

2-1-1996

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Recommended Citation

Jodi Golinsky, *DISCOVERY ABUSE: The Second Circuit's Imposition of Litigation Ending Sanctions for Failures to Comply with Discovery Orders: Should Rule 37(b)(2) Defaults and Dismissals Be Determined by a Roll of the Dice?*, 62 Brook. L. Rev. 585 (1996).
Available at: <https://brooklynworks.brooklaw.edu/blr/vol62/iss2/4>

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THE SECOND CIRCUIT'S IMPOSITION OF LITIGATION-ENDING SANCTIONS FOR FAILURES TO COMPLY WITH DISCOVERY ORDERS: SHOULD RULE 37(b)(2) DEFAULTS AND DISMISSALS BE DETERMINED BY A ROLL OF THE DICE?

INTRODUCTION

Federal courts across the nation have become less hesitant to impose severe sanctions on parties who fail to comply with discovery orders.¹ For example, in June of 1995, the Second Circuit affirmed a \$280,000 default judgment against a litigant for failure to comply with a discovery order.² The default judgment was entered in accordance with the provisions of Rule 37(b)(2) of the Federal Rules of Civil Procedure.³ Rule 37(b)(2)

¹ Numerous articles can be found in recent years regarding harsh sanctions being levied for discovery abuse. See, e.g., Comment, *Hinkle v. Sam Blanken & Co.: Dismissals for Discovery Abuse—Toward a New Standard in the District of Columbia*, 36 CATH. U. L. REV. 761, 767-68 (1987) (discussing the deterrent standard for discovery abuse endorsed by the Supreme Court in *National Hockey League v. Metropolitan Hockey Club, Inc.*, and its positive effect of decreasing a court's reluctance to impose the "ultimate sanction" of dismissal). For a discussion regarding *National Hockey*, see *infra* pp. 594-96 and accompanying notes; Deborah Pines, *Default Judgments Entered Due to Discovery Abuse*, N.Y. L.J., Nov. 10, 1993, at 1; Henry J. Reske, *Rare Sanction Against Firm, Client: Judge Enters Default Judgment, says ABC and Wilmer, Cutler Suppressed Facts*, A.B.A. J., July 1992, at 23 (discussing case in Washington, D.C. where federal judge ended a race discrimination suit filed by a prestigious firm with a default judgment); Georgia Sargeant, *Landmark Court Sanction May Herald New Era in Pre-Trial Discovery*, TRIAL, Apr. 1994, at 89; Gary Spencer, *Dismissal Affirmed for Discovery Abuse*, N.Y. L.J., Nov. 2, 1994, at 1; see also *Oliveri v. Thompson*, 803 F.2d 1265, 1271 (2d Cir. 1986), *cert. denied*, 480 U.S. 918 (1987) ("Even though the subject of sanctions is a distasteful one for any court, increasing tensions in and occasional abuses of the judicial system have prompted both judges and legislators to turn toward sanctions as a means of improving the litigation process.").

² *Bambu Sales, Inc. v. Ozak Trading Inc.*, 58 F.3d 849 (2d Cir. 1995).

³ Rule 37(b)(2) authorizes a district court to sanction a party for failure to comply with an order. It reads:

If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an

authorizes courts to make orders regarding discovery failures "as are just,"⁴ and provides examples of the sanctions a court may impose for failure to comply with a discovery order. For instance, a court may issue an order that establishes facts adverse to a disobedient party,⁵ precludes certain evidence or designated claims and defenses,⁶ strikes pleadings,⁷ stays proceedings,⁸ dismisses a party's action,⁹ or enters default judgment against a party.¹⁰ A court may also treat the failure to obey a discovery order as contempt of court.¹¹

order made under subdivision (a) of this rule or Rule 35, or if a party fails to obey an order entered under Rule 26(f), the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

(A) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting that party from introducing designated matters in evidence;

(C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any party thereof, or rendering a judgment by default against the disobedient party;

(D) In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination;

(E) Where a party has failed to comply with an order under Rule 35(a) requiring that party to produce another for examination, such orders as are listed in paragraphs (A), (B), and (C) of this subdivision, unless the party failing to comply shows that that party is unable to produce such person for examination.

In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising that party or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

FED. R. CIV. P. 37(b)(2).

⁴ *Id.*

⁵ FED. R. CIV. P. 37(b)(2)(A).

⁶ FED. R. CIV. P. 37(b)(2)(B).

⁷ FED. R. CIV. P. 37(b)(2)(C).

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ FED. R. CIV. P. 37(b)(2)(D).

Rule 37(b)(2)'s authorization to render default judgments for failure to comply with discovery orders is extreme.¹² Nevertheless, by affirming a default judgment in *Bambu Sales, Inc. v. Ozak Trading Co.*, the Second Circuit emphasized its policy that discovery orders are meant to be followed and that such "potent medicine"¹³ is appropriate against a party who "flouts such orders."¹⁴ Unfortunately, the *Bambu* decision does little to provide concrete guidance to either litigants or courts as to what circumstances warrant the "extreme measure" of default judgment rather than other, less drastic sanctions.

Depriving a litigant of the opportunity to have a case decided on the merits instinctively offends one's sense of fairness and justice if the deprivation is not clearly deserved. In fact, close examination of the *Bambu* case and prior Second Circuit case law suggests that perhaps the result was wrong. Because the Second Circuit has no articulated test by which to judge degrees of discovery abuse,¹⁵ it is difficult to ascertain whether *Bambu* warranted the extreme result affirmed in the case. The *Bambu* opinion fails to address the policy implications involved when a court chooses to impose a litigation-ending sanction on what it deems a contumacious party. Moreover, the case departs from other cases in the Second Circuit because the *Bambu* default judgment was entered without any warning and without any specified deadline for compliance.¹⁶

¹² *Bambu Sales, Inc. v. Ozak Trading Inc.*, 58 F.3d 849, 853 (2d Cir. 1995).

¹³ *Id.*

¹⁴ *Id.* (citation omitted).

¹⁵ See, e.g., *Oliveri v. Thompson*, 803 F.2d 1265, 1271 (2d Cir. 1986), *cert. denied*, 480 U.S. 918 (1987) ("Unfortunately, however, we do not yet have an integrated 'code' of sanctions to supply coherent guidance.").

¹⁶ See *infra* notes 207-08, 233 and accompanying text for a discussion of the role that prior warnings have played in Second Circuit litigation-ending sanction cases. Interestingly, *Bambu* was cited in a November 1995 Southern District of New York opinion as support for a Rule 37(d) dismissal based on discovery failures by the plaintiff in the case. *El-Yafi v. 360 East 72nd Owners Corp.*, 164 F.R.D. 12 (S.D.N.Y. 1995). The magistrate judge's report and recommendation in the case noted that "[t]he fact pattern here is quite similar to that in *Bambu*," because the recusant party had adequate notice that failure to comply with the second official discovery order "could result in default judgment."

