PROTECT YOURSELF: WHY THE ELEVENTH CIRCUIT'S APPROACH TO SANCTIONS FOR PROTECTIVE ORDER VIOLATIONS FAILS LITIGANTS

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I. INTRODUCTION

Laws without enforcement are just good advice.

That old adage holds true today in every dimension of regulating action—including the enforcement of pretrial discovery orders. Imagine a humble baker who, using her mother's secret cookie recipes and decades of effort, has built a chain of successful bakeries. Like many business owners, she becomes subject to a lawsuit. Entrenched in litigation for months on end, she struggles through volumes of discovery requests, delicately balancing the need to comply with those requests and her absolute desire to protect her company's most valuable asset—the secret family recipe. She ultimately seeks the cover of a protective order and turns over documents containing her trade secret only under the belief it will remain just that—secret.[1]

Per the terms of the protective order, once the suit reaches an ultimate resolution, her opponent will return any documents containing the secret recipe.[2] Business can proceed as usual. But what happens when the opponent refuses to return those documents?[3] Worse yet, what happens when the opponent discloses her proprietary formula to her competitors?[4]

While the baker can never unring the proverbial bell of information disclosure, surely the disclosure of her confidential information—information she specifically sought to shield under a protective order—is subject to some judicial sanction. At a bare minimum, her opponent should be liable for the attorney's fees incurred in bringing this breach of confidentiality to the court's attention and attempting to quell the spread of her confidential

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[1] *See generally* 8A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & RICHARD L. MARCUS, FEDERAL PRACTICE AND PROCEDURE § 2035 (3d ed. 2010) [hereinafter 8A WRIGHT, MILLER & MARCUS, *Rule 26*] (explaining the procedure for obtaining protective orders and their near ubiquitous presence in complex litigation).

[2] *See id.* § 2043 (discussing protective order's role in guarding trade secrets).

[3] *See, e.g.*, Lipscher v. LRP Publ'ns, Inc., 266 F.3d 1305, 1321–22 (11th Cir. 2001) (describing parties' refusal to return opponent's confidential banking statements in violation of a protective order).

[4] *See, e.g.*, Smith & Fuller, P.A. v. Cooper Tire & Rubber Co., 685 F.3d 486, 487 (5th Cir. 2012) (describing the inadvertent disclosure of an opponent's confidential records and trade secrets to competing plaintiff attorneys that opened the door to future litigation against the opponent).

information. In short, that minimal request would not be granted if she litigated the matter in the Eleventh Circuit.[5]

District courts in the Eleventh Circuit must follow *Lipscher v. LRP Publications, Inc.*,[6] which prevents an award of reasonable attorney's fees for a violation of a protective order based on a narrow reading of Federal Rule of Civil Procedure 37(b)(2).[7] In *Lipscher*, plaintiff's counsel refused to return several documents covered under a protective order.[8] After a hearing on the matter, the district court ordered the return of the documents, and the defendant sought sanctions for the violation of the protective order.[9] The Eleventh Circuit read Rule 37(b)(2)'s language to apply only "when a party 'fails to obey an order to provide or permit discovery.' "[10] It excluded protective orders from the scope of Rule 37(b)(2) because they *restrict* discovery by their very nature, rather than facilitating it.[11] Accordingly, violations of protective orders do not subject the offending party to Rule 37 sanctions, not even the payment of reasonable attorney's fees, in the Eleventh Circuit.

Other circuits have taken a different approach—an approach seemingly in line with the expectation of the small business owner in the opening hypothetical. For example, in *Smith & Fuller, P.A. v. Cooper Tire & Rubber Co.*,[12] the Fifth Circuit disagreed with the Eleventh Circuit's reading of Rule 37.[13] There, the plaintiff's attorneys disclosed the defendant's confidential files to other personal injury plaintiff's attorneys.[14] The court questioned the

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[5] *Compare Lipscher*, 266 F.3d at 1323 ("[A] Rule 26(c) protective order is not 'an order to provide or permit discovery,' and therefore, such orders do not fall within the scope of Rule 37(b)(2)." (quoting FED. R. CIV. P. 37 advisory committee's note)), *with Smith & Fuller*, 685 F.3d at 489 ("There is [ ] significant authority in support of the imposition of Rule 37(b) sanctions for violation of Rule 26(c) protective orders.").

[6] 266 F.3d 1305 (11th Cir. 2001).

[7] *See id.* at 1323 (limiting Rule 37(b)(2) sanctions to violations of an order to "provide or permit discovery," which includes only orders under Rule 26(c)(2), thus precluding the award of attorney's fees for violations of a protective order absent a finding of contempt or bad faith).

[8] *Id.* at 1322.

[9] *Id.*

[10] *Id.* at 1323.

[11] *Id.*

[12] 685 F.3d 486 (5th Cir. 2012).

[13] *Id.*

[14] *Id.* at 489.

reasoning used in *Lipscher*,[15] and instead chose to adopt a broader reading of Rule 37(b)(2).[16] Under the Fifth Circuit's reasoning, protective orders can facilitate discovery and thus provide or permit discovery; accordingly, they fall within the scope of Rule 37(b)(2).[17]

Because of the current circuit split, the ability of the district courts to enforce protective orders comes into question. Discovery plays an integral role in the litigation process,[18] and a district court's authority to sanction parties who abuse or refuse to comply with the discovery process is critical to maintaining an effective judicial system. Rule 37 sanctions, including the assessment of reasonable attorney's fees, serve as the sharp end of the enforcement stick.[19] But what happens to those district courts in the Eleventh Circuit? They are seemingly rendered helpless by an inability to sanction a party who violates one of the court's prior protective orders. Laws without enforcement are just good advice. Is a protective order without enforcement really just *advice* to the parties?

This Note explores the appropriateness of the Eleventh Circuit's finding and ultimately argues the *Lipscher* court's narrow interpretation of Rule 37(b)(2) fails to satisfy the fundamental objectives of Rule 37. Part II of this Note explores the evolution of modern discovery, emphasizing the development of Rules 37 and 26(c), a court's ability to sanction based on its inherent authority, and the rationales employed by the circuits in reaching their opposing decisions. Part III ultimately argues the Fifth Circuit's broader interpretation better effectuates the fundamental objectives of Rule 37.

II. BACKGROUND

This Part begins by outlining the history and purpose of discovery to shape the context from which the rules grew. It then details the specific evolutions of Rule 37, which granted courts

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[15] *Id.*

[16] *Id.* at 489–90.

[17] *Id.* at 490.

[18] *See* Hickman v. Taylor, 329 U.S. 495, 500–01 (1947) (discussing the role of discovery in trial preparation).

[19] *See* FED. R. CIV. P. 37 advisory committee's note (1970 Amendment) ("Rule 37(b)(2) should provide comprehensively for enforcement of all [applicable] orders.").

explicit authority to issue sanctions, and Rule 26(c), which granted courts explicit authority to issue protective orders. Next, this Part explores the inherent authority of courts to sanction parties. Finally, this Part concludes with a summary of the factual backdrop and analytical considerations that underlie the narrow interpretation of Rule 37(b)(2), as espoused by the Eleventh Circuit, and the broad interpretation, as espoused by the Fifth Circuit.

A. HISTORY AND PURPOSE OF DISCOVERY PROCEDURES

The rules of discovery brought litigation in the United States out of the darkness of trial by surprise and into the light of efficient adjudication by fully equipping each party to argue its case and rebut its opponent's case.[20] Prior to the implementation of Rules 26 through 37 in 1938,[21] parties were often left to prepare for each trial as though it were a major engagement when the opposing party's claims or defenses could be wholly meritless.[22] The new rules enabled parties to narrow issues and obtain evidence to be used at trial.[23] "No longer [could] the time-honored cry of 'fishing expedition' serve to preclude a party from inquiring into the facts underlying his opponent's case."[24] With this expanded flexibility, however, came the opportunity to abuse the discovery process for the purpose of extorting a settlement from an adversary.[25] As Justice Rehnquist wrote in a 1975 opinion about discovery:

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[20] *See Hickman*, 329 U.S. at 500–01 (discussing the evolution of the discovery process and the benefits of the then-recently codified Federal Rules of Civil Procedure).

