the Appellees here (or "Defendants")—who turned a blind eye to myriad red flags that the debt collectors were engaged in fraud. One Defendant enabled the debt collectors to call over a million consumers with threatening messages. The other four Defendants helped the debt collectors process payments from consumers who were threatened or deceived into paying off the phantom debt.

After years of litigation, the Bureau obtained final judgments ordering the debt collectors to pay over $5 million in compensation to the affected consumers. But the five Defendants who enabled the scheme were never held accountable because the court had previously dismissed the Bureau's case against them as a discovery sanction.

In early 2017, each of these Defendants noticed a 30(b)(6) deposition of the Bureau seeking testimony about all facts relevant to the Bureau's claims against them. To ensure that the Bureau's witness could provide that testimony, the Bureau's attorneys spent over 1,000 hours synthesizing the evidence that the Bureau had gathered about each of the eighteen defendants in the case. The witness spent over 300 hours reviewing the materials and preparing for the depositions.

But the Defendants were not satisfied with the depositions. They complained that Bureau counsel raised privilege objections when the Defendants asked questions that called for attorney work product. They complained that the witness

relied on memory aids to provide complete and accurate answers to Defendants' questions. And they complained that the witness testified that the Bureau had identified no facts that it deemed exculpatory.

As soon as the depositions concluded, the Defendants moved for sanctions under Federal Rule of Civil Procedure 37. And in August 2017, the district court granted the Defendants' motion and imposed the most drastic sanction available—striking the Bureau's claims against the Defendants and dismissing them from the case.

This was an abuse of discretion. No sanctions were warranted, let alone the severe sanction of foreclosing a law enforcement agency from pursuing its claims that Defendants unlawfully assisted a fraudulent debt collection scheme that victimized millions of consumers.

STATEMENT OF THE CASE

I. THE PARTIES

1. *Appellant—The Bureau*. As part of its response to the 2008 financial crisis, Congress enacted the Consumer Financial Protection Act of 2010 ("CFPA"), 12 U.S.C. § 5481 *et seq*. The CFPA established the Bureau and charged it with enforcing the federal consumer financial laws. *Id.* §§ 5481(14), 5564. Those laws include certain pre-existing consumer financial laws, such as the Fair Debt Collection Practices Act ("FDCPA"), *id.* §§ 5481(12), (14), as well as the newly

enacted CFPA, which, among other things, prohibits unfair, deceptive, or abusive acts or practices—and knowingly or recklessly providing substantial assistance to such practices—in connection with consumer financial products or services, *id.* §§ 5531(a), 5536(a).

2. *Appellees—Defendants*. Global Payments, Inc. ("Global Payments"), Pathfinder Payment Solutions, Inc. ("Pathfinder"), Frontline Processing Corp. ("Frontline"), and Francis David Corp. d/b/a Electronic Merchant Services ("EMS") (collectively, "Payment Processors") are corporations that have provided payment processing services that enable merchants to collect payment from consumers by credit and debit cards and other electronic means. Global Connect, LLC ("Global Connect") is a company that has provided telephone broadcast services that allow parties to broadcast automated telephone messages to numerous call recipients at once.

II. PROCEEDINGS BELOW

A. The Bureau's enforcement action.

On March 16, 2015, the Bureau filed a complaint in the Northern District of Georgia against eighteen defendants for engaging in a fraudulent debt collection scheme over several years. *See* ECF No. 1 at 2-4. The Complaint alleged that some defendants (collectively, "Debt Collectors") used threats and harassment to collect "phantom" debts that consumers did not owe or that the Debt Collectors had no

authority to collect. *Id.* at 2-3. Specifically, the Complaint alleged that the Debt Collectors contacted over a million consumers, falsely claiming that the consumers had unpaid debts or had committed check fraud, and threatening that failure to pay immediately would result in severe consequences like wage garnishment or arrest. *Id.* at 39-41. The Complaint claimed that the Debt Collectors violated the FDCPA and CFPA. *Id.* at 48-57.

The Complaint further alleged that five entities—the Appellees here (or "Defendants")—knowingly or recklessly provided substantial assistance to this fraudulent debt collection scheme in violation of the CFPA. *Id.* at 58-61. In particular, the Bureau alleged that Global Connect allowed the Debt Collectors to anonymously broadcast threatening automated messages to over one million consumers, despite warning signs that the messages were unlawful. *Id.* at 60. And it alleged that the four Payment Processors enabled the Debt Collectors to collect payment from consumers by credit and debit cards or other electronic means, despite numerous red flags that the Debt Collectors were defrauding those consumers. *Id.* at 58-59.

In May 2015, three Payment Processor Defendants—Pathfinder, Frontline, and Global Payments—moved to dismiss the case against them for failure to state a claim. *See* ECF Nos. 89, 93, 97. The district court denied the motions to dismiss, finding, among other things, that the Complaint plausibly alleged facts showing

that these Defendants knowingly or recklessly provided substantial assistance to the Debt Collectors in violating the law. ECF No. 149 at 42-44.

B. Discovery orders.

Discovery began in October 2015 and continued for over a year. In a hearing on June 10, 2016, the district court explained its approach to handling discovery disputes: The parties would informally present disputes to the court by letter; the court might hold a hearing; and the court would "issue an order based upon the hearing" that "may impose requirements on the parties." ECF No. 287 at 44.

In late 2016, Defendants served notices of Rule 30(b)(6) depositions on the Bureau seeking testimony about, among other things, all facts the Bureau had gathered about the Defendants in its investigation. The Bureau objected to sitting for these depositions, and following the court's approach to discovery, the parties wrote letters to the court explaining their positions. The Bureau argued that these notices should be quashed because the Bureau had already produced its entire investigative file (other than attorney notes and internal communications) and provided all the requested information in response to fact and contention interrogatories, and because the depositions were nothing more than an attempt to obtain protected attorney work product. *See* ECF No. 316-1.

The court issued a written order overruling the Bureau's objections. *See* ECF No. 316. Though the court ordered the Bureau to sit for 30(b)(6) depositions, the

court explained that the Bureau's witness would not "be required to disclose mental impressions, case strategies, or legal opinions" and that "the Bureau may assert any privileges to which it is properly entitled." *Id.* at 2-3 (cleaned up). Further, the court stated that the Bureau could file motions for protective orders if it had any "specific objections to topics designated by Defendants." *Id.* at 3.

Following this order and a series of meet-and-confer calls, the Bureau filed five motions for protective orders to limit the scope of the noticed topics due to specific objections of overbreadth, privilege, and other concerns. *See* ECF Nos. 327, 338, 342, 348, 368. The parties briefed their arguments, and the court then issued five short and substantively similar orders on the Bureau's motions, granting them in part and denying them in part. *See* ECF Nos. 371, 374, 375, 376, 392.

Of the 75 topics to which the Bureau objected, the court struck 30 entirely, permitted another 25, and narrowed the remaining 20. Most pertinent to this appeal, the court allowed each Defendant to question the Bureau about "all facts relevant to Plaintiff's claims against [the Defendant], including all facts that Plaintiff could reasonably identify as exculpatory." *E.g.*, ECF No. 371 at 2. The latter requirement—that the Bureau testify on facts it could reasonably identify as exculpatory—was added by the court *sua sponte*; no Defendant had noticed a topic about exculpatory evidence. After ruling on each topic, the court stated in closing

that it was not ruling on any of the Bureau's privilege objections, and explained that "[t]he proper time for [privilege] objections is in response to specific questions during the deposition itself." *Id.* at 3.

C. The five depositions of the Bureau.

In response to the court's orders, the Bureau designated a non-attorney witness to appear on the Bureau's behalf and began preparing him. This was a massive undertaking. Due to the nature of the scheme, testifying about "all facts relevant to" the Bureau's claims against each Defendant, *see* ECF No. 371 at 2, required the Bureau's witness to be prepared to testify about the activities of all eighteen defendants over several years. The witness spent over 300 hours reviewing the materials and preparing for the depositions *See* ECF No. 404 at 9. Similarly, the Bureau's attorneys spent over 1,000 hours reviewing the evidence and compiling every fact that the Bureau considered relevant to its claims in written materials that the witness could rely on when testifying. *Id.*

The Bureau prepared these written materials for two related reasons. First, because the witness had no personal knowledge of the facts in this case, and because there was too much information for anyone to memorize, memory aids would allow the witness to provide the most responsive testimony. Second, multiple Defendants had threatened to seek to preclude the Bureau from relying on facts at trial if its 30(b)(6) witness did not recite them in the depositions. *See, e.g.*,

ECF No. 346 at 9 ("[I]f the witness does not know the answers to Frontline's questions, that will bind the CFPB and prevent it from introducing evidence on these topics at trial."); ECF No. 316-1 at 6 (similar). Therefore, the Bureau sought to ensure the witness could accurately recite and correctly describe those facts by using the memory aids.

i. The April 11 deposition.