This mischaracterizes the *Bambu* case in two major aspects: 1) The recusant defendants in *Bambu* were not explicitly notified that failure to comply with the discovery order at issue could result in default, see *infra* pp. 636-37 and accompanying notes; and (2) The default entered against the defendants in *Bambu* was the result of failure to comply with a single discovery order, not two orders as was

Several other circuits, unlike the Second Circuit, have articulated specific factors that district courts must consider before imposing litigation-ending sanctions upon litigants who fail to comply with discovery orders.¹⁷ Not all circuits, however, have adopted such a method, and no one test is applied universally. This lack of uniformity is troublesome and merits attention because only in extreme situations should a litigant be denied the opportunity to have a case heard on its merits due to a procedural violation. Considering the circuits' different policies, contumacious conduct warranting a severe sanction in one circuit court may not lead to the same result in another. However, within any particular circuit similar conduct should ideally lead to similar results. At a minimum, there ought to be consistency in the application of harsh sanctions in any given circuit. Otherwise, sanction imposition has the potential to be arbitrary and unfair.

This Note explores the Second Circuit's approach to litigation-ending sanctions with a particular focus on the recent *Bambu* decision. *Bambu* both epitomizes the problems in this area and represents a dramatic departure from other, less recent Second Circuit decisions. Part I provides the historical background of Rule 37(b)(2) sanctions and discusses Supreme Court precedents that have influenced the various approaches to imposing litigation-ending sanctions. Part II reviews the approaches of other circuits. Particular emphasis is placed on those circuits with clear standards regarding the propriety of imposing litigation-ending sanctions for failures to comply with discovery orders. Part III explores the history of litigation-ending sanctions in the Second Circuit leading up to its decision in *Bambu*. Part IV then examines the *Bambu* decision in detail, and Part V discusses the case in light of the Second Circuit's approach in general. This detailed analysis both highlights *Bambu's* shortcomings and demonstrates that the sanction imposed in the case may have been too harsh. Finally, Part VI proposes a rule that, if adopted by the Second Circuit,

the case in *El-Yafi*. See *infra* Parts IV.A and IV.B detailing the course of events in *Bambu* which led to the entry of default judgment based on the violation of a single discovery order.

¹⁷ See *infra* notes 103-108 for cases enumerating the explicit tests applied by the Third, Fourth, Fifth, Sixth, Ninth and Tenth Circuits. The Federal Circuit and the D.C. Circuit are not included in this Note's discussion and analysis.

would provide greater clarity for judges and litigants, and would better serve the underlying purpose of sanction imposition. The proposal suggests an approach that balances judicial discretion in this sensitive area with greater certainty and consistency. Both the bench and trial practitioners recognize the need to impose more severe sanctions more often for discovery abuse.¹⁸ A less discretionary rule or approach will actually strengthen a court's ability to impose harsh sanctions and therefore advance the goals behind imposing discovery sanctions.¹⁹

¹⁸ See, e.g., Mark S. Cady, *Curbing Litigation Abuse and Misuse: A Judicial Approach*, 36 DRAKE L. REV. 483, 484-85, 518 (1986-87) (stating that public perception of legal system is at a "low ebb" and that judges must eliminate abuse by imposing sanctions and shifting responsibility for costs and fees); Barbara J. Gorham, *Fisons: Will It Tame the Beast of Discovery Abuse?*, 69 WASH. L. REV. 765 (1994) (exploring Washington Supreme Court case affirming dismissal for discovery abuse against what the author describes as "the backdrop of the historic failure of courts to impose adequate sanctions for discovery abuse"); Carol W. Hunstein, *The Decline of Professionalism—Bar Versus Bench Responsibilities*, 29 GA. ST. BAR J. 111 (1992) (noting that the entire legal system suffers as a result of pre-trial misconduct and that the trial judge should promptly hear discovery disputes and promptly impose sanctions); Florrie Y. Roberts, *Pre-Trial Sanctions: An Empirical Study*, 23 PAC. L.J. 1, 45 (1991) (after conducting a study of pretrial sanctions in the Central District of the Los Angeles County Superior Court, noting that even though the study did not analyze judges' decisions as to correctness, "certain trends were evident which revealed that the judges may not be using their power to sanction to the full extent possible in order to prevent discovery and other pre-trial abuse"); Marcia Coyle, *Misconduct Charged*, NAT'L L.J., Jan. 31, 1994, at 2 (counsel in D.C. case moves for default judgment against a Paul, Hastings, Janofsky & Walker client because of alleged misconduct by its lawyers in what reporter describes as a "nasty discovery battle"); Joseph Kelner & Robert S. Kelner, *Discovery Abuses*, N.Y. L.J., Nov. 23, 1993, at 3 ("[A]ctive trial practitioners [in New York] can attest to the fact that the [discovery] process is being widely overworked and abused."); Robert E. Shapiro, *Wrestling with the Discovery Demons*, LITIGATION, Fall 1991, at 14-15 ("Abusive discovery tactics work because judges hate discovery disputes and are too busy to understand them, and because the very rules have become weapons for the wily. To stop the abuse, you must get the judge's attention.")

¹⁹ See *National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639, 643 (1976) (per curiam). In this landmark decision, the Supreme Court expressly authorized courts to use sanctions as a general deterrent: "[Severe sanctions must be available to district courts] not merely to penalize those whose conduct may be deemed to warrant such a sanction, but to deter those who might be tempted to such conduct in the absence of a deterrent." *Id.* The Supreme Court has not addressed this issue since *National Hockey*. Thus, courts ought to consider general deterrence a primary purpose when imposing sanctions.

I. RULE 37 AND SUPREME COURT PRECEDENT

Rule 37 was originally adopted in 1938 by the Supreme Court as part of the Federal Rules of Civil Procedure which govern procedure for federal courts to follow in civil cases. It was originally entitled "Refusal to Make Discovery; Consequences."²⁰ Since 1938, Rule 37 has been amended several times—in 1948, 1970, 1980 and again in 1993.²¹ Two seminal Supreme Court cases provide insight into how the rule was originally fashioned.²² In both cases, the Supreme Court grappled with the propriety of imposing litigation-ending sanctions on a party for refusing to comply with a discovery order. The holdings in both of these cases were considered when Rule 37 was first drafted.

In *Hovey v. Elliot*,²³ decided in 1897, the defendants' answer was stricken and a decree pro confesso²⁴ was entered against them for failure to obey a court order requiring the defendants to show cause why they should not be decreed to be in contempt of court.²⁵ The Supreme Court concluded that precluding a party from the right to defend an action on the merits, absent a hearing, denied the defendant due process.²⁶ The holding in *Hovey* was substantially modified twelve years

²⁰ See generally 6 JAMES W. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 37.01 (2d ed. 1985 & Supp. 1994-95) [hereinafter MOORE'S]; CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE: CIVIL 2D § 2281 (2d ed. 1994) [hereinafter WRIGHT MILLER].

²¹ MOORE'S, *supra* note 20, ¶ 37.01[1][5][7]; WRIGHT MILLER, *supra* note 20, § 2281.