[21] *See* 8 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & RICHARD L. MARCUS, FEDERAL PRACTICE AND PROCEDURE § 2001 (3d ed. 2010) [hereinafter 8 WRIGHT, MILLER & MARCUS, *Overview*] (summarizing the adoption of the discovery rules in 1937).

[22] *See* Edson R. Sunderland, *The Theory and Practice of Pre-trial Procedure*, 36 MICH. L. REV. 215, 216 (1937) (explaining the environment for litigation that existed prior to the adoption of the modern discovery rules).

[23] *See* 8 WRIGHT, MILLER & MARCUS, *Overview*, *supra* note 21, § 2001 (describing the object and effect of the then-newly adopted discovery rules); *see also Hickman*, 329 U.S. at 501 ("The new rules, however, restrict the pleadings to the task of general notice-giving and invest the deposition-discovery process with a vital role in the preparation for trial.").

[24] *Hickman*, 329 U.S. at 507.

[25] *See* Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 741 (1975) (describing the heightened propensity for discovery abuse during the prosecution of securities violations but acknowledging the risk of abusive discovery techniques in all litigation, regardless of area of law).

> [T]o the extent that [discovery] permits a plaintiff with a largely groundless claim to simply take up the time of a number of other people, with the right to do so representing an *in terrorem* increment of the settlement value, rather than a reasonably founded hope that the process will reveal relevant evidence, it is a social cost rather than a benefit.[26]

As a result of the process's susceptibility to abuse, the Advisory Committee began to pay greater attention to curbing discovery through sanctions.

B. HISTORY, PURPOSE, AND SCOPE OF RULE 37 SANCTIONS

1. History and Purpose of Rule 37 Sanctions. Rule 37, the last of the discovery rules, was adopted in 1937 and implemented in 1938 as a means of enforcing the discovery devices in Rules 26 through 36.[27] The rule was meant to outline appropriate sanctions for "refusal to answer questions or permit inspection or otherwise make discovery."[28] Without such a rule, the procedure proscribed by the Federal Rules of Civil Procedure would be largely ineffectual.[29]

Stated broadly, Rule 37 authorized the use of sanctions for abusive discovery tactics to effectuate four distinct yet interrelated purposes: (1) compelling discovery, (2) punishment of culpable parties or attorneys; (3) deterrence of others from engaging in similar behavior; and (4) compensation for those parties who suffered because of the discovery abuse.[30] The substance of the original Rule 37 remained unchanged over the next several

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[26] *Id*.

[27] *See generally* 8B CHARLES ALAN WRIGHT, ARTHUR R. MILLER & RICHARD L. MARCUS, FEDERAL PRACTICE AND PROCEDURE § 2281 (3d ed. 2010) [hereinafter 8B WRIGHT, MILLER & MARCUS, *Rule 37*] (summarizing the history and purpose of Rule 37 sanctions).

[28] FED. R. CIV. P. 37 advisory committee's note (1937 Adoption).

[29] *See generally* 8B WRIGHT, MILLER & MARCUS, *Rule 37*, *supra* note 27, § 2281 (inferentially linking the failure to adhere to discovery orders with the effects on litigation).

[30] *See* Carlucci v. Piper Aircraft Corp., 775 F.2d 1440, 1453 (11th Cir. 1985) (framing the purposes as acceptable motivations to impose sanctions in a specific instance); s*ee also* Nat'l Hockey League v. Metro. Hockey Club, Inc., 427 U.S. 639, 643 (1976) (stressing future deterrence is equally as important as present punishment).

decades, except for a minor textual revision that became effective October of 1949.[31]

After over thirty years, however, it became apparent there were "a number of defects in the language of the rule as well as instances in which it [was] not serving the purposes for which it was designed."[32] As a result, courts often bypassed Rule 37 when assessing sanctions against violating parties, instead relying on other rules or the court's inherent authority to sanction.[33] The defects were plentiful, including: the ambiguous use of the terms "refusal" and "failure,"[34] the inconsistent requirement of willful action,[35] and the lack of consistent penalties for refusal to follow a previously-issued court order.[36]

To resolve these issues, the Advisory Committee made substantial changes to the rule, which became effective in July of 1970.[37] First, the updated rule replaced any reference to "refusal"

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[31] *See* FED. R. CIV. P. 37 advisory committee's note (1948 Amendment) (updating a reference in the rule from a dated session law to a permanent code reference).

[32] FED. R. CIV. P. 37 advisory committee's note (1970 Amendment).

[33] *See* Maurice Rosenberg, *Sanctions to Effectuate Pretrial Discovery*, 58 COLUM. L. REV. 480, 484–85 (1958) (discussing the various non-discovery rules courts used to support the assessment of sanctions against parties who failed to fully participate in discovery). A court's inherent authority to sanction will be discussed *infra* Part II.D.

[34] *See id*. at 489–90 (outlining the struggle of whether to read a purposeful requirement into the rule); *see also* Societe Internationale Pour Participations Industrielles et Commerciales, S.A. v. Brownell, 355 U.S. 812, 812 (1957) (granting certiorari and requesting the parties discuss the distinction between a party's *failure* to obey an order and a party's *refusal* to obey an order).

[35] *See* Rosenberg, *supra* note 33, at 490–92 (discussing the disparate placement of a willful requirement throughout the rule, which results in ambiguity regarding the necessary state of mind before a party merits sanctions). The text of the original 1937 version of Rule 37 allowed sanctions for a party that "willfully fails to appear before the officer who is to take his deposition . . . or fails to serve answers to interrogatories." FED. R. CIV. P. 37(d) (repealed 1970).

For an example of a court that ignored the literal reading, which would only apply the willful component to a failure to appear for a deposition and not a failure to answer interrogatories, and instead inferred that the willful component applied to both types of failure, see *Valenstein v. Bayonne Bolt Corp.*, 6 F.R.D. 363, 365 (E.D.N.Y. 1946). Some courts took even larger inferential leaps and constructively read "willfully" into subsection (b) of the 1937 version of the rule. *See, e.g.*, Campbell v. Johnson, 101 F. Supp. 705, 706–07 (S.D.N.Y. 1951) (requiring willful disobedience, gross indifference to the opponent's rights, deliberate callousness, or intended negligence).

[36] *See* Rosenberg, *supra* note 33, at 492–93 (highlighting subdivision (b)'s failure to discuss the consequences of failing to comply after the issuance of an order overruling objections under Rule 30).

[37] *See* FED. R. CIV. P. 37 advisory committee's note (1970 Amendment) (outlining the difficulties faced by courts, which necessitated a substantial revision of the rules). *See*

with "failure" in order to eliminate any doubt surrounding the required culpability of parties.[38] This change made sanctionable even a seemingly innocent violation of discovery rules.[39] The change reflected the Supreme Court's holding in *Societe Internationale v. Rogers*, handed down in 1958.[40] There, the Court found no point in attempting to discern different meanings from the seemingly interchangeable use of the two terms, thus clarifying Rule 37's applicability.[41]

Second, the rule was broadened to include all but two forms of discovery: physical and mental examinations under Rule 35, which require a court order in all instances,[42] and requests for admission under Rule 36, which are deemed admitted if the party fails to respond.[43] In addition, the amendment specified the appropriate court in which to bring motions to compel.[44]

Third, in situations where an opposing party failed to admit a later-proven fact, the application of Rule 37(c) was broadened and the showing necessary to receive an award of reasonable expenses was clarified.[45] Fourth, courts were given greater flexibility to impose sanctions against parties who fail to appear for a

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generally 8B WRIGHT, MILLER & MARCUS, *Rule 37*, *supra* note 27, § 2281 (exploring every revision made to Rule 37 during the 1970 amendment process).