The first deposition was taken by Global Payments on April 11, 2017, and it lasted the full seven hours allowed. The pertinent aspects were as follows:

First, the Bureau lodged a number of work-product objections. Most relevant here, the Bureau objected on work-product grounds to questions that asked the witness to distinguish between the facts showing that Defendants knowingly assisted the debt collectors' fraudulent scheme from the facts showing that Defendants recklessly assisted that scheme. For instance, Global Payments asked: "What facts is the Bureau aware of that Global Payments had *actual knowledge* of the factual allegations contained in Count 1 of the complaint?" and "[W]hat facts is the Bureau aware of that Global Payments *recklessly disregarded* the factual allegations contained in Count 1 of the complaint?" ECF No. 405-15 at 50 (emphasis added).[2] The Bureau objected to both of those questions on work-

[2] The page number in transcripts is the page number that appears in the header generated by the district court's electronic filing system.

product grounds. Since the Bureau's claim was that Defendants "knowingly *or* recklessly" provided substantial assistance to the fraudulent debt collection scheme, ECF No. 1 at 58, 60 (emphasis added)—consistent with the relevant statutory provision, which prohibits "knowingly *or* recklessly provid[ing] substantial assistance," 12 U.S.C. § 5536(a)(3) (emphasis added)—the Bureau had not separately identified facts showing that Defendants acted knowingly versus those showing they acted recklessly, and Bureau counsel reasonably believed that questions asking the witness to distinguish between those facts improperly called for attorney work product and required legal analysis that the fact witness was not qualified or prepared to do on the spot.

Second, when asked to identify exculpatory facts, the Bureau's witness testified that the Bureau had not identified any facts it considered exculpatory. ECF No. 405-15 at 8. And third, the Bureau's witness relied on the memory aids to provide complete answers on all the facts relevant to the Bureau's claims.

ii. The April 12 teleconference.

After the first deposition concluded, Pathfinder (which was scheduled to take the Bureau's deposition later that week) wrote to the court seeking an emergency conference to address two issues with the Bureau's first deposition—the Bureau's privilege objections and the witness's reliance on memory aids. Pathfinder did not raise any concern about the witness's testimony that the Bureau

had identified no exculpatory facts. The next day, before a transcript of the first deposition was available, the court held a sixty-minute teleconference intended to give "somewhat broad parameters, guidelines, what have you," to help the remaining depositions move forward. ECF No. 393 at 34.

The conversation was freeform, moving from one topic to the next. On the issue of the memory aids, the court first said that "in a case like this, with the breadth of the documents and the allegations and contentions, . . . it's an unreasonable expectation of any witness to be able to sit there and recount from memory specific facts about the various allegations." *Id.* at 4. Thus, the court said, "[I]t's okay for a witness to have these kinds of things with him or her at the time the deposition is given. It seems to me that this is a good faith effort on the part of CFPB to give what I said they had to give." *Id.* at 6. "At the same time," the court continued, "the witness needs to be prepared and versed." *Id.* at 6-7.

Later, the court explained the "expectation" that "the witness will be prepared by the CFPB to be able to address matters that aren't just memory tests" and "would answer those questions and, for lack of a better term, the human touch questions." *Id.* at 27. When the Bureau asked for clarification on what topics would require a "human touch," the court did not provide a definitive answer:

> I think a great example you cited in your e-mail, which was, you know, talk about industry standards, talk about publications sent to the—to the theory of damages, industry standards, theory of damages, those kinds of things. And those are the kinds of things that—the theory of damages

> perhaps not as much in terms of the numbers and so forth, that's more of a finite matter. But standards, those kinds of topics I can see not necessarily being something that you read off of a sheet, but maybe they are. But it seems to me that that would be the type thing that I would be thinking of that's not reading off of a set of interrogatory answers or off a set of—a prewritten document necessarily.

Id. at 28.

At one point, when the parties discussed the witness's reliance on the memory aids in response to specific questions, Bureau counsel said, "we're going to need a transcript to go through these question-by-question issues," and the court agreed, saying, "I think that's what we'll have to do." *Id.* at 17.

The court also spent some time on the issue of privilege objections. Early in the teleconference, the court acknowledged that "we've got a fine line between work product and evidence and facts" and that "we're in a gray area, it's not a clearcut area"—and that, "sadly . . . we may have to get a transcript and look at the questions and make the call." *Id.* at 26-27. The court then stated, "I hope that I have intimated to everyone my view" regarding privilege objections "so that you would not be surprised by any ruling you got from me if we get to that point." *Id.* at 27.

Later, the court asked Bureau counsel about its basis for making a work-product objection to a question seeking "the factual basis for a contention that a defendant had knowledge of a matter," which, the court said, "to me, is more of a factual question than a work product question." *Id.* at 30. Bureau counsel explained

that the deposition notice called for testimony about "all relevant facts" (*i.e.*, facts relevant to the claims) and did not call for testimony about facts supporting knowledge versus recklessness, and "a fact witness is not prepared to go in and make that distinction . . . on the spot" because it is "a legal distinction." *Id.* at 31. The court responded in apparent agreement: "Certainly I would not expect—I think you definitely cross over the line when you get into legal conclusions, legal distinctions. I don't disagree with you there and I think that would be an area that the witness would not be expected to testify about." *Id.* It further reiterated that questions about "what are the facts" would be permissible, but not questions about "what's your theory," as "that's clearly attorney work product." *Id.* at 32.

After some other discussion, the court returned to the issue of questions separately asking for facts that establish knowledge and facts that establish recklessness. The court said, "if the claim is that the defendant either knew or recklessly disregarded information or facts, if that's the contention, then to ask, well, what facts show that they actually knew, it seems to me to be a question directed specifically at the claim" and "those are essential elements of those claims." *Id.* at 39. But, the court also acknowledged, "I guess what you're saying is that's asking the witness to figure out which facts show which of those matters," before stating, "I guess we could debate whether if the witness put the wrong fact

under the wrong claim whether you could use it for either, I'm guessing I'd probably let you do that." *Id.*

The court concluded by saying, "I don't know that we can plow through every one of these questions" to resolve the privilege disputes. *Id.* The court did not seem to definitively rule on the objections, but instead gave the general guidance going forward: "[I]f it goes to an element of the claim, then that is a fair question," but "[i]f it's asking the witness to analyze it beyond offering the facts then you're getting out of bounds and you're arguably getting over into work product or you're getting into questions that the witness is not qualified to answer and that are subject to legitimate objections." *Id.* at 40. Thus, "so long as the inquiries are into facts that are within the knowledge of the Bureau and that are within the scope of the notice, then . . . they've got to be answered." *Id.* And the court said that "the example that was just given would be one where I would expect the question to be answered." *Id.*

Finally, in the middle of explaining its approach to work-product objections, the court mentioned in passing its prior ruling that Defendants were "entitled to question" the witness about exculpatory evidence. *Id.* at 33-34. The court did not suggest that the witness was required to answer Defendants' questions about exculpatory evidence in any particular way, nor did the court suggest that the witness's testimony in the first depositions had been improper. *See id.* In fact, no

party raised in the teleconference or letters to the court any concern about the witness's testimony in the first deposition that the Bureau had not identified any evidence that it considered exculpatory.

Following the teleconference, the court did not issue a written order setting forth guidelines for the remaining depositions.

iii. The April 13 deposition.

The morning after the teleconference, before any transcript of the teleconference became available, Frontline took the second deposition of the Bureau. Early in the deposition, Frontline's counsel asked two questions on knowledge and recklessness: "Does the CFPB rely on any facts to demonstrate that Frontline knew that [Debt Collectors] were collecting debt illegally?" and "Does the CFPB rely on any facts to demonstrate that Frontline was severely reckless in disregarding that [Debt Collectors] were collecting debts illegally?" ECF No. 405-17 at 7. Bureau counsel objected to both questions on work-product grounds. *Id.* During this deposition, the witness also continued to rely on the memory aids. And Frontline's counsel did not ask the witness to identify any exculpatory evidence.