²² See *infra* 23-32 and accompanying text.

²³ 167 U.S. 409 (1897).

²⁴ A decree pro confesso is "[a] term applied to a bill in equity, and the decree founded upon it, where no answer is made to it by the defendant. Under rules practice, this has been replaced by a default for want of prosecution." BLACK'S LAW DICTIONARY 1207 (6th ed. 1990).

²⁵ *Hovey*, 167 U.S. at 411-12; see WRIGHT MILLER, *supra* note 20, § 2283 (discussing this case and other Supreme Court precedents concerning the constitutional limits on Rule 37 sanctions). For general commentaries regarding constitutional-ity questions with respect to discovery sanctions, see Note, *The Constitutional Limits of Discovery*, 35 IND. L.J. 347, 348-50 (1960); Note, *Recent Innovations to Pretrial Discovery Sanctions: Rule 37 Reinterpreted*, 1959 DUKE L.J. 278, 282-83 (discussing what the author characterizes as the constitutional problem "lurking within the text of rule 37" with respect to a dismissal for noncompliance without full adjudication on the merits) [hereinafter *Rule 37 Reinterpreted*].

²⁶ *Hovey*, 167 U.S. at 413-14.

later in *Hammond Packing Co. v. Arkansas*.²⁷ In *Hammond*, the Supreme Court affirmed a judgment that struck a party's answer and granted default judgment against the party for its failure to produce books, papers and witnesses in a state anti-trust suit.²⁸ The Court distinguished *Hovey* by noting that due process had been denied in that case by the court's refusal to hear the party.²⁹ It reasoned, however, that due process had been preserved in *Hammond* because by refusing to produce evidence material to the administration of due process, the party admitted that the case lacked merit.³⁰

The Advisory Committee, a group of lawyers and law professors selected by the Supreme Court to prepare and submit draft rules of federal procedure,³¹ wanted to bring Rule 37 within the Court's "doctrine" as defined by the Rule's early cases, *Hovey* and *Hammond*. The advisory notes to the original version of Rule 37 stated that the rule was drafted in accordance with the decisions in *Hovey* and *Hammond* in that it justified the use of drastic sanctions to compel a party to produce evidence.³² However, the rule did not justify the use of such sanctions for the mere purpose of punishing a party.³³ While the Advisory Committee Notes explained when harsh sanctions might be appropriate, the rule itself provided no clarification.³⁴ So despite the Advisory Committee's Notes regarding Rule 37 sanctions, constitutional questions concerning the imposition of severe sanctions remained.³⁵ Particularly

²⁷ 212 U.S. 322 (1909); see *Societe Internationale Pour Participations Industrielles et Commerciales, S.A. v. Rogers*, 357 U.S. 197, 209 (1958) (in which the Supreme Court stated that *Hammond* "substantially modified" its earlier decision in *Hovey*).

²⁸ *Hammond*, 212 U.S. at 350-51.

²⁹ *Id.*

³⁰ *Id.*

³¹ FED. R. CIV. P. at 5.

³² WRIGHT MILLER, *supra* note 20, § 2283 n.9.

³³ WRIGHT MILLER, *supra* note 20, § 2283 n.9.

³⁴ The rule itself makes no distinction between sanctioning a party in order to compel production of evidence and sanctioning a party merely to punish. WRIGHT MILLER, *supra* note 20, § 2283 n.9.

³⁵ For instance, the question remained whether entry of a harsh sanction violated a party's right to due process if the failure to comply was not willful. The rule did not distinguish between deliberate and willful misconduct as opposed to mere inability to comply. For a general commentary, see WRIGHT MILLER, *supra* note 20, § 2283; see also Richard H. Williams, Comment, *Pleading, Practice and Procedure: Sanctions for Enforcement of Discovery—Constitutionality of Rule 37, 37*

troublesome to litigants, and later addressed in *Societe Internationale Pour Participations Industrielles et Commerciales, S.A. v. Rogers*,³⁶ was the concern that a good faith failure to produce did not justify the imposition of harsh sanctions.³⁷

In *Societe Internationale*, a case decided subsequent to Rule 37's enactment, the plaintiff's action had been dismissed in the court below for failure to produce documents.³⁸ The lower court ignored the fact that the plaintiff was unable, rather than unwilling, to comply with the order to produce.³⁹ The Supreme Court reversed and held that "Rule 37 should not be construed to authorize dismissal . . . when it has been established that failure to comply has been due to inability, and not to willfulness, bad faith, or any fault of petitioner."⁴⁰ *Societe Internationale* held that due process precludes the harshest of sanctions where the party to be sanctioned is unable to comply with a court's discovery order. Moreover, the *Societe Internationale* holding implied that lesser sanctions are appropriate even in the absence of bad faith. Congress embraced *Societe Internationale's* holding, as evidenced by the 1970 amendments to Rule 37.

The Advisory Committee Notes to the 1970 amendment state that "[e]xperience has brought to light a number of defects in the language of the rule as well as instances in which it is not serving the purposes for which it was designed."⁴¹ The "defect" was that the rule sometimes referred to a party's "refusal" to comply with a discovery order and other times referred merely to a party's "failure" to do so.⁴² In order to elim-

WASH. L. REV. 175, 177-81 (1962) (discussing Washington's rules of procedure by explaining the constitutionality of Rule 37 and *Hovey*, *Hammond* and *Societe Internationale*); *Rule 37 Reinterpreted*, *supra* note 25, at 287-90 (discussing seminal Supreme Court cases and the "constitutional pitfalls" of Rule 37).

³⁶ 357 U.S. 197 (1958).

³⁷ See WRIGHT MILLER, *supra* note 20, § 2283.

³⁸ *Societe Internationale*, 357 U.S. at 201. The case was dismissed despite the fact that the Master found that plaintiff had proven good faith efforts to comply with a production request but could not produce the requested documents without violating Swiss law.

³⁹ *Id.*

⁴⁰ *Id.* at 212.

⁴¹ MOORE'S, *supra* note 20, ¶ 37.01[6] (citation omitted).