[38] *Compare* FED. R. CIV. P. 37 (using the term "fail" exclusively and declining to impose a culpability requirement), *and* FED. R. CIV. P. 37 advisory committee's notes (1970 Amendment) (explaining the substitution of "failure" for "refusal" was meant to exclude any relevance of willfulness or purpose of the parties, and gathering cases demonstrating the need for such a delineation), *with* FED. R. CIV. P. 37 (repealed 1970) (using "failure" and "refusal" in a seemingly interchangeable manner and inconsistently requiring willful action by the offending parties).

[39] *See* Note, *Proposed 1967 Amendments to the Federal Discovery Rules*, 68 COLUM. L. REV. 271, 292 (1968) (noting *Societe Internationale v. Rogers* intimated that the degree of culpability might nonetheless be relevant to the severity of the sanction imposed).

[40] 357 U.S. 197 (1958).

[41] *Id*. at 207 (stating any argument for applying different meanings "turns on too fine a literalism and unduly accents certain distinctions").

[42] *See* FED. R. CIV. P. 35(a) (describing the court's authority to issue an order "only on motion for good cause and on notice to all parties and the person to be examined").

[43] *See* FED. R. CIV. P. 36(a)(3) ("A matter is admitted unless . . . the party to whom the request is directed serves . . . a written answer or objection . . . .").

[44] *See* FED. R. CIV. P. 37(a)(2) (directing the movant to different courts depending upon whether the requested order is to a party (the court where the action is pending) or a nonparty (the court where the discovery will be taken)).

[45] *See* FED. R. CIV. P. 37(c) advisory committee's note (1970 Amendment) (clarifying sanctions are available even for innocent failures to admit; however, if the request for admission was objectionable, additional provisions protect a party from having to pay expenses).

deposition, answer interrogatories, or respond to a request for inspection.[46] Fifth, and most important to this Note's discussion, the use of an award of reasonable expenses was made available as a sanction for failure to comply with an order compelling discovery.[47] The updated rule revised the necessary showing to receive an award of reasonable expenses in an effort to induce courts to issue these awards more frequently.[48] After the 1970 amendments, an order for the payment of reasonable expenses was compulsory without a finding of substantial justification.[49]

Since the 1970 amendments, Rule 37 has largely remained the same.[50] Accordingly, the requirements set forth in the current version of Rule 37 substantially reflect the intended changes enacted over four decades ago.[51]

2. Current Scope of Rule 37. How a district court effectuates the purposes behind Rule 37 is largely in the court's discretion.[52] The district court has broad discretion in both determining whether a violation has occurred and, if so, the appropriate type and severity of sanction imposed.[53] Rule 37 grants the court authority to compel disclosure or discovery or impose sanctions for failure to comply with discovery orders.[54] The first of these powers, to compel disclosure or discovery, is found in subdivision

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[46] *See* FED. R. CIV. P. 37(d) advisory committee's note (1970 Amendment) (eliminating the culpability requirement).

[47] *See* FED. R. CIV. P. 37(b) advisory committee's note (1970 Amendment) (explaining the expanded reach of sanctions to all forms of discovery).

[48] *See* 8B WRIGHT, MILLER & MARCUS, *Rule 37*, *supra* note 27, § 2288 (arguing the award of reasonable expenses is the most effective deterrent to frivolous discovery requests and orders); *see also* FED. R. CIV. P. 37(b) advisory committee's note (1970 Amendment) ("Subdivision (b)(2) is amplified to provide for payment of reasonable expenses caused by the failure to obey the order.").

[49] *See* Note, *supra* note 39, at 292–93 (discussing possible perils with the rule's failure to define "substantial justification" and the ambiguity courts face in discerning its meaning).

[50] *See* FED. R. CIV. P. 37 advisory committee's note (explaining technical and substantive changes to Rule 37 since 1970).

[51] *See* 8B WRIGHT, MILLER & MARCUS, *Rule 37*, *supra* note 27, § 2281 (discussing the minor amendments made to Rule 37 since the 1970 overhaul). Since 1970, amendments to Rule 37 have included a 1993 amendment that added a meet-and-confer requirement on the parties prior to proceeding to court, a 2006 amendment that addressed discovery sanctions pertaining to electronically stored information, and a 2007 restyling of the rules. *Id.*

[52] *See* GREGORY P. JOSEPH, SANCTIONS: THE FEDERAL LAW OF LITIGATION ABUSE 521 (1989) (explaining the scope of the district court's discretion to issue sanctions).

[53] *See id.* (noting, however, the district court's discretion to sanction is inherently limited by the narrow scope of Rule 37).

[54] FED. R. CIV. P. 37.

(a) of Rule 37.[55] This subdivision grants the court the authority to compel disclosure or discovery responses upon motion by a party.[56]

In addition to implicitly granting the court the power to hear the motion, Rule 37 explicitly mandates payment of reasonable expenses and attorney's fees by either the movant or non-movant, depending upon the outcome of the motion.[57] If the motion is granted or the discovery occurs after the motion was filed, the court *must* require the party who necessitated the motion to pay the reasonable expenses to the movant.[58] Similarly, if the motion is denied, the court *must* impose the sanction of reasonable expenses.[59] Both these awards of reasonable expenses are subject to the court's limited discretion.[60] Specifically, this discretion is limited to instances where the party's actions were "substantially justified" or where there exist some other circumstances that "make an award of expenses unjust."[61]

In addition to granting authority to compel discovery and award reasonable fees in subdivision (a), Rule 37(b) grants a court the authority to impose sanctions upon parties who fail to comply with orders to provide or permit discovery, including those issued in accordance with Rule 37(a).[62] In relevant part, the rule reads: "If a party . . . fails to obey an order to *provide or permit discovery*, including an order under Rule 26(f), 35, or 37(a), the court where the action is pending may issue further just orders."[63] The rule continues by listing specific examples of orders the district court may impose.[64] More importantly to the discussion in this note, subdivision (b)(2)(C) mandates the imposition of "reasonable

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[55] FED. R. CIV. P. 37(a).

[56] FED. R. CIV. P. 37(a)(3).

[57] FED. R. CIV. P. 37(a)(5).

[58] FED. R. CIV. P. 37(a)(5)(A); s*ee also* FED. R. CIV. P. 37 advisory committee's note (1970 Amendment) (encouraging judges to more actively impose reasonable expenses upon the losing party as a tool to deter future failure to comply with discovery requests).

[59] FED. R. CIV. P. 37(a)(5)(B).

[60] *See* JOSEPH, *supra* note 52, at 534 (explaining the award is compulsory unless "the failure to make discovery was 'substantially justified' or that 'other circumstances make an award of expenses unjust' "). As referenced, *supra* note 49, the Advisory Committee declined to define "substantially justified" or give a basis for determining when the imposition of sanctions would be unjust. Thus, this determination is left to the court's seemingly broad discretion.

[61] FED. R. CIV. P. 37(a)(5)(A)(i)–(iii); FED. R. CIV. P. 37(a)(5)(B).

[62] FED. R. CIV. P. 37(b)(2)(A).

[63] *Id.* (emphasis added).

[64] FED. R. CIV. P. 37(b)(2)(A)(i)–(vii).

expenses" upon the noncompliant party unless the noncompliance is "substantially justified."[65]

Because of the mandatory nature of the award, reasonable expenses is by far the most frequently awarded under Rule 37, even with the discretion granted to courts.[66] Under both subdivisions (a) and (b) of Rule 37, the award may be assessed against the party, its attorney, or both.[67]

As will be discussed further below,[68] the circuit split focuses on whether Rule 26(c) protective orders "provide or permit discovery." The debate focuses on both the plain reading of the rule's text and the advisory notes to the 1970 amendment, which elaborate on the intended meaning of the rule's language.[69]

3. Discretion of District Courts Imposing Sanctions. Rule 37 was designed to be flexible.[70] The Advisory Committee specifically provided for the use of discretion in assessing sanctions in multiple parts of the current version of Rule 37.[71] The district court may,

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[65] FED. R. CIV. P. 37(b)(2)(C).

[66] *See* JOSEPH, *supra* note 52, at 535 (discussing the frequency of an award of fees despite the "entirely discretionary" nature of the sanction).