Meanwhile, the rough transcript of the court's teleconference became available around 1:00 pm, in the middle of the deposition.

iv. The April 14 deposition.

The following day, on April 14, Pathfinder took the third deposition. During this deposition, the Bureau's witness continued relying on the memory aids, and the witness testified that the Bureau had not identified any exculpatory evidence. ECF No. 405-16 at 22.

Also, the Bureau lodged work-product objections when Pathfinder's counsel asked the witness whether the Bureau "contend[s] that Pathfinder actually knew" of a red flag—that a Debt Collector had a criminal history. *Id.* at 45. Pathfinder's counsel claimed this objection was improper, and the parties pulled up the transcript of the April 12 teleconference to discuss the court's guidance. Pathfinder's counsel argued that "the court indicated that it was a proper area for inquiry to determine whether the CFPB is alleging that a particular defendant had actual knowledge versus whether it recklessly disregarded." *Id.* at 46. Bureau counsel disagreed, saying the court's instructions were to answer questions asking for facts supporting claims, and the witness was "prepared to provide all facts the CFPB relies on to support its contentions." *Id*. As Pathfinder's counsel conceded, its "question to [the witness] was not to provide the factual basis," *id.*, which is why Bureau counsel said it was "beyond the scope . . . of what's permissible in the court's order," *id.* at 47.

After further debate, Pathfinder's counsel eventually asked the witness what "facts . . . show that Pathfinder" knew that a Debt Collector had a criminal history; the Bureau did not object, and the witness answered. *Id.* at 51. Later in the deposition, Pathfinder asked whether the "CFPB rel[ies] on any facts to demonstrate that Pathfinder knew that [certain Debt Collectors] were allegedly collecting debts illegally"; the Bureau did not object, and the witness answered. *Id.* at 68. These were the only two questions in the deposition asking for *facts* supporting the Bureau's claim of knowledge or recklessness.

v. The May 10 and 11 depositions.

A few weeks later, EMS and Global Connect took the fourth and fifth depositions on May 10 and May 11, respectively. For these depositions, the Bureau again did not object to questions separately asking for facts supporting the Bureau's claims that those Defendants acted knowingly or recklessly, and the witness answered. *See* ECF No. 407-1 at 81-85; ECF No. 418-2 at 61-62. The witness also continued relying on the memory aids, and the witness testified in response to Global Connect's counsel's questions that the Bureau had not identified any exculpatory evidence. *See* ECF No. 418-2 at 38, 44. EMS did not ask about exculpatory evidence.

D. Rule 37 sanctions.

On May 11, the same day as the final deposition, Global Payments, Frontline, and Pathfinder moved for sanctions under Federal Rules of Civil Procedure 37(b) (which authorizes sanctions where a party "fails to obey an order to provide or permit discovery") and 37(d) (which authorizes sanctions where a party's 30(b)(6) witness "fails . . . to appear for that person's deposition"). *See* ECF No. 397. EMS and Global Connect soon filed joinders. *See* ECF Nos. 407, 418. All the Defendants requested the sanction of dismissal, and Global Connect and EMS alternatively requested that the court reopen the depositions.

After briefing, the court granted the Defendants' motions. ECF No. 436. The court found that the Bureau "willfully violated the Court's repeated instructions to identify for Defendants the factual bases for its claims and that, in each deposition, it willfully failed to present a knowledgeable 30(b)(6) witness." *Id.* at 21. The court broke down its discussion into two sections.

First, the court analyzed whether the Bureau presented a knowledgeable witness, focusing on the witness's use of the memory aids and the witness's testimony on exculpatory evidence. The court found that the witness failed to abide by the court's instructions by reading almost exclusively from the memory aids and failing to provide a "human touch." *Id.* at 13-15. The court also found that the Bureau's "refusal to testify about any exculpatory evidence" "reflects an

unwillingness to comply with the Court's instructions and a bad faith attempt to frustrate the purpose of the Defendants' depositions," and at the least "amounts to a failure to present a knowledgeable witness." *Id.* at 17.

Second, the court focused on the Bureau's privilege objections. The court found that the Bureau asserted "privilege objections to questions that the Court has repeatedly ordered to be answered." *Id.* at 21. Specifically, the court highlighted that, in the second deposition, which was held the day after the emergency teleconference and which began before any transcript of that teleconference became available, the Bureau objected to questions asking for facts supporting knowledge versus recklessness. The court found that these objections amounted to a "willful disregard of the Court's instructions." *Id.*

In its conclusion, the court expressed its view that, "[i]n light of the CFPB's pattern of conduct in this case, the Court is not optimistic that reopening the depositions would be fruitful," especially "given the CFPB's continued use of privilege objections in response to questions that the Court expressly identified as permissible." *Id.* at 21-22. Accordingly, the court struck the Bureau's claims against the Defendants and dismissed them from the case. *Id.* at 22.

E. Final judgment and appeal.

Following those dismissals, the Bureau continued litigating its claims against the Debt Collectors for several years. On October 20, 2021, the district court entered final judgment against the remaining defendants. ECF No. 718.

With the final judgment disposing of all claims against all Defendants, the Bureau timely appealed the sanctions order on December 17, 2021.

STANDARD OF REVIEW

The Eleventh Circuit reviews an appeal of Rule 37 sanctions for "an abuse of discretion and a determination that the findings of the trial court are fully supported by the record." *BankAtlantic v. Blythe Eastman Paine Webber, Inc.*, 12 F.3d 1045, 1048 (11th Cir. 1994). One way a court abuses its discretion is when it "makes findings of fact that are clearly erroneous." *FTC v. AbbVie Prods. LLC*, 713 F.3d 54, 61 (11th Cir. 2013) (cleaned up). "A factual finding is clearly erroneous when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *United States v. Robertson*, 493 F.3d 1322, 1330 (11th Cir. 2007) (cleaned up). The court's underlying discovery orders are also reviewed for abuse of discretion. *Donovan v. Mosher Steel Co., Div. of Trinity Indus.*, 791 F.2d 1535, 1537 (11th Cir. 1986).

SUMMARY OF THE ARGUMENT

The district court abused its discretion in two ways: first, in sanctioning the Bureau at all, and second, in imposing the drastic sanction of dismissal.

1. The court abused its discretion in sanctioning the Bureau. The court imposed sanctions under Rule 37(b), which authorizes sanctions if a party or witness "fail[s] to obey an order to provide or permit discovery," and Rule 37(d), which authorizes sanctions if a party's Rule 30(b)(6) witness "fails . . . to appear" for a deposition. In sanctioning the Bureau, the court found fault with: (1) the Bureau's privilege objections; (2) the witness's testimony on exculpatory evidence; and (3) the witness's reliance on memory aids.

Sanctions were not appropriate on any of those grounds. First, no sanctions were warranted under Rule 37(b) for failing to comply with court orders. On privilege objections, the court's only guidance came during an emergency teleconference in the midst of a demanding discovery schedule, and the court's statements were far from a clear and unambiguous discovery order. Even so, the Bureau made all reasonable efforts to comply (and unquestionably did comply once given the time and opportunity to do so). On exculpatory evidence, the court improperly ordered the Bureau to identify evidence that the Bureau considered exculpatory—which intruded on attorney work product and imposed obligations in this civil case exceeding those in criminal prosecutions— and further erred in

finding that the Bureau failed to comply because its witness testified that the Bureau had identified no evidence it considered exculpatory. And on memory aids, the court's statements (again delivered only during an emergency teleconference) did not give clear guidance on which questions the witness could appropriately rely on the aids to answer and which would necessitate a "human touch," nor is it clear how the witness even could have provided a "human touch." Finally, no sanctions were warranted under Rule 37(b) for failing to appear for a deposition because the Bureau's witness, after preparing extensively, appeared for five depositions and provided over thirty hours of testimony.

2. Even if some sanction were warranted (though none was), imposing the drastic sanction of dismissal was an abuse of discretion. Under this Court's clear precedent, dismissal is a sanction of last resort, applicable only in the most extreme circumstances. To protect against district courts too lightly resorting to dismissal, this Court rigorously requires district courts to find both that the noncompliant party's behavior was willful or in bad faith, and that lesser sanctions would not suffice to curb the behavior. Here, the district court found that the Bureau's conduct was willful, but this finding was clearly erroneous: The record shows that the Bureau exhaustively prepared for the depositions and attempted in good faith to comply with the court's orders as it reasonably understood them. The court also failed to consider alternative sanctions, and there is no reason to think that lesser

sanctions would not have sufficed, particularly considering the court never reprimanded or warned the Bureau prior to dismissing its claims outright. Finally, the court failed to consider that the discovery conduct that Defendants complained of caused them absolutely no prejudice, as they had all the facts at their disposal to prepare their defenses for trial.