⁴² MOORE'S, *supra* note 20, ¶ 37.01[6] (citation omitted); see Maurice Rosenberg, *Sanctions to Effectuate Pretrial Discovery*, 58 COLUM. L. REV. 480, 489-91 (1958)

inate this confusion, and to conform the rule with *Societe Internationale*, the rule was amended to substitute the word "failure" for "refusal" throughout.⁴³ Rule 37, as amended in 1970, authorized sanctions for any "failure" to comply with a discovery order regardless of the party's willfulness or bad faith. However, willfulness or bad faith was still relevant in selecting an appropriate sanction.⁴⁴ Although the Advisory Committee Notes explain this distinction, and clearly point out that severe sanctions are only appropriate if there is proof of willfulness or bad faith, to this day the rule itself contains no such distinction.⁴⁵

Subsequent to the 1970 amendments, the Supreme Court made its strongest pronouncement with respect to the imposition of litigation-ending sanctions in *National Hockey League v. Metropolitan Hockey Club, Inc.*⁴⁶ In *National Hockey*, the Supreme Court reversed a Third Circuit decision which held that dismissal was too harsh a sanction for the discovery abuse involved in the case.⁴⁷ By reversing the Third Circuit, the Supreme Court endorsed, *even encouraged*, other courts to utilize the extreme sanction of dismissal.⁴⁸ Characterizing the defendant club's failure to comply with a discovery order as "flagrant bad faith" and "a callous disregard of its responsibilities," the Supreme Court held that dismissal was an appropriate sanction to impose.⁴⁹ What is most striking about *National Hockey* is the Supreme Court's determination that sanctions are meant to deter all litigants in all courts, not merely the offending party in any particular litigation:

[T]he most severe in the spectrum of sanctions provided by statute or rule must be available to the district court in appropriate cases,

(criticizing Rule 37 for its inconsistent use of the words "failure" and "refusal"); *Rule 37 Reinterpreted*, *supra* note 25, *Rule 37 Reinterpreted*, at 284-86 (exploring the problem of the "refusal-failure" dichotomy).

⁴³ MOORE'S, *supra* note 20, ¶ 37.01[6].

⁴⁴ MOORE'S, *supra* note 20, ¶ 37.01[6].

⁴⁵ See *supra* note 32 and accompanying text regarding the fact that the Advisory Committee Note to the original version of Rule 37 also discussed the propriety of sanction imposition in certain situations, but that such a distinction appeared nowhere in the text of the rule.

⁴⁶ 427 U.S. 639 (1976) (per curiam).

⁴⁷ *Id.* at 643.

⁴⁸ *Id.* at 639.

⁴⁹ *Id.*

not merely to penalize those whose conduct may be deemed to warrant such a sanction, but to deter those who might be tempted to such conduct in the absence of a deterrent. If the decision [below remained undisturbed], it might well be that *these* respondents would faithfully comply with all future discovery orders entered by the District Court in this case. But other parties to other lawsuits would feel freer than we think Rule 37 contemplates they should feel to flout other discovery orders of other district courts.⁶⁰

Prior to *National Hockey* general deterrence was not an established or even articulated goal of sanctions, particularly the imposition of harsh sanctions. The purpose of sanctions under Rule 37(b)(2), as expressed by the Court in cases like *Hovey* and *Hammond* and by the Advisory Committee in its commentaries, was simply to secure compliance with discovery orders.⁶¹ *National Hockey* changed this. After *National Hockey*, courts were free to use sanctions not only to compel a particular party to comply with a discovery order, but also to send a message to *all* litigants that discovery orders must be followed. *National Hockey*, therefore, represented a dramatic shift in the focus and purpose of sanction imposition.

Equally noteworthy in the *National Hockey* decision is the Court's admonition to reviewing courts to apply strictly the abuse of discretion standard with respect to these types of cases. The Supreme Court warned the reviewing courts to avoid the "natural tendency" to be influenced by the severity of outright dismissal because it has the benefit of hindsight.⁶² It reminded appellate courts that "[t]he question, of course, 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."⁶³

National Hockey, and the deterrence goal it established with respect to discovery sanction imposition, has been the subject of numerous articles and commentaries.⁶⁴ Since this

⁶⁰ *Id.* For a detailed discussion on the importance of deterrence with respect to imposing discovery sanctions, see Cady, *supra* note 18 at 517-22.

⁶¹ See WRIGHT MILLER, *supra* note 20, §§ 2281, 2283 n.9. ("Sanctions are intended to prompt a party to respond.")

⁶² *National Hockey*, 427 U.S. at 642.

⁶³ *Id.* For a general commentary on the abuse of discretion standard, see Henry J. Friendly, *Indiscretion about Discretion*, 31 EMORY L.J. 747 (1982).

⁶⁴ See, e.g., John W. Heiderscheid III, *Rule 37 Discovery Sanctions in the Ninth Circuit: The Collapse of the Deterrence Goal*, 68 OR. L. REV. 57 (1989); Kathy

1976 per curiam decision, the Supreme Court has not issued a single opinion regarding sanctions for discovery abuse under Rule 37(b)(2).⁵⁵ Thus, in the last two decades the lower federal courts have been left to their own devices in fashioning policies and procedures that embody the *National Hockey* holding. Prior to 1970 district courts seemed hesitant to impose discovery sanctions. Since the 1970 amendments of Rule 37 and *National Hockey*, however, it appears that sanctions have been more readily imposed by district courts.⁵⁶ Particularly in the last five years there appears to be a greater inclination by district courts to impose harsh sanctions for discovery abuse.⁵⁷

Bidegaray Irigoien, *Rule 37 Sanctions: Deterrents to Discovery Abuses*, 46 MONT. L. REV. 95 (1985); Charles B. Renfrew, *Discovery Sanctions: A Judicial Perspective*, 67 CAL. L. REV. 264 (1979); Note, *The Emerging Deterrence Orientation in the Imposition of Discovery Sanction*, 91 HARV. L. REV. 1033 (1978).

⁵⁵ However, this should not be interpreted to mean that no controversy or problem exists with respect to imposing Rule 37(b)(2) litigation-ending sanctions. More than likely, litigants faced with such a sanction do not even attempt a petition for certiorari to the Supreme Court. Not only is such a pursuit costly, but the chance of success, even if certiorari is granted, is quite slim. In *National Hockey*, the Supreme Court made clear its position regarding the abuse of discretion standard. The Court criticized the Third Circuit for departing from the standard and substituting its own judgment for that of the trial court. If a court of appeals has determined that the imposition of a litigation-ending sanction was not an abuse of discretion, it is highly unlikely that the Supreme Court would upset such a decision. Therefore, the incentive for a party upon which a litigation-ending sanction has been imposed to petition for certiorari is not high.

⁵⁶ See WRIGHT MILLER, *supra* note 20, § 2281.

⁵⁷ This increased willingness to impose harsh sanctions might also be attributed to the Civil Justice Reform Act ("CJRA"), 28 U.S.C. § 471-82 (1990). The CJRA was passed in part as a response to what was deemed by the bench and bar as pervasive discovery abuse and its negative effect on judicial efficiency. One scholar has written a compelling piece concerning the CJRA and the myth of pervasive discovery abuse. See Linda S. Mullenix, *Discovery in Disarray: The Pervasive Myth of Pervasive Discovery Abuse and the Consequences for Unfounded Rulemaking*, 46 STAN. L. REV. 1393 (1994). Professor Mullenix argues that the pervasive myth of discovery abuse rests upon "inadequate social science findings," and that politicians, lawyers, judges, insurance companies and other interested parties have manipulated the media to identify American litigiousness as a societal ill, particularly discovery abuse. *Id.* at 1396-97. The *National Law Journal* reported in May 1993 that "[t]wo new studies of civil discovery—the first in a decade—conclude that for most cases, 'formal discovery is not out of control,' and the bench and bar can correct problems that do exist without adopting major changes in the rules governing discovery." Randall Samborn, *Fuel Reform Opposition Reports: Little Discovery Abuse*, NAT'L L.J., May 31, 1993, at 3. Nonetheless, right or wrong, there is no question that lawyers, judges and the general public believe that discovery abuse is both common and ubiquitous. See, e.g., Carol W. Hunstein, *The Decline of Professionalism*, 29 GA. ST. BAR J. 111 (1992) ("Not all of the criticism directed at

Not surprisingly, each circuit approaches the imposition of litigation-ending sanctions differently. In order to clarify the Second Circuit's approach and demonstrate its weaknesses, it is necessary to examine the different approaches employed by other circuits.