[67] *See id*. (collecting cases in which the court imposed sanctions against attorneys, clients, or both). For instances when a court could decide not to impose a sanction, see FED. R. CIV. P. 37(a)(5)(A) (excusing the imposition of reasonable fees as a sanction against the noncompliant party if the movant did not act in good faith, the noncompliant party was substantially justified in its actions, or the imposition would otherwise be unjust); FED. R. CIV. P. 37(a)(5)(B) (excusing the imposition of reasonable fees against the movant if its motion was substantially justified or the imposition of sanctions is otherwise unjust); FED. R. CIV. P. 37(b)(2)(C) (excusing the imposition of reasonable fees against the noncompliant party unless the noncompliant party was substantially justified in its actions or the imposition of sanctions is otherwise unjust).

[68] *See infra* Part II.E.

[69] *See* Lipscher v. LRP Publ'ns, Inc., 266 F.3d 1305, 1323 (11th Cir. 2001) (arguing the plain reading of Rule 37 precludes sanctions for violations of Rule 26(c) protective orders); Smith & Fuller, P.A. v. Cooper Tire & Rubber Co., 685 F.3d 486, 488–90 (5th Cir. 2012) (arguing Rule 37 is broad enough to include sanctions for violations of Rule 26(c) protective orders).

[70] *See* 8B WRIGHT, MILLER & MARCUS, *Rule 37*, *supra* note 27, § 2284 (describing the court's ability to use discretion and make "just" decisions).

[71] *See, e.g.*, FED. R. CIV. P. 37(a)(5)(A)(iii) (allowing the court to waive the imposition of reasonable expenses for failing to participate in discovery for "other circumstances [that] make an award of expenses unjust"); FED. R. CIV. P. 37(b)(2)(C) (granting the court the authority to waive the imposition of reasonable expenses if the failure to comply with the court order was "substantially justified or other circumstances make an award of expenses unjust"); FED. R. CIV. P. 37(c)(1) (permitting, but not requiring, the court to impose a number of sanctions for failure to disclose a witness as required by Rule 26(a)). For a collection of cases shaping the bounds of the court's discretion regarding the imposition of sanctions under Rule 37, see generally 8B WRIGHT, MILLER & MARCUS, *Rule 37*, *supra* note 27, § 2284 n.1.

within reason, use multiple sanctions as it sees fit to best serve the interests of justice.[72] In determining the severity of sanctions, district courts often consider the culpability of the violating party.[73] However, courts traditionally offer a party a second opportunity to comply with discovery rules and orders.[74] As a natural result of this broad discretion, the appellate courts take on an important, albeit restricted, policing role.

Orders imposing sanctions are appealable, sometimes immediately, but in any event on appeal from the final judgment.[75] Upon appeal, the appellate court can overturn the imposition of sanctions only if there was an abuse of the district court's discretion.[76] The Supreme Court solidified this standard in *National Hockey League v. Metropolitan Hockey Club, Inc.*[77] After repeated failures to comply with court-imposed deadlines, the district court employed the most severe sanction available and dismissed the claim.[78] The sanction was initially reversed by the

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[72] *See* 8B WRIGHT, MILLER & MARCUS, *Rule 37*, *supra* note 27, § 2284 (collecting cases demonstrating the district courts' use of different sanctions depending upon the contextual circumstances of the discovery violation).

[73] *See, e.g.*, Societe Internationale Pour Participations Industrielles et Commerciales, S.A. v. Rogers, 357 U.S. 197, 208 (1958) (acknowledging party culpability affects only the type and severity of sanction imposed and not whether the imposition of sanctions is appropriate); Commodity Futures Trading Comm'n v. Noble Metals Int'l, Inc., 67 F.3d 766, 771 (9th Cir. 1995) ("To justify the imposition of such a harsh sanction, the district court must find that the violations were 'due to willfulness, bad faith, or fault of the party.' " (internal citation omitted)).

[74] *See* 8B WRIGHT, MILLER & MARCUS, *Rule 37*, *supra* note 27, § 2284 n.42 (collecting cases that demonstrate a district court's willingness to impose lenient sanctions on offending parties, particularly those whose error was arguably innocent).

[75] *Id.* (describing grounds for appeal of an order); *see also* 8 WRIGHT, MILLER & MARCUS, *Overview*, *supra* note 19, § 2006 (summarizing the appeal process for discovery orders). The Supreme Court added guidance about which discovery sanctions are immediately appealable in *Cunningham v. Hamilton Cnty., Ohio*, 527 U.S. 198 (1999). There, the court held sanctions are often based on the completeness of the party's responses, which can only be properly assessed after the merits have been ultimately resolved. *Id.* at 206. As such, the court implied most discovery sanctions would not be appealable until after the final resolution on the merits. *Id.*

[76] *See* 8B WRIGHT, MILLER & MARCUS, *Rule 37*, *supra* note 27, § 2284 (discussing the appellate process for discovery sanctions); *see, e.g.*, United States v. $49,000 Currency, 330 F.3d 371, 376 (5th Cir. 2003) (holding that the appellate court reviews discovery sanctions, even the strictest sanction of default judgment, for an abuse of discretion); Toth v. Grand Trunk R.R., 306 F.3d 335, 343 (6th Cir. 2002) (enumerating factors for determining if the district court abused its discretion).

[77] 427 U.S. 639 (1976).

[78] *Id.* at 639–41.

Third Circuit, which held the lower court did not have sufficient evidence to impose such severe sanctions.[79]

Upon review by the Supreme Court, the sanctions were reinstated.[80] As support for its decision, the Court cited the extensive factual history provided by the district court.[81] The Court criticized the Third Circuit's use of "extenuating factors," including comments made by the sanctioned attorney during oral arguments before the appellate court.[82] "The question, of course," as explained by the Court, "is not whether this Court, or whether the Court of Appeals, would as an original matter have dismissed the action; it is whether the District Court abused its discretion in so doing."[83] The opinion concludes by explaining the dual motivations behind ensuring district courts maintain the discretion to enforce and determine sanctions: "[T]o penalize those whose conduct may be deemed to warrant such a sanction," and "to deter those who might be tempted to such conduct in the absence of such deterrent."[84] Thus, as the Court held, the importance of the trial court's discretion transcends any individual case and is critical to curbing the abusive behavior of future litigants.[85]

C. HISTORY, PURPOSE, AND SCOPE OF RULE 26(C) PROTECTIVE ORDERS

Rule 26(c) grants the court broad authority to issue orders to protect parties or witnesses throughout the discovery process.[86] Originally, protective orders were only issued with regard to depositions.[87] As the rules evolved, however, protective orders were expanded to cover both written interrogatories and requests for admission.[88] Finally, the rules governing protective orders

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[79] *In re* Prof'l Hockey Antitrust Litig., 531 F.2d 1188, 1195 (3d Cir. 1976).
[80] *Nat'l Hockey League*, 427 U.S. at 643.
[81] *Id*. at 640–41.
[82] *Id*. at 641.
[83] *Id*. at 642.
[84] *Id*. at 643.
[85] *Id*.
[86] *See generally* 8A WRIGHT, MILLER & MARCUS, *Rule 26*, *supra* note 1, § 2035 (summarizing the evolution and purpose of Rule 26).
[87] *See id.* (collecting cases showing the historical limitations placed on protective orders).
[88] *See id*. (explaining the effect of the 1948 amendments).

were consolidated into Rule 26(c), which allowed courts to issue protective orders for all forms of discovery.[89]

As discovery progressed and litigation became exceedingly more complex, parties began to enter into agreements for umbrella protective orders that authorized the parties to designate confidential information as protected under the order.[90] Because this process bypasses the showing of good cause necessary to receive a protective order and other burdens on the courts, many parties have employed umbrella protective orders.[91]

Under the current set of rules, the authority to issue protective orders stems from Rule 26(c).[92] Upon a party's motion, a court may issue a protective order so long as there is a finding of good cause.[93] While courts can predictably issue protective orders that curb or restrict discovery,[94] orders can also dictate how discovery should actively proceed.[95] Further, subdivision (c)(2) allows a court to compel discovery after denying a motion for a protective order.[96] Disagreement over the court's authority under this subdivision to dictate how discovery shall proceed or to issue an order that provides or permits discovery plays a major role in the existing circuit split.[97]

D. INHERENT JUDICIAL AUTHORITY TO SANCTION

A court's inherent authority to sanction a party's behavior can help fill gaps left between the rules. This inherent authority to sanction applies primarily in instances of bad faith, but goes hand-

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[89] *See id.* ("[L]anguage of the protective order section [ ] was changed to make it directly applicable to all forms of discovery.").