ARGUMENT

I. THE DISTRICT COURT ABUSED ITS DISCRETION IN SANCTIONING THE BUREAU.

The district court issued sanctions under Rules 37(b) and 37(d), but sanctions were not warranted under either rule.

While a district court has broad discretion to impose sanctions, that discretion "is not unbridled." *Pesaplastic, C.A. v. Cincinnati Milacron Co.*, 799 F.2d 1510, 1519 (11th Cir. 1986). A district court abuses its discretion when it imposes Rule 37 sanctions based on findings of fact that are clearly erroneous, *Martin v. Automobili Lamborgini Exclusive, Inc.*, 307 F.3d 1332, 1336 (11th Cir. 2002); based on an underlying order that is unclear and ambiguous, *In re Se. Banking Corp.*, 204 F.3d 1322, 1332 (11th Cir. 2000); based on an underlying order that is invalid, *Chudasama v. Mazda Motor Corp.*, 123 F.3d 1353, 1366 (11th Cir. 1997); or based on noncompliance despite a party's reasonable efforts (or inability) to comply, *BankAtlantic*, 12 F.3d at 1050; *cf. McGregor v. Chierico*, 206 F.3d 1378, 1383 (11th Cir. 2000) ("Upon appellate review, a civil contempt

order may be upheld only if . . . 1) the allegedly violated order was valid and lawful; 2) the order was clear, definite and unambiguous; and 3) the alleged violator had the ability to comply with the order.").

A. No sanctions were warranted under Rule 37(b) for failing to comply with the court's orders.

The district court abused its discretion in sanctioning the Bureau under Rule 37(b), which authorizes sanctions if a party or witness "fail[s] to obey an order to provide or permit discovery." In its sanctions order, the court identified three ways in which it believed the Bureau failed to comply with the court's instructions: (i) continuing to assert privilege objections to questions that the court believed it had ordered to be answered, (ii) testifying that there was no evidence the Bureau considered exculpatory, and (iii) failing to provide a "human touch."[3] Rule 37(b) sanctions were not warranted on any of those grounds.

i. Privilege objections.

It was an abuse of discretion to sanction the Bureau for making privilege objections when the Bureau made all reasonable efforts to comply (and did

[3] The district court analyzed the last two issues—testifying that the Bureau considered no evidence exculpatory and failing to provide a "human touch"—within the discussion of whether the Bureau failed to present a knowledgeable witness for purposes of Rule 37(d). *See* ECF No. 436 at 12-17. The court did not appear to rely on these findings to support sanctions under Rule 37(b). In any event, neither the witness's supposed failure to provide a "human touch" nor its testimony on exculpatory evidence would warrant sanctions under Rule 37(b).

comply) with confusing oral guidance delivered in the midst of a demanding discovery schedule.

The district court imposed sanctions on the ground that the Bureau "assert[ed] privilege objections to questions that the Court has repeatedly ordered to be answered." ECF No. 436 at 21. In particular, the court found that, after the April 12 teleconference, the Bureau "blatant[ly] disregard[ed]" the court's instructions by objecting to questions asking for facts establishing knowledge and facts establishing recklessness. *Id.* at 20. But the court's oral statements on objections during that emergency teleconference were far from "clear, definite, and unambiguous," *see Chierico*, 206 F.3d at 1383. Even so, the Bureau made all reasonable efforts to understand the court's guidance and comply. Indeed, while the Bureau objected to those questions during the second deposition (before it had an opportunity to review the teleconference transcript), the Bureau did not object to those questions in the third, fourth, and fifth depositions. Thus, far from blatantly disregarding the court's instructions, the Bureau made all reasonable efforts to comply with them.

1. To start, there would be no basis to conclude that it was improper for the Bureau to raise privilege objections during the first deposition. In its initial discovery orders, the court did not rule on any of the Bureau's privilege objections, instead stating that "the Bureau may assert any privileges to which it is properly

entitled," ECF No. 316 at 2-3, and that "[t]he proper time for [privilege] objections is in response to specific questions during the deposition itself," ECF No. 371 at 3.

So, that is what the Bureau did. Most pertinent here, Bureau counsel objected on work-product grounds to questions that asked the witness to distinguish between facts supporting (a legal finding of) knowledge and facts supporting (a legal finding of) recklessness. For example, during the first deposition, the Bureau objected when Global Payments' counsel asked the witness what facts showed that "Global Payments had actual knowledge" of the Debt Collectors' fraudulent conduct and separately asked what facts showed that Global Payments "recklessly disregarded" that conduct. ECF No. 405-15 at 50. As discussed above, Bureau counsel reasonably believed that questions asking the witness to distinguish between the facts supporting knowledge and facts supporting recklessness improperly called for attorney work product and would have required legal analysis that the fact witness was not qualified or prepared to do on the spot.

Before the first deposition, the court had never even arguably instructed the Bureau not to object to these sorts of questions—and there was therefore no basis to sanction the Bureau for raising such objections during the first deposition.

2. There was likewise no basis to sanction the Bureau for making those objections in the second deposition, which took place the day after the April 12 teleconference. The court did not issue a written order after the teleconference, and

not even a rough transcript of the teleconference was available until midway through the second deposition. Any oral guidance that the court gave during the teleconference were unclear, indefinite, and ambiguous, particularly without the benefit of a transcript. For instance, at the teleconference, the court indicated that it was offering only general guidance and would defer ruling on specific objections. The court said, for example, that it might be necessary "to get a transcript and look at the questions and make the call," ECF No. 393 at 27, that "this is going to some extent have to work itself out and we will have to deal with it as we can," *id.* at 34, and that "the best we shoot at today is somewhat broad parameters, guidelines, what have you, to help us get there," *id.*

The court also was indefinite on how it viewed the Bureau's obligation to answer questions about facts going to knowledge versus recklessness. For instance, the court repeatedly acknowledged the complexity of the privilege issues, saying this is in "a gray area," "not a clearcut area," and walking "a fine line between work product and evidence and facts." *Id.* at 12, 26-27. The court also gave seemingly contradictory guidance on whether certain questions were permissible. At one point, when Bureau counsel explained that "a fact witness is not prepared" to distinguish between facts supporting knowledge versus recklessness "on the spot" because that is "a legal distinction," the court seemed to agree, saying, "I think you definitely cross over the line when you get into legal conclusions, legal

distinctions. I don't disagree with you there and I think that would be an area that the witness would not be expected to testify about." *Id.* at 31. At another point, however, the court said that a question asking for facts supporting knowledge "seems . . . to be a question directed specifically at the claim," and that it "would expect the question to be answered," even though it is "asking the witness to figure out which facts show which of those matters." *Id.* at 39-40. The April 12 teleconference thus failed to state "in specific and clear terms" what was required of the Bureau. *In re Se. Banking Corp.*, 204 F.3d at 1332.

But even if any clear and definitive instruction can be gleaned from parsing through the transcript, that transcript was not available until around 1:00 pm the following day, midway through the April 13 deposition. Without the aid of the transcript, and without any written order, the court's guidance from a one-hour oral teleconference was especially unclear, and Bureau counsel reasonably did not believe that the court had issued a definitive ruling on the Bureau's objections. It was an abuse of discretion to sanction the Bureau for not following confusing guidance given during an emergency teleconference. *See EEOC v. Troy State Univ.*, 693 F.2d 1353, 1357-58 (11th Cir. 1982) (reversing dismissal sanction where EEOC did not produce discovery based on a reasonable understanding of a confusing oral hearing).

3. Nor was there any basis to sanction the Bureau for objections made in the third, fourth, or fifth depositions because, in each of these depositions, Bureau counsel did not object to questions asking for facts demonstrating knowledge or facts demonstrating recklessness. By the third deposition, after having had the opportunity to parse through the teleconference transcript and review the evidence in support of its claims, the Bureau's attorneys determined that the same facts supported both knowledge and recklessness. Thus, Bureau counsel allowed the witness to answer such questions by providing all of those facts.