II. OTHER CIRCUITS' APPROACHES TO IMPOSING LITIGATION-ENDING SANCTIONS

The most striking feature about other circuits' approaches to imposing litigation-ending sanctions under Rule 37(b)(2) is that no single approach is followed by more than one circuit. Similar to the Second Circuit,⁵⁸ the First, Seventh, Eighth and Eleventh Circuits do not have an articulated set of standards that district courts must consider prior to imposing litigation-ending sanctions.⁵⁹ The Third, Fourth, Fifth, Sixth, Ninth and Tenth Circuits, however, have implemented firm standards by which to judge the propriety of imposing litigation-ending sanctions.⁶⁰

The factors considered by some or all of the circuits are: (1) the willfulness or bad faith of the noncompliant party; (2) the amount of prejudice noncompliance has on the moving party; (3) the efficacy of lesser sanctions; (4) whether imposition of a sanction promotes general deterrence; (5) the noncompliant party's history of dilatory conduct; (6) whether the noncompliant party was warned of the possibility of harsh sanction imposition; (7) whether the failure to comply was the

our profession is undeserved. This is particularly true in the area of discovery"); Susan Keilitz et. al., *Attorneys' View of Civil Discovery*, 32 JUDGE'S J. 2 (1993) ("Criticism of the civil discovery process is neither new nor limited to a vocal minority. Earlier surveys of attorneys practicing in federal district courts . . . indicate significant discontent with the discovery process. Moreover, two major efforts to amend the Federal Rules of Civil Procedure within the past decade as well as the enactment of the [CJRA] demonstrate a widely shared interest in reforming the discovery process in the federal courts."); Ward Wagner, Jr. & Helen Wagner McAfee, *Combating Discovery Abuse*, TRIAL DIPL. J., Winter 1992, at 197 ("Discovery abuse unfortunately has become commonplace in litigation practice.")

⁵⁸ See *infra* Parts III, IV and V.

⁵⁹ For a discussion regarding circuit courts without a test, see *infra* pp. 598-603.

⁶⁰ See *infra* notes 103-108 discussing the various tests employed by the other circuit courts.

attorney's fault or that of the client; and (8) general policy matters such as judicial efficiency and preferences for disposing of cases on their merits.

The difference among approaches can be attributed to each circuit's policy perspective with respect to balancing the desire to have a case litigated on its merits with the importance of order and efficiency in courts. While some circuits are extremely protective of a party's right to its day in court, others place more emphasis on judicial discretion, judicial efficiency and general deterrence.

A. *Circuits without a Test*

Even the circuits that do not have fixed standards by which to measure the propriety of imposing litigation-ending sanctions—the First, Seventh, Eighth and Eleventh Circuits—do have approaches to sanction imposition that are noteworthy. The First Circuit is sensitive to the policy implications of denying a litigant the right to try a case on its merits, although it does not require a district court to consider any particular set of factors prior to imposing sanctions under Rule 37(b)(2). Dismissal or default sanctions in the First Circuit run “counter to [its] strong policy favoring the disposition of cases on their merits . . . [such that] fairness requires that some limits be placed on [the use of dismissal or default as a sanction].”⁶¹ To determine if conduct is sufficiently serious to warrant a litigation-ending sanction, the district court must consider *all* the factors involved.⁶² These factors may include the party's level of culpability, whether the misconduct is occasioned by counsel or by the client, the amount of time involved, the number of instances of misconduct, disadvantage to the adverse party and the progress of the litigation.⁶³

The First Circuit strictly construes Rule 37(b)(2) and favors adherence to the *National Hockey* general deterrence doctrine.⁶⁴ If a party refuses to comply with a valid order, less

⁶¹ *Velazquez-Rivera v. Sea-Land Serv., Inc.*, 920 F.2d 1072, 1075-76 (1st Cir. 1990) (citations omitted).

⁶² *Id.*

⁶³ *Id.* at 1076.

⁶⁴ See, e.g., *Damiani v. Rhode Island Hosp.*, 704 F.2d 12, 16 (1st Cir. 1983) (affirming dismissal of an antitrust suit for plaintiff's failure to respond to inter-

drastic sanctions need not precede the imposition of a litigation-ending sanction because nothing in Rule 37(b)(2) so requires.⁶⁵ It is of no consequence if noncompliance is solely the attorney's fault. In *Damiani v. Rhode Island Hospital*,⁶⁶ the First Circuit affirmed dismissal of plaintiff's case for repeated failure to respond to interrogatories and rejected the argument that attorney misconduct should not be visited upon an innocent client.⁶⁷ Thus, the First Circuit recognizes the need for litigation-ending sanctions and encourages their use when necessary.⁶⁸ However, absent an order compelling discovery and a subsequent failure to comply with that order, sanctions are not warranted.⁶⁹ Moreover, in a close case, its policy is that "doubts should be resolved in favor of adjudicating contested claims on the merits"⁷⁰ rather than imposing litigation-ending sanctions.

Likewise, the Seventh Circuit is conscious of the need for its district courts to balance the appropriate use of harsh sanctions with the principle that it does not "cabin unrealistically the needed discretion of the district courts . . ."⁷¹ In one case, the Seventh Circuit remanded a dismissal sanction because the district court failed to explain the basis for its determination

rogatories and requests for production of documents and citing *National Hockey* as support for its holding).

⁶⁵ *Morgan v. Massachusetts Gen. Hosp.*, 901 F.2d 186, 195 (1st Cir. 1990) (citing *Damiani*, 704 F.2d at 15).

⁶⁶ 704 F.2d 12 (1st Cir. 1983).

⁶⁷ "The argument that the sins of the attorney should not be visited on the client is a seductive one, but its siren call is overborne by the nature of the adversary system . . . [and the First Circuit] turn[s] a deaf ear to this plea." *Damiani*, 704 F.2d at 16-17 (citation omitted); *accord*, *Barreto v. Citibank*, 907 F.2d 15, 16 (1st Cir. 1990).

⁶⁸ *See Barreto*, 907 F.2d at 16 (affirming dismissal for failure to comply with order rejecting and definitively affirming the innocent client argument); *Damiani*, 704 F.2d at 17 (affirming dismissal for failure to comply with discovery order).