[90] *Id.*

[91] *Id.*

[92] *See* FED. R. CIV. P. 26(c) (prescribing the process and options available to parties seeking protection from "annoyance, embarrassment, oppression, or undue burden or expense").

[93] *See* FED. R. CIV. P. 26(c)(1) (requiring all movants to include a certification that they have sought a resolution to the issue outside the court).

[94] *See* FED. R. CIV. P. 26(c)(1)(A) ("[F]orbidding the disclosure or discovery.").

[95] *See, e.g.*, FED. R. CIV. P. 26(c)(1)(C) ("[P]rescribing a discovery method other than the one selected by the party seeking discovery."); FED. R. CIV. P. 26(c)(1)(F) ("[R]equiring that a deposition be sealed and opened only on court order.").

[96] *See* FED. R. CIV. P. 26(c)(2) ("If a motion for a protective order is wholly or partly denied, the court may, on just terms, order that any party or person provide or permit discovery."); *see also infra* note 143 and accompanying text.

[97] *See generally infra* Part II.E.

in-hand with its rule- and statute-based authority to sanction.[98] In *Chambers v. NASCO, Inc.*,[99] the Supreme Court explained and affirmed this inherent authority to sanction.[100] Following a contract dispute filled with abusive litigation procedures,[101] the district court required Chambers to pay NASCO's attorney's fees and expenses for the entire litigation.[102] The district court found neither the Federal Rules of Civil Procedure nor any statutes fully addressed all the defendant's sanctionable actions.[103] Thus, to sanction the defendant for the full extent of his malfeasance, the district court relied on its inherent authority to impose sanctions.[104] The court of appeals affirmed the lower court's decision.[105]

The Supreme Court, in upholding the appellate court's decision, took the opportunity to define the scope of the court's inherent powers as it applied to sanctions, particularly for the exercise of bad faith.[106] Primary to the Court's consideration was the interplay between sanctions based on rules or statutes and sanctions based on the court's inherent power.[107] Ultimately, the Court concluded the rules and statutes do not inhibit the inherent powers of the court, based largely on the breadth of inherent authority compared to the powers granted by the rules and statutes.[108] Explaining the interchangeability of a district court's sources of authority, the Court added, "[N]either is a federal court forbidden to sanction bad-faith conduct by means of inherent

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[98] *See* GEORGENE M. VAIRO, RULE 11 SANCTIONS 764 (3d ed. 2004) (discussing the interplay between the various rules prescribing sanctions and highlighting those areas left uncovered by the current rules structure); *see also* Roadway Exp., Inc. v. Piper, 447 U.S. 752, 767 (1980) (remanding a case so the district court may consider the assessment of attorney's fees under *both* Rule 37 *and* the court's inherent authority).

[99] 501 U.S. 32 (1991).

[100] *Id*. at 43–46.

[101] *See id*. at 36–40 (describing in detail the numerous techniques the litigant used to avoid the administration of justice).

[102] *Id*. at 40.

[103] *Id*. at 41 ("[T]he District Court deemed Rule 11 'insufficient' for its purposes. The court likewise declined to impose sanctions under § 1927 . . . ." (internal citations omitted)).

[104] *Id*. at 42.

[105] *Id*. (citing NASCO, Inc. v. Calcasieu Television & Radio, Inc., 894 F.2d 696 (5th Cir. 1990)).

[106] *Id*. at 43–46.

[107] *Id*. at 46–48.

[108] *Id*. at 46 ("We discern no basis for holding that the sanctioning scheme of the statute and the rules displaces the inherent power to impose sanctions for the bad-faith conduct described above.").

power simply because that conduct could also be sanctioned under the statute or the Rules."[109]

While the Supreme Court has yet to address a district court's use of inherent authority as a basis for sanctioning a party who violates a protective order, the Eleventh Circuit faced that consideration in *McDonald v. Cooper Tire & Rubber Co.*[110] During a products liability suit, the plaintiff's attorney took the deposition of a key employee of the defendant.[111] Pursuant to a protective order, the defendant designated the majority of the witness's deposition as confidential.[112] The plaintiff's attorney, disregarding the protective order, produced the deposition to a second district court as part of separate litigation involving the defendant.[113] In response, the defendant directly enforced the protective order in the second district court and sought sanctions to reimburse the attorney's fees spent on that enforcement.[114] The trial court granted the defendant's motion after concluding the plaintiff's attorney willfully violated the protective order.[115]

The Eleventh Circuit affirmed the district court's decision after a review for an abuse of discretion.[116] The court confirmed the district court's inherent authority to impose sanctions based on violations of a court order.[117] That imposition, however, still requires a finding that the sanctioned party acted in bad faith.[118] By limiting the reach of inherent judicial authority, *McDonald* created a risk that district courts could have no way around the Eleventh Circuit's narrow interpretation of Rule 37 without a finding of bad faith.

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[109] *Id*. at 50. The Court did, however, caution that inherent authority could not be used to completely circumvent a rule's mandate. *Id*. at 51 (distinguishing Bank of Nova Scotia v. United States, 487 U.S. 250, 254–55 (1988), where the Court struck down the district court's circumvention of a clear mandate from a procedural rule).

[110] 186 F. App'x 930 (11th Cir. 2006).

[111] *Id*. at 930–31.

[112] *Id*. at 931.

[113] *Id*.

[114] *Id*.

[115] *Id*.

[116] *Id*. at 932.

[117] *Id*. at 931 (citing Kleiner v. First Nat'l Bank of Atlanta, 751 F.2d 1193, 1209 (11th Cir. 1985)).

[118] *Id.* ("To exercise its inherent power a court must find that the party acted in bad faith." (quoting Martin v. Automobili Lamborghini Exclusive, Inc., 307 F.3d 1332, 1335 (11th Cir. 2002))).

That risk materialized in *Valdez-Castillo v. Busch Entertainment Corp.*[119] There, the defendant moved for sanctions after the plaintiff's attorney violated a protective order by releasing trade secrets to a local newspaper.[120] Bound by *Lipscher* and without a finding of bad faith, the court was left unable to impose sanctions.[121] While a violation of the protective order occurred, the circumstances did not support the finding of bad faith necessary to "invoke [the court's] inherent powers to sanction [the offending parties]."[122] The court then turned to Rule 37(b)(2) in search of authority to impose sanctions against the plaintiff's attorney. Bound, however, by *Lipscher*, the district court was unable to use the rule as a basis for sanctions.[123] After looking at one other source for authority to impose sanctions,[124] the court

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[119] 2008 WL 4999175 (S.D. Fl. 2008).

[120] *Id*. at *2.

[121] *Id*. at *6–7.

[122] *Id*. at *4–5. In determining the culpability of the party, the court considered the timing of the order compared to the release, experience of the attorney, and subsequent actions by the attorney to mitigate the damage caused by the release. *Id*. The court ultimately concluded that the attorney's "deficiency . . . was borne of inexperience, as opposed to nefarious motivation." *Id*. at *5.

[123] *Id*. at *6–7. The court noted the disparate treatment of different forms of discovery along with the puzzling effects of the Eleventh Circuit's ruling before conceding to the binding effect of precedent:

> It may not be entirely obvious to some why Rule 26(c) protective orders do not enjoy the protections of Rule 37(b) while other discovery orders issued pursuant to Rule 26(c) do, since an agreed protective order may be viewed as allowing discovery to proceed, albeit without the need to litigate over the terms of the protective order first. Regardless, however, Eleventh Circuit opinions are binding upon this Court and must be followed.

Id. at *6.