For instance, in the third deposition on April 14, Pathfinder's counsel asked what "facts does the CFPB have that show that Pathfinder . . . actually knew" of a red flag—that a Debt Collector had a criminal record. ECF No. 405-16 at 51. The Bureau did not lodge a work-product objection, and the witness answered, providing the factual basis for this claim. *Id.* at 51-55. Similarly, in the May 10 and 11 depositions, the witness was asked for facts supporting the Defendants' knowledge of the Debt Collectors' underlying criminal conduct, and the Bureau did not lodge a work-product objection, allowing the witness to answer. *See* ECF No. 407-1 at 81-85; ECF No. 418-2 at 61-62.

To be sure, the Bureau objected to a few questions in the April 14 deposition asking whether the Bureau was "alleging that Pathfinder actually knew" of red flags indicating Debt Collectors' illegal conduct. ECF No. 405-16 at 47. These

questions, however, did not ask for the facts supporting knowledge or recklessness, but rather asked the witness to describe contentions that are not in the Complaint. The court had not ordered the Bureau to answer these questions, let alone clearly and unambiguously. And when the parties pulled up the transcript of the April 12 teleconference and parsed through the court's guidance, the Bureau pointed to the court's language saying the witness was obligated to provide the *facts* supporting the Bureau's claims. *Id.* at 46-47. As Pathfinder's counsel admitted, this "question to [the witness] was not to provide the factual basis." *Id.*

In sum, the record shows that the Bureau made all reasonable efforts to comply with the court's guidance. Following the April 12 teleconference, the Bureau objected to only two questions asking the Bureau's witness for the facts demonstrating knowledge separately from the facts demonstrating recklessness—both of which occurred the morning after the April 12 teleconference and before the transcript of that teleconference became available. Once the Bureau had a written record of the court's guidance, and the time and opportunity to review it, the Bureau ceased these objections. Thus, even if the court's statements during the teleconference could be construed as clear and unambiguous instructions (which they were not), the Bureau complied, and the court's finding that the Bureau continued making privilege objections in disregard of its orders finds no support in the record. *See Robertson*, 493 F.3d at 1330 ("Although review for clear error is

deferential, a finding of fact must be supported by substantial evidence."). Sanctioning the Bureau on this basis was therefore an abuse of discretion. *See FTC v. AbbVie Prods.*, 713 F.3d at 61.

4. Finally, while the depositions were ongoing, Bureau counsel reasonably believed that the court would issue a definitive ruling on the merits of its objections, perhaps after the deposition transcripts became available and the parties fully explained their positions in letters to the court. That approach would have been consistent with the court's usual practice for handling discovery disputes, which, as the court had previously stated, involved hearings and letters to the court, followed by written orders spelling out the court's instructions. *See* ECF No. 287 at 44. But the court never issued a written order specifically ruling on the Bureau's objections. Indeed, not even in the sanctions order did the court rule that the Bureau's objections were unjustified, even though the Bureau briefed its argument to the court and supplemented it with a Privileges and Objections Log. ECF Nos. 424, 425-4. For the court to sanction the Bureau for lodging work product objections that are "too numerous to recount," ECF No. 436 at 17, without actually ruling on the merits of those objections, is itself an abuse of discretion, *cf. Chudasama*, 123 F.3d at 1370 (holding district court abused its discretion by compelling discovery where party "filed and argued numerous good-faith

objections based on persuasive grounds" but district court failed "to indicate that it had taken the objections into consideration").

ii. Exculpatory evidence

In sanctioning the Bureau, the district court also found that the Bureau failed to comply with the court's instructions because its witness testified that the Bureau had not identified any exculpatory facts. *See* ECF No. 436 at 17. The court abused its discretion in sanctioning the Bureau on this ground because (1) the underlying order itself was an abuse of discretion insofar as it required the Bureau's witness to identify which facts in the case the Bureau considered to be exculpatory, and (2) the Bureau complied with the court's order.

1. When a district court imposes sanctions under Rule 37(b), "the propriety of [the sanctions order] depends in large part on the propriety of the earlier . . . order" to provide discovery. *Chudasama*, 123 F.3d at 1366; *see also Donovan*, 791 F.2d at 1537 ("Appeal of an order imposing sanctions necessarily includes a review of the underlying discovery order."). Thus, "[i]n evaluating whether a district court abuses its discretion when it imposes severe sanctions upon a party that violates an order," "an important factor is whether the entry of that order was itself an abuse of discretion." *Chudasama*, 123 F.3d at 1366.

Here, the district court abused its discretion by ordering the Bureau's witness not only to testify about all facts relevant to the Bureau's claims—which

might well include some facts that Defendants would cast as exculpatory—but also to identify for Defendants which of those facts the Bureau would concede were exculpatory. Such an order is invalid because it necessarily compelled the Bureau to reveal protected attorney work product. Whether a fact is exculpatory is a legal opinion that an attorney reaches by developing a legal theory and applying the law to the facts of the case. That sort of legal conclusion or opinion "of a party's attorney . . . concerning the litigation" is "opinion work product" that "can be discovered only in very rare and extraordinary circumstances." *Drummond Co., Inc. v. Conrad & Scherer, LLP*, 885 F.3d 1324, 1335 (11th Cir. 2018); *see also, Sporck v. Peil*, 759 F.2d 312, 316 (3d Cir. 1985) ("Opinion work product includes such items as an attorney's . . . evaluation of the strengths and weaknesses of his case"); *FTC v. CyberSpy Software, LLC*, No. 6:08-CV-1872-ORL-31GJK, 2009 WL 2386137, at *4 (M.D. Fla. July 31, 2009) ("The Defendants are not entitled to explore opposing counsel's thought processes as to which facts support these contentions (and which do not), or what inferences can be drawn from the evidence that has been assembled so far.").

The fact that the government has an obligation to disclose exculpatory evidence in criminal cases under *Brady v. Maryland*, 373 U.S. 83, 97 (1963), does not suggest that it was proper for the court to require the Bureau's witness to identify which facts were exculpatory in this civil case. Even in the criminal

context, the government generally need only disclose exculpatory evidence (which the Bureau did here), not specifically identify for the defendant what evidence may be exculpatory. *See United States v. Valera*, 845 F.2d 923, 927 (11th Cir. 1988) (holding that government has no obligation to turn over exculpatory information "when the accused or his counsel [already] knows . . . about" it).

In short, because it was improper for the district court to order the Bureau to specifically identify evidence that it considered exculpatory, "the district court should not have imposed a Rule 37 sanction upon appellant for refusing to reveal the information." *EEOC v. First Nat'l Bank of Jackson*, 614 F.2d 1004, 1007 (5th Cir. 1980).[4]

2. In any event, sanctions were unwarranted for the independent reason that the court clearly erred in finding that the Bureau failed to comply with the court's instruction to identify for Defendants which pieces of evidence the Bureau thought were exculpatory.

The court ordered the Bureau to testify about "all facts that [the] *Plaintiff* could reasonably identify as exculpatory." ECF No. 371 at 2 (emphasis added). During the depositions, the Bureau's witness testified that he was prepared to testify on this topic but that the Bureau had not identified any exculpatory facts.

[4] In *Bonner v. City of Prichard, Ala.*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), this court adopted as binding precedent all Fifth Circuit decisions handed down before October 1, 1981.

See, e.g., ECF No. 405-15 at 8. As Bureau counsel further explained, "[t]he attorneys' view in this case is that there aren't any facts that exculpate" the Defendants. *Id.* at 17. Moreover, after the Bureau's witness testified at the first deposition that the Bureau had identified no exculpatory evidence, no Defendant complained about that to the district court, and the court did not clarify that it expected anything different in the subsequent depositions.

While the district court criticized the Bureau for "tak[ing] advantage of the Court's instruction to testify about any exculpatory facts that *it* [i.e., the Bureau], could reasonably identify," ECF No. 436 at 17 (emphasis in original), it was "not unreasonable" for the Bureau to believe, "[g]iven the wording of the order," that that is what the court had ordered, *Lambright v. Ryan*, 698 F.3d 808, 822 (9th Cir. 2012) (holding district court abused its discretion by sanctioning a party "for failing to make a showing that the briefing order did not require him to make"). The Bureau reviewed the evidence and determined, based on the Bureau's theories of the case, that none of the facts were exculpatory. This conclusion does not amount to an "unwillingness to comply" with the court's instructions to identify exculpatory evidence, ECF No. 436 at 17; it simply means the Bureau found none. And even though the Bureau declined to concede that any particular facts were exculpatory, the Bureau's witness was fully prepared to testify about all the

relevant facts, including those that Defendants might claim were exculpatory. *See* ECF No. 405-15 at 8, 17.

iii. Human touch

Finally, in sanctioning the Bureau, the district court found that the Bureau failed to abide by the court's instructions to provide a "human touch" because the witness "rel[ied] almost exclusively on the memory aids." ECF No. 436 at 14-15. The court abused its discretion in sanctioning the Bureau on this ground because it did not give clear instructions on what the witness should do, including how the witness even could have provided a "human touch."