⁶⁹ Such a situation occurred in *United States v. One 1987 BMW 325*, 985 F.2d 655, 660-62 (1st Cir. 1993); *accord*, *United States Fidelity & Guar. Co. v. Baker Material Handling Corp.*, 62 F.3d 24, 28-29 (1st Cir. 1995) (noting that party cannot complain after the fact about discovery violations but must move to compel at the time of the violation); *R.W. Int'l Corp. v. Welch Foods, Inc.*, 937 F.2d 112 (1st Cir. 1991) (reversing and dismissing action for failure to answer questions in deposition because there was no order compelling answers to questions and deponent appeared for deposition).

⁷⁰ *Velazquez-Rivera v. Sea-Land Serv., Inc.*, 920 F.2d 1072, 1079 (1st Cir. 1990) (citations omitted).

⁷¹ *In re Scheri*, 51 F.3d 71, 75 (7th Cir. 1995).

that dismissal was appropriate.⁷² The Seventh Circuit cautioned that deferential review of sanction determinations should not be confused with no review.⁷³

Nonetheless, the Seventh Circuit has affirmed the imposition of litigation-ending sanctions on numerous occasions. For example, in *Halas v. Consumer Services, Inc.*,⁷⁴ the Seventh Circuit affirmed dismissal of plaintiff's case for his knowing failure to attend his deposition and subsequent failure to respond in writing to the court regarding his noncompliance.⁷⁵ In *Patterson v. Coca-Cola Bottling Co.*,⁷⁶ the Seventh Circuit affirmed dismissal against a plaintiff for failure to name an expert within the district court's imposed deadline.⁷⁷ Despite the harshness of a litigation ending sanction, the Seventh Circuit, like the First Circuit, believes it is "axiomatic that the district court need not impose a lesser sanction prior to assessing the sanction of dismissal."⁷⁸

It seems difficult, however, to determine what type of misconduct will be deemed sufficient to warrant a litigation-ending sanction in the Seventh Circuit. In *Stafford v. Mesnik*,⁷⁹ the Seventh Circuit held that the defendant's absence from one meeting was an inadequate basis for entering default judgment against him.⁸⁰ The Seventh Circuit explained its reversal by distinguishing *Stafford* from a number of other Seventh Circuit cases where default or dismissal was affirmed. It noted that the "degree of egregiousness" justifying

⁷² *Id.* Other courts have also reversed or remanded the imposition of a harsh sanction when the district courts have not articulated fully the rationales behind their decisions. See, e.g., *Regional Refuse Sys., Inc. v. Inland Reclamation Co.*, 842 F.2d 150, 154 (6th Cir. 1988) (distinguishing an earlier case in the circuit in which dismissal was reversed because the district court failed to articulate its rationale for dismissal on the record, from instant case in which district court's memorandum included "extensive and painstaking examination of the basis for its dismissal").

⁷³ *In re Scheri*, 51 F.3d at 75. The First Circuit has also stated that its deference to district court rulings should not be confused with "automatic acquiescence" or with rubber stamping. *One 1987 BMW 325*, 985 F.2d at 657 (citation omitted).

⁷⁴ 16 F.3d 161 (7th Cir. 1994).

⁷⁵ *Id.* at 162-63.

⁷⁶ 852 F.2d 280 (7th Cir. 1988).

⁷⁷ *Id.* at 285.

⁷⁸ *Halas*, 16 F.3d at 165.

⁷⁹ 63 F.3d 1445 (7th Cir. 1995).

⁸⁰ *Id.* at 1451.

the sanctions in these other cases was absent in *Stafford*.⁸¹ Beyond this vague, general statement the Seventh Circuit did not distinguish between particular factors that constitute egregious behavior justifying a harsh sanction and misconduct not warranting the imposition of such a sanction.⁸²

The Eighth Circuit's approach to imposing litigation-ending sanctions is overwhelmingly policy-driven.⁸³ Although fewer cases exist in the Eighth Circuit regarding this issue, there are certainly cases that provide litigants with insight into the Eighth Circuit's approach. For instance, in *Avionic Co. v. General Dynamics Corp.*,⁸⁴ dismissal was affirmed because of a plaintiff's failure to comply with a discovery order. Here, the Eighth Circuit held that *oral* notice to compel discovery was a sufficient basis for Rule 37(b)(2) sanctions.⁸⁵ The Eighth Circuit also proclaimed that in "this circuit, before dismissing a case under Rule 37(b)(2) the [district] court must investigate whether a sanction less extreme than dismissal would suffice, unless the party's failure was deliberate or in bad faith."⁸⁶

In a recent unpublished opinion, the Eighth Circuit found that the pro se plaintiff was warned that failure to attend a deposition might lead to dismissal and the plaintiff, nonetheless, willfully failed to appear.⁸⁷ Dismissal was affirmed.⁸⁸

⁸¹ *Id.*

⁸² However, it may not be realistic for a circuit court to discuss the propriety of a district court's sanction determination because of the abuse of discretion standard of review. Admittedly, the factual circumstances warranting a determination regarding sanction imposition are discussed, reviewed and handled primarily at the district court level. This Note does not delve into district courts' determinations save for the *Bambu* case. See *infra* Part IV. It is only at the circuit court level that policy concerning sanction imposition is made. Thus, absent direction and guidance from above, it is unlikely that district courts will make consistent decisions from a policy standpoint.

⁸³ See *Edgar v. Slaughter*, 548 F.2d 770, 772 (8th Cir. 1977) ("There is a strong policy favoring a trial on the merits and against depriving a party of his day in court. [The Eighth Circuit's] cases reflect the proper balance between the conflicting policies of the need to prevent delays and the sound public policy of deciding cases on their merits.") (citation omitted); see also *infra* pp. 612-13 and accompanying notes.

⁸⁴ 957 F.2d 555 (8th Cir. 1992).

⁸⁵ *Id.* at 558.

⁸⁶ *Id.*

⁸⁷ *Meints v. DeWitt*, 68 F.3d 478, 478 (8th Cir. 1995) (per curiam) (unpublished disposition). Even though this decision has no precedential value, it demonstrates a recent application of sanction imposition in the Eighth Circuit.

⁸⁸ *Id.*

However, in *Edgar v. Slaughter*,⁸⁹ the Eighth Circuit reversed a default judgment against the plaintiff on a counterclaim for failure to comply with an order to respond to interrogatories because noncompliance was the fault of the attorney and not the client.⁹⁰ Thus, in order for a deliberate failure to warrant harsh sanctions in the Eighth Circuit, the court may consider whether the misconduct was that of the client and not only the attorney.⁹¹

The Eleventh Circuit appears to be concerned with protecting litigants' rights to trials on the merits of cases. In *Malautea v. Suzuki Motor Co.*,⁹² the Eleventh Circuit identified three "factors" that its district courts *may* consider when determining the appropriateness of a litigation-ending sanction. First, Rule 37(b)(2) gives district judges broad discretion to fashion appropriate sanctions for violation of discovery orders, but the discretion is guided by the rule that a litigation-ending sanction requires willful or bad faith failure to obey a discovery order.⁹³ In addition, the sanction must be "just" and represent general due process restrictions on the court's discretion.⁹⁴ Finally, the "severe sanction of a dismissal or default judgment is appropriate only as a last resort, when less drastic sanctions would not ensure compliance with the court's orders."⁹⁵ Guided by these three "factors," the Eleventh Circuit affirmed a default judgment for defendants' willful violation of three clear orders.⁹⁶ Also, in affirming a dismissal of a pro se plaintiff's

⁸⁹ 548 F.2d 770 (8th Cir. 1977).