[124] The court also considered whether the protective order itself provided for sanctions. *Id*. at *6. The defendants contended the order provided independent authority for sanctions. *Id*. In part, the order provided, "It is expressly understood and agreed that any person who violates the terms and conditions of this Order . . . may be subject to sanctions in the event of unauthorized use." *Id*. The court, however, concluded the order merely defined the parties subject to the order and there needed to be an "independent source of authority" to impose a sanction. *Id*. The language of this order seems to plainly contemplate the imposition of sanctions for violations of the order. Since the court declined to use this text to impose sanctions, it is unlikely any language would circumvent the need for an independent source of authority.

The court did acknowledge the imposition of reasonable attorney's fees might have been proper had the parties entered into a separate contractual agreement regarding the confidentiality of materials protected by the protective order. *Id*. at *6, n.4. While this seems to offer a plausible source of sanctions, it is unlikely a party with little confidential information, and thus little need for the shield of a protective order, would ever consent to an agreement that provides for sanctions when they are otherwise unavailable. Those parties, like most of the parties in the cases discussed here, would have little to lose by

ultimately allowed the attorney to escape without sanction despite his obvious violation of the court's order.[125] After acknowledging the seriousness of the violations and putting the attorney on notice that subsequent violations would be considered bad faith, the attorney walked away unscathed.[126] The district court's frustration in *Valdez-Castillo* demonstrates inherent authority cannot fill all the gaps left by the Eleventh Circuit's narrow interpretation of Rule 37(b)(2).

E. DIFFERING INTERPRETATIONS OF RULE 37: *LIPSCHER* AND *SMITH & FULLER*

Courts have come to differing conclusions as to whether Rule 37 is sufficiently broad to encompass violations of Rule 26(c) protective orders.[127] The key disagreement between the circuits revolves around whether Rule 26(c) protective orders are orders that "provide or permit discovery."[128]

The Eleventh Circuit took one side in the dispute in *Lipscher v. LRP Publications, Inc.*[129] In *Lipscher*, the district court issued sanctions for failing to return documents protected by a Rule 26(c) protective order.[130] The order confined the scope of a subpoena to "documents that related specifically to [the defendant's] use of [the plaintiff's] jury verdict publications."[131] After the defendant's bank produced several documents that the defendant suspected were protected by the court's order, it requested their return.[132] When the plaintiff's counsel refused to return the requested documents,

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weakening the protective order and little incentive to consent to an agreement that would strengthen that protective order.

[125] *Id.* at *7.

[126] *Id.* ("The parties are advised, however, that the Court regards Plaintiff's violations of the Protective Order very seriously. Should another violation . . . occur in this case, the Court will have more difficulty finding a lack of bad faith.").

[127] *Compare* Smith & Fuller, P.A. v. Cooper Tire & Rubber Co., 685 F.3d 486, 489 (5th Cir. 2012) ("There is . . . significant authority in support of the imposition of Rule 37(b) sanctions for violation of Rule 26(c) protective orders."), *with* Lipscher v. LRP Publ'ns, Inc., 266 F.3d 1305, 1323 (11th Cir. 2001) ("[A] Rule 26(c) protective order is not 'an order to provide or permit discovery,' and therefore, such orders do not fall within the scope of Rule 37(b)(2).").

[128] FED. R. CIV. P. 37(b)(2)(A); *see Smith & Fuller*, 685 F.3d at 489 (considering a protective order an "order to provide or permit discovery"); *Lipscher*, 266 F.3d at 1323 (excluding protective orders from the scope of Rule 37 sanctions).

[129] 266 F.3d 1305 (11th Cir. 2011).

[130] *Id.* at 1322.

[131] *Id.*

[132] *Id.*

the defendant sought relief from the district court.[133] The court eventually found ninety-two of the ninety-eight documents were subject to the protective order.[134] Given counsel's initial refusal to return the documents, the court imposed sanctions of partial attorney's fees in the amount of $7,960.24 against both the plaintiff and its attorneys, Lipscher and Kehoe.[135] The district court made two explicit findings: the sanctions were based on Rule 37(b)(2) and neither the attorneys nor their client were in contempt.[136]

The sanctioned attorneys appealed based on three arguments: the district court erred in finding the protective order was unmistakably clear; the district court abused its discretion; and the district court erred by invoking Rule 37 sanctions for violation of the protective order.[137] The appellate court began with the third contention as a threshold issue for considering the other two arguments.[138]

The Eleventh Circuit court first considered the plain language of Rule 37 and found no foundation for sanctions.[139] After dispensing with any argument that Rule 37(b)(2) explicitly applies to protective orders, the court considered the notes of the Advisory Committee.[140] While the court conceded that the notes mention orders for discovery under Rule 26(c), it construed the notes narrowly.[141] As the court wrote, "[T]he notes refer to Rule 26(c) only in connection with the rules authorizing 'orders *for discovery*.' "[142] The court read the Advisory Notes as referring *only* to those orders wherein the district court denied a protective order and instead issued an order compelling discovery.[143] Accordingly, protective orders issued under Rule 26(c)(1) are not, in the

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[133] *Id.*
[134] *Id.*
[135] *Id.*
[136] *Id.*
[137] *Id.*
[138] *Id.*
[139] *Id.* at 1323 ("Rule 37(b)(2) does not mention Rule 26(c) protective orders.").
[140] *Id.*
[141] *Id.*
[142] *Id.*
[143] *Id.*; *see also* FED. R. CIV. P. 26(c)(2) (providing, though not mandating, that the court may "order that any party or person *provide or permit discovery*" if the motion for a protective order is wholly or partly denied (emphasis added)).

Eleventh Circuit's view, orders to "provide or permit for discovery."[144]

The *Lipscher* court concluded its opinion by noting two things in dicta for future consideration: first, monetary considerations are proper when a contempt order is issued; and second, a court could potentially issue a similar sanction using its inherent powers.[145] However, as neither of those circumstances appeared in the present case, the court did not expound on either issue.[146]

The Fifth Circuit took the opposite view and affirmed the imposition of monetary sanctions for violations of a protective order in *Smith & Fuller*.[147] During an action against defendant Cooper Tire & Rubber Company, the plaintiff's attorneys inadvertently disseminated Cooper's trade secrets and confidential information during a conference attended by several other personal injury attorneys.[148] The district court concluded the attorneys clearly violated the protective order.[149] Accordingly, the district court sanctioned them under Rule 37(b)(2)(C), ordering the payment of Cooper's expenses connected to the violation in the amount of $29,667.71.[150]

The Fifth Circuit upheld the district court's ruling on appeal, disagreeing with the Eleventh Circuit's "narrow application of Rule 37(b)."[151] Instead of limiting orders under Rule 26 that "provide or permit discovery" to those issued under subdivision (c)(2), the court decided a multitude of orders under subdivision (c)(1) could also "provide or permit discovery."[152] Because the district court's order prescribed the "method and terms of discovery of confidential material," the Fifth Circuit determined it necessarily "provided or permitted discovery."[153]

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[144] *Lipscher*, 266 F.3d at 1323; *see also* FED. R. CIV. P. 37(b)(2) (allowing sanctions for violations of orders providing or permitting discovery). The Eleventh Circuit highlighted the identical wording in Rule 26(c)(2) and Rule 37(b)(2) to support its reading of the Advisory Committee's Notes. *Lipscher*, 266 F.3d at 1323.

[145] *Lipscher*, 266 F.3d at 1323.

[146] *Id.*

[147] *See* Smith & Fuller, P.A. v. Cooper Tire & Rubber Co., 685 F.3d 486, 489–90 (5th Cir. 2012) (rejecting the *Lipscher* ruling and affirming sanctions).

[148] *Id.* at 487.

[149] *Id.*

[150] *Id.* at 488.

[151] *Id.* at 489.

[152] *Id.* at 489–90.

[153] *Id.* at 490.