At the April 12 teleconference, the district court approved the witness's use of the memory aids as a general matter, finding them to represent a "good faith effort on the part of [the Bureau]" to provide responsive testimony. ECF No. 393 at 6. The court explained that the depositions should not be a "memory test" and "it's an unreasonable expectation of any witness to be able to sit there and recount from memory specific facts about the various allegations." *Id.* at 4.

To be sure, the court also said that the witness should provide "more of a human touch" to certain types of questions—"for lack of a better term, the human touch questions." *Id.* at 6-7, 27. But it never clearly identified what a "human touch" question would be. When the Bureau asked for clarification on what sorts of questions would call for a "human touch," *id.* at 27-28, the court did not give a

clear answer. It first listed as examples "the theory of damages" and "industry standards." *Id.* at 28. But the court then immediately backtracked: "[T]he theory of damages perhaps not as much in terms of the numbers and so forth, that's more of a finite matter." *Id.* As for industry standards, the court likewise equivocated: "[S]tandards, those kinds of topics I can see not necessarily being something that you read off of a sheet, but maybe they are." *Id.*

At the depositions following the April 12 teleconference, the Bureau's witness continued to rely on the memory aids because Bureau counsel did not believe any questions called for a "human touch," and in any event, the witness was unable to provide a meaningful "human touch" since the witness did not know—and had no way to know—anything beyond what was in the memory aids. Further, Defendants' questions asked for facts relevant to a wide variety of allegations that necessarily required the witness to rely on those memory aids to provide factually accurate and complete answers.

Indeed, the court said it was "appropriate" to "have the information marshaled together" in memory aids "from which that witness can get specifics to the extent that they are requested through the questioning." *Id.* at 5. That is especially so "in a case like this, with the breadth of the documents and the allegations and contentions," where it would be "an unreasonable expectation of any witness to be able to sit there and recount from memory specific facts about

the various allegations." *Id.* at 4. That the witness relied on these memory aids thus reflects not a violation of the court's instructions, but rather the Bureau's efforts to comply with the court's other instructions to testify on "all facts relevant to [the Bureau's] claims" against the Defendants, *see e.g.*, ECF No. 371 at 2. It was impossible to meet the court's order to testify on all facts while also providing "human touch" testimony, if that meant not relying so heavily on the written materials. *See Khan v. United States*, 928 F.3d 1264, 1278 (11th Cir. 2019) ("[N]oncompliance . . . cannot be faulted when it is impossible to satisfy a court order or comply with a condition . . . .").

Because the district court did not state "in specific and clear terms what acts were required or prohibited," *In re Se. Banking*, 204 F.3d at 1332, and because the witness was unable to provide complete testimony without relying on the memory aids, *see Khan*, 928 F.3d at 1278, it was an abuse of discretion to sanction the Bureau for failing to provide a "human touch" in its deposition testimony.

B. No sanctions were warranted under Rule 37(d) for effectively failing to appear for the depositions.

The district court also sanctioned the Bureau under Rule 37(d), which authorizes sanctions if a witness designated under Rule 30(b)(6) "fails . . . to appear for that person's deposition." The district court found that the Bureau "willfully failed to present a knowledgeable 30(b)(6) witness," and that this

effectively amounted to a failure "to appear" under Rule 37(d). ECF No. 436 at 11, 21.

As an initial matter, this was an abuse of discretion because Rule 37(d) sanctions apply only when a witness "literally fails to show up for a deposition session." *Salahuddin v. Harris*, 782 F.2d 1127, 1131 (2d Cir. 1986); *accord Evans v. Griffin*, 932 F.3d 1043, 1045 (7th Cir. 2019); *Estrada v. Rowland*, 69 F.3d 405, 406 (9th Cir. 1995); *Aziz v. Wright*, 34 F.3d 587, 589 (8th Cir. 1994); *R.W. Int'l Corp. v. Welch Foods, Inc.*, 937 F.2d 11, 15 n.2 (1st Cir. 1991). *But see Black Horse Lane Assoc., L.P. v. Dow Chem.* Corp., 228 F.3d 275, 300, 305 (3d Cir. 2000); *Resol. Tr. Corp. v. S. Union Co.*, 985 F.2d 196, 197 (5th Cir. 1993). Here, the Bureau's witness showed up and testified.

Even if Rule 37(d) also authorized sanctions for producing an insufficiently knowledgeable witness, sanctions were unwarranted here because the Bureau made all reasonable efforts to, and did in fact, present a knowledgeable witness. Bureau counsel spent over 1,000 hours preparing its witness to testify on facts about the conduct of eighteen defendants spanning several years, and the witness spent more than 300 hours preparing for the depositions, reviewing the documents, and meeting with counsel. ECF No. 405-15 at 7. The witness was prepared to answer questions on the noticed topics, and indeed he provided extensive testimony over the course of five depositions. The district court erred by ignoring this evidence

demonstrating the witness's overall preparedness. *See FTC v. AbbVie Prods.*, 713 F.3d at 61 ("A district court abuses its discretion if it . . . ignores or misunderstands the relevant evidence" (internal citation and quotation omitted)).

The district court relied on *Resolution Trust* as establishing that "[a] failure to appear includes circumstances where the witness 'is not knowledgeable about relevant facts, and the principal has failed to designate an available, knowledgeable, and readily identifiable witness.'" ECF No. 436 at 11 (quoting *Resol. Tr.*, 985 F.2d at 197). But the facts of this case are a far cry from those in *Resolution Trust*, where the court held that the witness's appearance was "for all practical purposes, no appearance at all." 985 F.2d at 197.

There, Resolution Trust Corporation ("RTC") designated two witnesses to testify on its behalf. But during their depositions, it became clear that the witnesses "possessed no knowledge relevant to the subject matters identified in the Rule 30(b)(6) notice." *Id.* at 196. When the first witness was asked if he had knowledge of "each item of inquiry designated in the notice," "the answer was 'no.'" *Id.* at 197. And the second witness "was equally unknowledgeable." *Id.* As it turned out, there was a third person who had personal knowledge of the deposition topics, yet RTC never designated that person as a witness. Accordingly, because RTC designated witnesses with no knowledge to testify on its behalf, and "failed to designate an available, knowledgeable, and readily identifiable witness," the court

concluded that the "designation of the first two witnesses was tantamount to a complete failure of the corporation to appear." *Id.*

Here, by contrast, the Bureau produced a witness who testified that he was prepared to testify on the noticed topics and who indeed testified on those topics—such as industry standards that Defendants violated, *see, e.g.*, ECF No. 405-16 at 51, 418-2 at 94-95; consumer harm and damages, *see, e.g.*, ECF No. 405-16 at 71-72, ECF No. 405-17 at 30-31; and all facts showing Defendants' knowing or reckless conduct, *see, e.g.*, ECF No. 405-15 at 53-66; ECF No. 407-1 at 136-41. Notably, the court never found that the witness failed to adequately prepare or lacked knowledge of the noticed topics. This case is thus far removed from the types of cases where courts impose sanctions under Rule 37(d) for the failure to present a knowledgeable witness. *See, e.g.*, *Black Horse Lane*, 228 F.3d at 300, 305 (upholding monetary sanctions where witness testified that he was unaware he was the designated 30(b)(6) representative, did not know the answers to many of the noticed topics, and later stated clearly that he had not bothered to read the deposition notice at all); *Turner v. Hudson Transit Lines, Inc.*, 142 F.R.D. 68, 78 (S.D.N.Y. 1991) (imposing monetary sanction where designated witness lacked knowledge about two out of four designated topics and provided misleading testimony about a third); *Thomas v. Hoffmann-LaRoche, Inc.*, 126 F.R.D. 522, 524 (N.D. Miss. 1989) (imposing monetary sanction where designated witnesses were

unable to address the required topics and were available for only a limited time, and counsel terminated the scheduled depositions).[5]

The only findings the court relied on to find that the Bureau's witness effectively failed to appear was that the witness did not provide a "human touch," ECF No. 436 at 13-14, or identify "any exculpatory evidence," *id.* at 17. But those two findings in no way support the court's conclusion that the witness was not knowledgeable such that his appearance was "for all practical purposes, no appearance at all," *Resol. Tr.*, 985 F.2d at 197; *see also Black Horse*, 228 F.3d at 304 (comparing a completely unknowledgeable witness to a "deponent who physically appears for the deposition but sleeps through it"). Instead, they simply reflect, as discussed above, that Bureau counsel believed no exculpatory facts existed, and that the witness needed to rely on memory aids to give complete answers given the sheer volume of information. And particularly viewed in context of the witness's preparedness to testify on numerous topics, the court clearly erred in finding that the witness was not knowledgeable.