⁹⁰ "Prior to dismissal or entering a default judgment, fundamental fairness should require a district court to enter an order to show cause and hold a hearing, if deemed necessary, to determine whether assessment of costs and attorney fees or even an attorney's citation for contempt would be a more just and effective sanction." *Id.* at 773.

⁹¹ *Id.*; see *infra* Part II.B.3.d for a discussion of the attorney-client issue with respect to circuits that do have tests for litigation-ending sanction imposition.

⁹² 987 F.2d 1536 (11th Cir.), *cert. denied*, 510 U.S. 863 (1993).

⁹³ *Id.* at 1542 (citing *Societe Internationale*).

⁹⁴ *Id.* (citing *Insurance Corp. of Ireland, Ltd. v. Campagne des Bauxites de Guinee*, 456 U.S. 694, 707 (1982)). *Campagne des Bauxites* places two restrictions on sanction imposition: (1) that the sanction relate to the matter in dispute; and (2) that it be just.

⁹⁵ *Id.* (citation omitted). This position is consistent only with the goal of punishing a party for failure to comply for the purpose of ensuring compliance with respect to the case at hand only. General deterrence as a goal and purpose of sanction imposition seems to be forgotten.

⁹⁶ *Id.* at 1543.

complaint, the Eleventh Circuit explained that "[w]hile dismissal is an extraordinary remedy, dismissal upon disregard of an order, especially where the litigant is forewarned, generally is not an abuse of discretion."⁹⁷

Although one might conclude that the Eleventh Circuit has a consistent approach to determining the propriety of litigation-ending sanctions, such a conclusion is not warranted. The three factors discussed in *Malautea* are not consistently applied. In a number of other cases, these "factors" are not even mentioned.⁹⁸ This suggests that merely identifying important factors to consider is not sufficient. It is more desirable that a circuit require consistent application of particular factors.⁹⁹

Decisions rendered in circuits without a defined approach to litigation-ending sanctions undoubtedly comply with minimum due process requirements and adhere to Supreme Court precedent regarding the propriety of sanction imposition because the minimum due process threshold, as discussed *supra*, is not particularly difficult to maintain. Yet, it is difficult to determine whether these courts effectively balance the competing policies inherent in deciding whether to impose severe sanctions on a party. The difficulty partly results from a lack of fixed standards by which to measure the propriety of a sanction.¹⁰⁰ In short, what is troublesome about an undefined approach is that sanction imposition has a tendency to become a game of chance—a "roll of the dice"¹⁰¹—because so much depends on how a particular district court chooses to impose harsh sanctions. Thus, the purpose underlying sanction imposition, particularly in the area of general deterrence, is undermined. If sanction imposition is to have any substantive deterrent effect on litigants, it must be as consistent and certain as possible.¹⁰²

⁹⁷ Moon v. Newsome, 863 F.2d 835, 837 (11th Cir.), cert. denied, 493 U.S. 863 (1989).

⁹⁸ See BankAtlantic v. Blythe Eastman Paine Webber, Inc., 12 F.3d 1045 (11th Cir. 1994); Devaney v. Continental Am. Ins. Co., 989 F.2d 1154 (11th Cir. 1993).

⁹⁹ See *infra* pp. 624, 628-29 concerning the desirability of having a formal test in place.

¹⁰⁰ The shortcomings attributable to this unsteady approach are explored in greater detail in Part V of this Note discussing the Second Circuit.

¹⁰¹ The Second Circuit explicitly stated so in *Bambu Sales, Inc. v. Ozak Trading Inc.*, 58 F.3d 849, 853 (2d Cir. 1995) ("Defendants rolled the dice on the district court's tolerance for deliberate obstruction and they lost.") (emphasis added).

¹⁰² "[A]pparent haphazard judicial sanctioning results in predictability difficulties

B. Circuits with a Test

1. Preface

Several circuits—namely, the Third,¹⁰³ Fourth,¹⁰⁴ Fifth,¹⁰⁵ Sixth,¹⁰⁶ Ninth¹⁰⁷ and Tenth¹⁰³ Circuits—have

and uncertainty for litigators.” Susan A. Yager, *Discovery Abuse: Have the 1993 Amendments to the Federal Rule Curbed the Problem?*, 37 FED’N INS. & CORP. COUNS. Q. 399, 409 (1987). The lack of an objective standard encourages attorneys to continue their abusive practices. *Id.* at 416.

¹⁰³ See, e.g., *Harris v. City of Philadelphia*, 47 F.3d 1311, 1330 n.18 (3d Cir. 1995) (identifying six factors considered by Third Circuit in levying the sanction of dismissal for failure to obey discovery orders: (1) extent of party’s personal responsibility; (2) prejudice to adversary caused by failure to meet scheduling orders and to respond to discovery; (3) history of dilatoriness; (4) whether conduct of party or attorney was willful or in bad faith; (5) effectiveness of sanctions other than dismissal, which entails analysis of alternative sanctions; and (6) meritoriousness of claim or defense) (citation omitted).

¹⁰⁴ See, e.g., *Mutual Fed. Sav. and Loan Ass’n v. Richards & Assoc., Inc.*, 872 F.2d 88, 92 (4th Cir. 1989) (competing interests involved in judgment by default require application of four-part test in Fourth Circuit: (1) whether noncomplying party acted in bad faith; (2) the amount of prejudice the noncompliance caused the adversary, which necessarily includes an inquiry into the materiality of the evidence not produced; (3) the need for deterrence of the particular sort of noncompliance; and (4) the effectiveness of less drastic sanctions).

¹⁰⁵ See, e.g., *FDIC v. Conner*, 20 F.3d 1376, 1380-81 (5th Cir. 1994) (The Fifth Circuit has articulated several factors that *must* be present before a district court may dismiss a case as a sanction for violating a discovery order: (1) refusal to comply results from willfulness or bad faith accompanied by clear record of delay or contumacious conduct; (2) violation of the discovery order attributable to the client instead of the attorney; (3) violating party’s misconduct substantially prejudices the opposing party; and (4) a less drastic sanction would not substantially achieve the desired deterrent effect).

¹⁰⁶ See, e.g., *Beil v. Lakewood Eng’g & Mfg. Co.*, 15 F.3d 546, 552 (6th Cir. 1994) (The Sixth Circuit announced several factors that *should* be considered when deciding whether a district court abused its discretion by imposing litigation-ending sanctions, including whether the adversary was prejudiced by the dismissed party’s failure to cooperate, whether the dismissed party was warned that failure could lead to dismissal, and whether less drastic sanctions were imposed or considered before dismissal was ordered); see also *Wexell v. Komar Indus., Inc.*, 18 F.3d 916, 920 (Fed. Cir. 1994) (applying Sixth Circuit law and reiterating its test).