With the *Lipscher* and *Smith & Fuller* opinions left to stand on their own, the authority of district courts to impose sanctions for violation of Rule 26(c)(1) protective orders currently varies by circuit. With the ever-increasing presence of protective orders,[154] this uncertainty takes on enhanced importance. Having explored the texts of Rule 26(c) and Rule 37 and the historical and practical points leveraged by both sides of the circuit split, this Note shifts to an analysis of which side gets it right.

III. ANALYSIS

The Eleventh Circuit's narrow interpretation of the scope of Rule 37 sanctions fails to effectuate the objectives of Rule 37. Thus, the Eleventh Circuit should adopt a different, reasonable interpretation of Rule 37 that better accomplishes those goals. The Fifth Circuit's broader interpretation provides the best model for adoption. This analysis begins by articulating how the Eleventh Circuit's approach, specifically its reliance upon inherent authority as a basis for imposing sanctions, fails to meet the four fundamental objectives of Rule 37. The analysis then proceeds to argue that the broader interpretation espoused by the Fifth Circuit is reasonable based on the text of Rule 37(b)(2) and better effectuates Rule 37's fundamental objectives.

A. RELYING UPON INHERENT AUTHORITY FAILS TO EFFECTUATE RULE 37'S OBJECTIVES

Contrary to the Eleventh Circuit's position in *Lipscher*, a court's inherent authority is insufficient to protect the fundamental policy objectives of Rule 37(b)(2). District courts' minimal amount of inherent authority to sanction serves only as a gap-filler in instances when statutes or rules fail to provide the necessary authority.[155] The Eleventh Circuit noted violations of a protective order as one of those instances.[156] However, the ability to impose sanctions using inherent authority is limited by an additional

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[154] *See supra* Part II.C (discussing the expansion of protective orders in complex litigation).

[155] *See supra* notes 106–09 and accompanying text (explaining a court's inherent power to sanction is not inhibited by rules and statutes providing for sanctions).

[156] *See supra* note 98 (discussing the interplay between the various rules prescribing sanctions and noting the areas not expressly subject to sanctions under the current rule structure).

element not found in Rule 37 bad faith.[157] That requirement necessitates the district court find some additional level of culpability above the strict existence of a violation.[158] This quasi-scienter requirement allows a party to escape sanctions when he or she violates a protective order to a degree short of bad faith.[159]

While a second violation of the same protective order can suggest the requisite bad faith,[160] requiring district courts to wait for a second violation before imposing sanctions dilutes the effectiveness of protective orders. With an eye to the fundamental objectives of Rule 37,[161] the inability to sanction a party after a single violation fails three of the four objectives. Such a policy does not necessarily undermine the second enumerated objective of punishing culpable parties or attorneys. Because the only parties that escape punishment are those who acted in good faith—those who by implication were not culpable—the second enumerated objective will still be effectuated. Nonetheless, in many cases, the Eleventh Circuit's reliance upon inherent authority, undermines each of the remaining three objectives.

First, parties that know their information can be released in spite of a protective order will likely be less willing to participate in negotiations regarding which discovery to permit. That is, parties will be increasingly weary of the improper release of their confidential information and thus increasingly hesitant to agree to turn over that information under the unreliable cover of a negotiated protective order.

Second, there will be a minimal deterrent effect by granting parties a pass for their admittedly negligent actions. In *Valdez-Castillo*, the court implied that simple negligence would fall short

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[157] *See, e.g.*, Martin v. Automobili Lamborgini Exclusive, Inc., 307 F.3d 1332, 1335 (citing *In re* Mroz, 65 F.3d 1567, 1575 (11th Cir. 1995)) ("To exercise its inherent [authority] a court must find the party acted in bad faith.").

[158] *See, e.g.*, Valdez-Castillo v. Busch Entm't Corp., No. 06-2772-CIV, 2008 WL 4999175, at *4–5 (S.D. Fla. Nov. 20, 2008) (demonstrating circumstances in which a party can, without acting in bad faith, violate a protective order).

[159] *Id.* at *5 ("Where, as here, the Court finds no bad faith, the Court may not invoke its inherent powers to sanction. . . .").

[160] *See, e.g.*, *id.* at *7 (warning the party that another violation will almost assuredly constitute bad faith).

[161] *See supra* note 30 and accompanying text (listing the fundamental objectives of Rule 37 as (1) compelling discovery; (2) punishment of culpable parties or attorneys; (3) deterrence of others from engaging in similar behavior; and (4) compensation for those parties who suffered because of the discovery abuse).

of the bad faith standard and escape sanctions.[162] While negligent parties certainly lack the culpability of a party demonstrating willful misconduct or bad faith, negligent behavior can be just as detrimental to the party whose confidential information is released.[163] The risk of irreparable damage from disclosure creates a need to deter all behavior that results in the dissemination of confidential material, not just that behavior found to be intentional. By refusing to impose sanctions upon those less culpable parties, a court fails to fully deter violations of protective orders.[164]

Lastly, refusing to impose sanctions for actions falling short of bad faith fails entirely to compensate the party whose confidential information has been disclosed. That party bears the burden of both the damage stemming from the breach itself and the cost of attempting to mitigate the damage. When that breach was due to actions falling short of bad faith, the victimized party will be completely uncompensated.[165] Thus, refusing to impose sanctions for actions falling short of bad faith fails the objective of compensating the wronged party. While the imposition of reasonable attorney's fees will never "unring" the bell, it compensates the party for the dissemination of their information and attempts to minimize the damage stemming from that "ring."[166]

By requiring an element of bad faith when Rule 37(b)(2) has no such requirement, inherent authority fails to effectuate the objectives of Rule 37 with the efficacy of the rule itself, and thus is

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[162] *Valdez-Castillo*, 2008 WL 4999175, at *4–5 (listing the wrongful actions of the plaintiff's attorney but finding those actions, taken as a whole, fall short of the requisite willful misconduct).

[163] *See, e.g.*, McDonald v. Cooper Tire & Rubber Co., 186 F. App'x 930, 930–31 (11th Cir. 2006) (explaining that opposing counsel in a separate litigation was able to obtain the confidential information of the defendant).

[164] The idea of culpability discussed here is parallel to that of a crime requiring mens rea compared to a strict liability crime. Strict liability crimes, theoretically, have a greater deterrent effect compared to crimes requiring mens rea because punishment is more directly connected to the act being deterred. *See generally* Steven S. Nemerson, Note, *Criminal Liability Without Fault: A Philosophical Perspective*, 75 COLUM. L. REV. 1517, 1548–50 (1975) (explaining the theoretical effect of strict liability crimes on rational, utilitarian thinkers).

[165] *See, e.g.*, *Valdez-Castillo*, 2008 WL 4999175, at *7 (summarizing the court's inability to award any compensation because of a lack of bad faith and a narrow reading of Rule 37).

[166] *See, e.g.*, *McDonald*, 186 F. App'x at 931 (awarding full fees incurred by a party who sought to enforce the protective order on its own).

an inadequate proxy for Rule 37. Accordingly, the Eleventh Circuit's reliance on bad faith fails where adopting a broader interpretation of Rule 37(b)(2), as the Fifth Circuit has, likely would succeed.

B. THE BROADER INTERPRETATION IS REASONABLE AND BETTER EFFECTUATES THE OBJECTIVES OF RULE 37

Since the Eleventh Circuit's narrow interpretation fails to effectuate the objectives of Rule 37, the Eleventh Circuit should adopt another reasonable interpretation of Rule 37 that better effectuates those objectives and still comports with the rule's text. This section employs common textual and substantive techniques of interpretation to assess the reasonableness of the Fifth Circuit's broader interpretation and validates it on both fronts. Having established the reasonableness of that interpretation, this section next argues that the broader interpretation effectuates the purposes of Rule 37 while avoiding the pitfalls of the Eleventh Circuit's approach.

1. The Fifth Circuit's Interpretation is Plausible Under the Text and Advisory Notes of Rule 37. Any analysis of a statutory provision necessarily begins with the text itself.[167] The plain meaning of the words "permit or provide for discovery" demonstrates the Fifth Circuit's broader interpretation is a reasonable one. Generally, ordinary meaning can be ascertained from either a dictionary definition or by determining the understanding a prototypical legislator would have during her consideration of the language.[168] Both the dictionary definition and the legislators' understanding demonstrate the reasonableness of the Fifth Circuit's broader approach.