[5] Motivating these court's decisions are also the evasive tactics by corporations seeking to shield the true witness with actual knowledge. *See Resolution Trust*, 985 F.2d at 197 (noting "potential for abuse" when a corporation holds the power to designate its witness); *Black Horse Lane*, 228 F.3d at 304 (noting the "'bandying' by which officers or managing agents of a corporation are deposed in turn but each disclaims knowledge" of relevant facts (*quoting* Fed. R. Civ. P. 30 advisory committee's note)). The Bureau engaged in no such evasion.

Moreover, the witness's testimony must be viewed in the unique context of this government law enforcement action, where the Bureau's attorneys and agents had no personal knowledge of the facts but rather assembled their case from the records and testimony of others. If the witness's testimony was rote, that simply reflects the reality that the witness was, as the court acknowledged, merely a "conduit for information," ECF No. 393 at 22, who had no personal knowledge of the underlying facts and could not reasonably be expected to memorize the extensive factual record in the case. Indeed, it was impossible for the Bureau to present a more knowledgeable witness in this case because no such witness existed.

For these reasons, the court abused its discretion in sanctioning the Bureau for failing to appear under Rule 37(d).

II. THE DISTRICT COURT ABUSED ITS DISCRETION IN IMPOSING THE DRASTIC SANCTION OF DISMISSAL.

Upon finding that the Bureau had engaged in sanctionable conduct, the district court proceeded to impose the most drastic sanction possible—striking the Bureau's claims against the Defendants and dismissing them from the case. Even if some sanction were warranted (none was), a case-terminating sanction was an abuse of discretion.

This Court has repeatedly held that dismissal is "a sanction of last resort, applicable only in extreme circumstances." *EEOC v. Troy State*, 693 F.2d at 1354

(citation omitted). Therefore, "[w]hen reviewing an order striking a [party's] pleadings," this court's "review should be particularly scrupulous lest the district court too lightly resort to this extreme sanction." *Chudasama*, 123 F.3d at 1366.

Dismissal "may be properly imposed only when: (1) a party engages in a clear pattern of delay or willful contempt (contumacious conduct); and (2) the district court specifically finds that lesser sanctions would not suffice." *Betty K Agencies, Ltd. v. M/V MONADA*, 432 F.3d 1333, 1338 (11th Cir. 2005) (cleaned up). This Court "rigidly require[s] the district courts to make these findings precisely because the sanction of dismissal with prejudice is so unsparing." *Id.* at 1339 (cleaned up). Another factor that this Court considers when determining whether a district court abuses its discretion in resorting to dismissal sanctions is whether "the other party's preparation for trial was substantially prejudiced." *Searock v. Stripling*, 736 F.2d 650, 653 (11th Cir. 1984) (cleaned up).

Here, the district court abused its discretion in imposing the drastic sanction of dismissal because the Bureau did not willfully disregard discovery obligations, lesser sanctions would have been adequate to remedy the court's concerns with the Bureau's conduct, and Defendants experienced no prejudice. In suggesting otherwise, the district court abused its discretion and deprived the Bureau of its day in court against these Defendants.

A. The Bureau did not act willfully or in bad faith.

Because a dismissal sanction "requires a willful or bad faith failure" to comply with discovery obligations, a party's "negligence, misunderstanding, or inability to comply will not justify a Rule 37 default judgment or dismissal." *Malautea v. Suzuki Motor Co.*, 987 F.2d 1536, 1542 (11th Cir. 1993). This court reviews a finding of willfulness or bad faith for clear error. *See In re Porto*, 645 F.3d 1294, 1304 (11th Cir. 2011).

Here, the court's finding of willfulness and bad faith cannot be squared with the ample evidence that the Bureau made good faith efforts to comply with the court's orders and to present a knowledgeable witness. If the Bureau failed to meet these obligations, it was due simply to a misunderstanding or an inability to comply.

i. The Bureau did not willfully or in bad faith violate the court's instructions.

Dismissal was an abuse of discretion because the Bureau never acted willfully or in bad faith.

1. *Privilege objections.* The court clearly erred in finding the Bureau's objections were a "willful disregard of the Court's instructions." ECF No. 436 at 21.

During the first deposition, the Bureau lodged work-product objections to questions asking for the facts supporting Defendants' knowledge of underlying

conduct, and separately asking for facts supporting their recklessness, based on the good-faith belief that asking the witness to distinguish between these facts required legal analysis beyond the qualifications of a fact witness and protected by the work-product doctrine. Before the first deposition, the court had never even arguably instructed the Bureau not to object to these sorts of questions—and there was therefore no basis to believe the Bureau raised these objections in bad faith.

During the second deposition, the Bureau continued these work-product objections based on the good-faith belief that the court had not yet ruled on the Bureau's objections. As discussed above, the court's discussion of privileges during the April 12 teleconference was unclear, and without the benefit of a transcript or written order, Bureau counsel was confused by the court's guidance heading into the April 13 deposition. Bureau counsel reasonably believed that the court would later issue its definitive ruling on the merits of its objections, as the court said was its usual practice for handling discovery disputes. *See* ECF No. 287 at 44. And where a party's interpretation of a court's oral order "does not seem to have been wholly unreasonable," and the party's "confusion . . . provides a feasible explanation" for its conduct, dismissal is an abuse of discretion. *See EEOC v. Troy State*, 693 F.2d at 1357 (reversing dismissal sanction).

Lastly, during the third, fourth, and fifth depositions, the Bureau did not object to questions asking for the factual basis of the Bureau's claims of

knowledge and allowed the witness to answer. The Bureau adjusted its approach to the depositions after having had time to review the transcript of the April 12 teleconference—at one point in the middle of a deposition—and this changed approach evinces the Bureau's good faith efforts to comply with a reasonable interpretation of the court's guidance.

2. *Exculpatory evidence.* The district court also clearly erred in finding that the Bureau's testimony identifying no exculpatory evidence "reflects . . . a bad faith attempt to frustrate the purpose of Defendants' depositions." ECF No. 436 at 17.

The Bureau reviewed the evidence and concluded that no evidence undermined its theory of liability. So, during the first deposition, the witness testified that the Bureau had not identified any evidence that it considered exculpatory. No party raised any concern about that testimony in the April 12 teleconference or in letters to the court, nor did the court offer additional guidance in the teleconference. In the subsequent depositions, the Bureau's witness provided the same (true) answers that the Bureau had identified no exculpatory evidence.

While Defendants may have identified evidence that they believe is exculpatory under their theories, the Bureau disagrees with their characterization of that evidence. This differing of legal opinions does not reflect bad faith. Further, Defendants cannot complain that the Bureau's witness should have identified facts

that would be exculpatory under *Defendants*' theories of the case. The Bureau reasonably did not believe that the court had ordered it to do that legal work for them. And if that is what the court had intended, then that order would have been invalid for impermissibly requiring the Bureau to disclose attorney work product that "was not properly discoverable," and for this additional reason "the district court should not have imposed a Rule 37 sanction," let alone dismissal, *EEOC v. First Nat'l Bank*, 614 F.2d at 1007.

3. *Human touch.* While the district court faulted the Bureau's witness for relying on memory aids and failing to provide a "human touch," the court never made a specific finding that the Bureau or its witness acted willfully or in bad faith in doing so. Because this Court "rigidly requires the district court" to make this finding, this absence alone renders dismissal unwarranted for this conduct. *See Betty K Agencies*, 432 F.3d at 1339.