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[167] *See, e.g.*, United States v. Standard Brewery, 251 U.S. 210, 217 (1920) ("Nothing is better settled than that in the construction of a law its meaning must first be sought in the language employed. If that be plain, it is the duty of the courts to enforce the law as written . . . ."); Nat'l Coal Ass'n v. Chater, 81 F.3d 1077, 1081 (11th Cir. 1996) ("Any exercise of statutory interpretation begins first with the language of the act.").

[168] *See, e.g.*, Green v. Bock Laundry Mach. Co., 490 U.S. 504, 528 (1989) (Scalia, J., concurring) ("The meaning of terms on the statute books ought to be determined . . . on the basis of which meaning is . . . most in accord with context and ordinary usage, and thus most likely to have been understood by the *whole* Congress which voted on the words of the statute. . . ."); United States v. Lopez, 590 F.3d 1238, 1248 (11th Cir. 2009) ("To ascertain ordinary meaning, courts often turn to dictionary definitions for guidance.").

To determine a word's dictionary definition, courts will often consult dictionaries from the time around the passage of the statute.[169] Because definitions and meanings can change over time, courts find these contemporary dictionaries relevant in determining the appropriate meaning of statutory text. As the current form of Rule 37(b)(2) was developed and passed in the years leading up to 1970,[170] a dictionary from that era is the most appropriate.

Both "permit" and "provide" have multiple definitions. In assessing the reasonableness of the Fifth Circuit's interpretation, all applicable definitions of each word are relevant. Turning first to the term "permit," the first definition falls more in line with the Eleventh Circuit's interpretation.[171] The definition reads, "to give permission to; to authorize; to grant by express consent. . . ."[172] The express nature of that definition connotes positive action. When the Eleventh Circuit contemplated the issue at hand, it determined sanctions were only appropriate for those orders requiring positive action.[173] As such, protective orders—orders ordinarily governing negative action or action withholding discoverable material—would not fall within the scope of this definition. Based solely on the first definition, the Fifth Circuit's interpretation seems inappropriate.

The second definition of "permit," however, demonstrates the reasonableness of the Fifth Circuit interpretation. Specifically, the definition reads, "to allow by silent consent, or by not prohibiting; to suffer without giving express authority; to tolerate."[174] This definition contemplates the absence of action not addressed in the first definition. Specifically, the term "allow," as included in the first clause of the definition, inherently brings to mind passive action. Even more convincing, the second clause of the definition

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[169] *See, e.g.*, Saint Francis Coll. v. Al-Khazraji, 481 U.S. 604, 610–12 (1987) (using a nineteenth century dictionary to interpret the Civil Rights Act of 1866).

[170] *See* FED. R. CIV. P. 37 (citing March 30, 1970 as the amended date of the applicable changes).

[171] *See* WEBSTER'S NEW TWENTIETH CENTURY DICTIONARY 1336 (2d ed. 1967) (defining "permit").

[172] *Id.*

[173] *See* Lipscher v. LPR Publ'ns, 266 F.3d 1305, 1322–23 (11th Cir. 2001) (discussing the application of Rule 37(b)(2) to orders issued pursuant to Rule 26(c)(2), which positively require discovery of some information).

[174] WEBSTER'S, *supra* note 171, at 1336.

specifically refers to a lack of prohibition.[175] As documented in the cases discussed above, the issues giving rise to sanctions from violations of protective orders arise when some discoverable evidence is turned over to the opponent under conditions the opponent later breaches.[176] In those instances, the opponent obtained the evidence under specific circumstances as an alternative to entirely excluding it from the litigation.[177] Thus second definition of "permit" reflects the Fifth Circuit's reading,[178] and demonstrates the reasonableness of the broader interpretation.

While the definitions of "provide" seem more clearly inconsistent with the Fifth Circuit's interpretation,[179] court orders need only "permit" *or* "provide" discovery to fall within the scope of Rule 37.[180] Accordingly, the Fifth Circuit's interpretation that Rule 26(c) protective orders fall within the plain text of Rule 37(b)(2)—as derived from an appropriate dictionary that reflects what a prototypical legislator would have understood in 1970—is a reasonable one. This section now asks whether the broader interpretation better effectuates the fundamental objectives of Rule 37 than the narrow Eleventh Circuit interpretation.

2. The Fifth Circuit's Interpretation of Rule 37(b)(2) Better Effectuates the Core Objectives of Discovery Sanctions. This analysis previously identified the failures of the Eleventh Circuit's narrow interpretation to effectuate the objectives of Rule 37.[181] The broader interpretation espoused by the Fifth Circuit furthers each of those objectives better than the narrow interpretation.

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[175] *Id.*

[176] *See generally supra* Part II.E.

[177] *See generally supra* Part II.E.

[178] *See supra* notes 152–53 and accompanying text.

[179] In relevant part, "provide" means, "to procure beforehand; to get, collect, or make ready for future use; to prepare . . . ." WEBSTER'S, *supra* note 171, at 1450. A second definition reads, "to make available; to supply; to afford." *Id.* While both these definitions seemingly refer to the type of positive action envisioned by the Eleventh Circuit, protective orders arguably make evidence "ready for future use" or "available." Accordingly, these definitions provide some additional support for the Fifth Circuit's plain text interpretation of Rule 37(b)(2).

[180] *See* FED. R. CIV. P. 37(b)(2) (using the conjunctive "or" and thus applying to orders that *either* permit *or* provide). Given the conjunctive use of "or," permitting discovery should suffice to place protective orders within the scope of Rule 37(b)(2).

[181] *See supr*a Part III.A (highlighting that the narrow interpretation fails to effectuate three of the four identified objectives of Rule 37).

First, the Eleventh Circuit's approach reduces the parties' incentive to willingly enter into a protective order agreement.[182] That lack of willingness will undermine the efficiency gained through the regular practice of joint protective orders. The Fifth Circuit's broader approach, which applies to sanctions, a standard similar to strict liability, virtually ensures that all violating parties will be subject to sanctions. This creates a disincentive for parties to violate protective orders and allows them to enter into protective order agreements knowing the information disclosed under these agreements will be reasonably protected. Accordingly, the broader interpretation of Rule 37 better motivates parties to participate in the discovery process, thus facilitating and furthering the first fundamental objective of Rule 37.

Second, the Eleventh Circuit's approach reduces the deterrent effect of sanctions by allowing some violating parties to escape punishment. Since the Fifth Circuit's broader interpretation operates more like a strict liability scheme, deterrence under this interpretation is more likely than under the Eleventh Circuit's interpretation.[183] Accordingly, the Fifth Circuit's approach better effectuates the third fundamental objective of Rule 37—deterring others from engaging in similar actions.

Lastly, the Eleventh Circuit's refusal to impose sanctions on violating parties does nothing to compensate a party whose confidential information is no longer confidential. While the imposition of reasonable attorney's fees will never "unring" the bell, it nonetheless compensates the party for their actions to minimize the damage stemming from their opponent's violation. The Fifth Circuit's approach enables the district court to compensate the injured party in every instance—even absent the violator's bad faith—and thus better effectuates the fourth fundamental objective of Rule 37.

IV. CONCLUSION

The Eleventh Circuit's interpretation of Rule 37(b)(2) is too narrow. It fails on several levels to effectuate the fundamental objectives of Rule 37 and disregards a more faithful, reasonable

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[182] *See supra* Part III.A.

[183] *See supra* note 164 (describing the increased theoretical deterrence of strict liability schemes).

approach to protective order violations. Going forward, the Eleventh Circuit should reverse its holding in *Lipscher* and adopt the interpretation of Rule 37(b)(2) espoused by the Fifth Circuit in *Smith & Fuller*. In doing so, the Eleventh Circuit would better serve the intended ends of the Federal Rules and would help create a consistent standard across the circuits. Absent such a change, district courts will force litigants, like our self-made baker, to risk their invaluable trade secrets without any cover from a protective order.

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