In any event, the Bureau did not act in bad faith in presenting a witness who used memory aids to testify. The Bureau had many reasons for providing the witness with memory aids: the sheer breadth of the noticed topics rendered memorization impossible; the witness lacked personal knowledge of any facts; and Defendants had repeatedly threatened to block the Bureau from using evidence it did not identify in the depositions, thus making it especially important for the witness not to leave anything out.

Additionally, the Bureau never understood the court to say that the witness could not rely on the memory aids. Quite the opposite, the court said that "it's an unreasonable expectation of any witness to be able to sit there and recount from memory specific facts about the various allegations" and "it's okay for a witness to have these kinds of things with him or her at the time the deposition is given." ECF No. 393 at 4, 6. The court also praised the written materials as a "good faith effort on the part of the CFPB to give what [the court] said they had to give." *Id.* at 6. To be sure, the court said it expected the witness to be prepared to answer the "human touch questions." *Id.* at 27. But when the Bureau asked for guidance on what type of questions would warrant such a "human touch," the court was unable to give a clear answer. *Id.* at 28. Without clear guidance, Bureau counsel was confused about what type of questions, if any, would warrant a "human touch." What's more, it is unclear how the Bureau's designated witness (or any witness in this matter) could have reasonably provided a "human touch" since the witness had no personal knowledge and nothing to draw on apart from the evidence that the litigation team had amassed. The witness thus relied on the memory aids, not in bad faith, but rather as a result of the lack of clear guidance and the witness's inability to provide a personal spin on the evidence the Bureau had collected about Defendants.

ii. The Bureau did not willfully or in bad faith fail to present a knowledgeable witness.

The district court also clearly erred in finding that the Bureau "willfully failed to present a knowledgeable 30(b)(6) witness." ECF No. 436 at 21.

As discussed above, it is indisputable that the Bureau undertook an extensive effort to present a knowledgeable witness. The Bureau's attorneys spent over 1,000 hours preparing the written materials, and the witness spent over 300 hours reviewing them to prepare for the depositions. The witness also appeared for five depositions, offering over thirty hours of testimony. If the witness failed to offer a "human touch" or identify exculpatory facts, it was due not to bad faith, but to the difficulty in testifying about a vast evidentiary record without relying on memory aids and to the Bureau's sincere belief that no fact, considered within the whole record of the case, undermined its claims that Defendants violated the law.

Moreover, the Bureau's efforts to prepare the witness should be viewed in light of the text of Rule 37(d), which authorizes sanctions only when a witness "fails . . . to appear" for their deposition. While this Court has upheld a dismissal sanction under Rule 37(d) where a party literally fails to appear for a deposition, *see, e.g.*, *Hashemi v. Campaigner Publ'ns, Inc.*, 737 F.2d 1538, 1539 (11th Cir. 1984), neither this Court nor any other court of appeals has ever upheld such a severe sanction where a witness appeared but was found to be insufficiently knowledgeable. Nor should it. *See SEC v. Rsch. Automation Corp.*, 521 F.2d 585,

588-89 (2d Cir. 1975) (strictly construing Rule 37(d) to apply only "where a defendant literally fails to show up for a deposition" considering "the policy against a grant of relief by default except in a clear case"); *Stevens v. Greyhound Lines, Inc.*, 710 F.2d 1224, 1228 n.7 (7th Cir. 1983) (similarly viewing a strict construction of Rule 37(d) "appropriate where the sanction is a dismissal of a plaintiff's suit as in this case").

B. Less drastic sanctions would have sufficed.

Because dismissal is "proper only where less drastic sanctions cannot substantially accomplish its purpose," *Troy State*, 693 F.2d at 1358, a district court abuses its discretion in resorting to dismissal "if less drastic sanctions would suffice," *Wouters v. Martin Cnty., Fla.*, 9 F.3d 924, 934 (11th Cir. 1993); *see also Kilgo v. Ricks*, 983 F.2d 189, 193 (11th Cir. 1993) (vacating dismissal order because the court of appeals saw "no reason to believe that a lesser sanctions . . . would not suffice in this case, if sanctions are called for at all").

Here, the district court "failed to make the necessary finding that lesser sanctions would not suffice." *World Thrust Films, Inc. v. Int'l Fam. Ent., Inc.*, 41 F.3d 1454, 1456 (11th Cir. 1995). The court noted in passing that it was "not optimistic that reopening the depositions would be fruitful," ECF No. 436 at 21, without explaining why it believed that sanction, let alone any other sanction besides dismissal, would be inadequate. Given the lack of explanation, this Court

should decline "to infer from this language that the trial court reflected upon the wide range of sanctions at its disposal and concluded that none save dismissal would spur this litigation to its just completion." *Mingo v. Sugar Cane Growers Co-op. of Fla.*, 864 F.2d 101, 103 (11th Cir. 1989).

Further, the court's unexplained conclusion is unfounded. There is every reason to think that lesser sanctions, even assuming they were necessary, would have sufficed here. *See Boazman v. Econ. Lab'y., Inc.*, 537 F.2d 210, 212 (5th Cir. 1976) ("[L]esser sanctions would suffice in all but the most flagrant circumstances."). The Bureau litigated its case against these Defendants for two years before the district court. At no point prior to the sanctions order did the district court issue any reprimand or warning to the Bureau. Nor did the court ever indicate that it considered the Bureau's conduct to be anything but proper.

This case thus stands in stark contrast to extreme circumstances where this Court upheld dismissal after the district court tried lesser sanctions or warned the noncompliant party that it was considering dismissal. *See, e.g.*, *Malautea*, 987 F.2d at 1543 (upholding default judgment after party failed to comply with court order despite "two explicit warnings of a default judgment sanction"); *Moon v. Newsome*, 863 F.2d 835, 837 (11th Cir. 1989) (upholding dismissal where party failed to pay monetary sanction and had been "warned that failure to make timely payment would result in dismissal with prejudice"); *Jones v. Graham*, 709 F.2d

1457, 1462 (11th Cir. 1983) (upholding dismissal where party violated court orders and "[i]n two instances the court threatened to dismiss unless plaintiffs responded"); *Navarro v. Cohan*, 856 F.2d 141, 142 (11th Cir. 1988) (upholding dismissal where district court "restrained from ordering dismissal until after other lesser sanctions had failed").

In short, by resorting immediately to the drastic sanction of dismissal, the district court deprived the Bureau of any opportunity to alter its behavior. Had the court relied on lesser sanctions, even a warning, the Bureau would have made all reasonable efforts to comply.

C. Defendants experienced no prejudice.

Finally, the district court did not consider whether the Defendants were substantially prejudiced in their preparation for trial by the Bureau's conduct. *See Searock*, 736 F.2d at 653. While this factor is not controlling, it is significant because "Rule 37 sanctions are intended to prevent unfair prejudice to the litigants." *Gratton v. Great Am. Commc'ns*, 178 F.3d 1373, 1374 (11th Cir. 1999). For instance, in *EEOC v. Troy State*, the Eleventh Circuit held that "something short of dismissal was appropriate" in part because "Troy State was not prejudiced by any 'lack of access' to information" since they already had most of the information. 693 F.2d at 1358.

Here too, the Defendants suffered no prejudice from the Bureau's conduct during the depositions. First, the Bureau provided to the Defendants its entire investigative file (other than attorney notes and communications). This ensured that Defendants possessed all the available evidence, including evidence they might cast as exculpatory, so they were not prejudiced by the fact that the Bureau did not concede that any particular facts were exculpatory. Even more, the Bureau provided the Defendants with the memory aids relied on by the witness. As the district court itself acknowledged, this gave them a "good sense of what they were going to face when they went to trial" ECF No. 393 at 5, so they suffered no prejudice from the witness's inability to provide a "human touch" about the relevant facts. Finally, the investigative file and memory aids identified all facts that supported both knowledge and recklessness, so the Defendants were on notice of what facts the Bureau would rely on to support the claim that Defendants "knowingly or recklessly" provided substantial assistance.

The lack of any prejudice (let alone substantial prejudice) is yet another reason why the court abused its discretion in dismissing the case.

CONCLUSION

For the foregoing reasons, this Court should reverse the district court's sanctions order and remand for the Bureau to prosecute its claims against Defendants on the merits.

Dated: March 14, 2022

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CERTIFICATE OF COMPLIANCE

I certify that this document complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B)(i) because it contains 12,910 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f) and Eleventh Circuit Rule 32-4.

I further certify that this document complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman.

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CERTIFICATE OF SERVICE

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