¹⁰⁷ See, e.g., *Henry v. Gill Indus., Inc.*, 983 F.2d 943, 948 (9th Cir. 1993) (five-factor test used by Ninth Circuit to determine propriety of imposition of litigation-ending sanction. District court must weigh: (1) public’s interest in expeditious resolution of litigation; (2) court’s need to manage its dockets; (3) risk of prejudice to party seeking sanctions; (4) public policy of favoring disposition of cases on their merits; and (5) availability of less drastic sanctions) (citation omitted); see also *Refac Int’l, Ltd. v. Hitachi, Ltd.*, 921 F.2d 1247, 1253-54 (Fed. Cir. 1990) (applying Ninth Circuit law and same five-factor test).

¹⁰³ See, e.g., *Jones v. Thompson*, 996 F.2d 261, 264 (10th Cir. 1993) (“district

explicit tests to evaluate the appropriateness of imposing litigation-ending sanctions. No two circuits apply the same test. Instead, each circuit attempts to balance the competing policies involved in imposing litigation-ending discovery sanctions using their own mix of factors. On the one hand, the circuits strive to preserve judicial discretion and efficiency. District judges should be able to exercise as much discretion as necessary to ensure that litigants comply with orders and that cases are controlled by judges and not contumacious parties. On the other hand, the circuits recognize the value of litigating a case on its merits and the unfairness of depriving a litigant of his or her day in court. The different tests employed by the circuits substantiate their efforts to reconcile these important competing policies. However, each circuit has different notions of what is essential for district courts to consider prior to imposing harsh discovery sanctions. Nevertheless, the tests espoused by these circuits contain certain common elements.

2. Common Factors—Bad faith, Prejudice to Adversary, Efficacy of Lesser Sanctions

Certain elements appear in several of the various circuits' tests. For instance, save for the Ninth Circuit, all of the circuits consider whether the noncomplying party acted in bad faith.¹⁰⁹ This requirement flows from Supreme Court precedent and is also always considered by the Second Circuit.¹¹⁰ Because of due process, it is inappropriate to levy the harshest of sanctions against a party unable, not unwilling, to comply. However, no circuit except the Second Circuit has pronounced that gross negligence suffices to meet the willfulness requirement.¹¹¹ The willfulness or bad faith requirement is axiomat-

court is *cautioned* to consider following factors before choosing dismissal as a just sanction: (1) degree of *actual* prejudice to the defendant; (2) amount of interference with the judicial process; (3) culpability of the *litigant*; (4) whether the court warned the party in advance that dismissal of that action would be a likely sanction for noncompliance; and (5) efficacy of lesser sanctions") (emphasis added) (citation omitted).

¹⁰⁹ For a complete recital of each circuit's test, see *supra* notes 103-108.

¹¹⁰ See *supra* pp. 592-94 and accompanying notes regarding *Societe Internationale* and the willfulness requirement, and *infra* p. 616 regarding the same.

¹¹¹ See *infra* n. 184 and accompanying text for a discussion of Second Circuit precedent that establishes this rule; see also *infra* pp. 654-55 regarding gross neg-

ic and an element which any court must consider prior to imposing dismissal or default for failure to comply with a discovery order.¹¹²

Another recurring factor among these circuits is the amount of prejudice noncompliance has caused the adversary or moving party. "A [party] suffers prejudice if the [noncomplying party's] actions impair [the] ability to go to trial or threaten to interfere . . . with the rightful decision of the case."¹¹³ While the Ninth Circuit characterizes the risk of prejudice to the party seeking sanctions as a "key" factor,¹¹⁴ the Fifth Circuit has held that the violating party's misconduct must substantially prejudice the adverse party.¹¹⁵ The Fourth Circuit has indicated that considering the amount of prejudice "necessarily includes an inquiry into the materiality of the evidence [that a party] failed to produce."¹¹⁶ Interestingly, the prejudice occasioned by noncompliance is one of the only common elements recognized by each circuit that employs a test.¹¹⁷

The only other element common to each of the circuits that have tests is the efficacy of lesser sanctions.¹¹⁸ Unfortunately, except for the Ninth Circuit, no circuit has articulated the meaning of this factor or how such a consideration should affect a determination with respect to sanction imposition.¹¹⁹ Some courts have intimated that litigation-ending sanctions

ligence and this Notes' proposal for the Second Circuit.

¹¹² See *supra* notes 35-45 and accompanying text discussing the fact that although Rule 37 only describes noncompliance in terms of "failure" to comply, the Advisory Committee Notes and case law have clearly stated that bad faith, fault or their equivalent must be present prior to imposing a litigation-ending sanction.

¹¹³ *Henry v. Gill Indus., Inc.*, 983 F.2d 943, 948 (9th Cir. 1993) (citation omitted).

¹¹⁴ The other key factor for the Ninth Circuit is the availability of lesser sanctions. *Id.*

¹¹⁵ *Coane v. Ferrara Pan Candy Co.*, 898 F.2d 1030, 1032 (5th Cir. 1990). Similarly, the Tenth Circuit's test requires a district court to consider the amount of actual prejudice to the moving party. See, e.g., *Jones v. Thompson*, 996 F.2d 261, 264 (10th Cir. 1993).

¹¹⁶ *Mutual Fed. Sav. & Loan Ass'n v. Richards & Assocs., Inc.*, 872 F.2d 88, 92 (4th Cir. 1989).

¹¹⁷ But see *infra* p. 658 and accompanying notes discussing why this factor is not included in the proposed test for the Second Circuit.

¹¹⁸ Although not required, it was also something which the magistrate judge in *Bambu* purportedly considered. See *infra* Part IV.C.3.

¹¹⁹ See *infra* note 121.

are only appropriate when the imposition of lesser sanctions has proven futile.¹²⁰ Still others are adamant that a court need not impose lesser sanctions prior to imposing a harsh sanction such as dismissal or default.¹²¹

In *Malone v. United States Postal Service*,¹²² the Ninth Circuit dealt comprehensively with this factor explaining what a district court should do to demonstrate that it has considered the efficacy of lesser sanctions.¹²³ In *Malone*, the Ninth Circuit affirmed the dismissal of plaintiff's case for her willful failure to comply with a pretrial order requiring both parties to complete a list of their witnesses, each question to be asked of the witnesses, and file the anticipated responses with the court by a specified deadline.¹²⁴ Both parties were warned that no continuances would be accepted.¹²⁵ Yet the plaintiff waited until two days prior to the deadline to inform the other party that it refused to comply and did not appeal the order until after the deadline for compliance had passed.¹²⁶ The district court dismissed plaintiff's case.¹²⁷ On appeal, the plaintiff argued that the district court failed to consider the efficacy of lesser sanctions as required by the Ninth Circuit.¹²⁸ The

¹²⁰ See, e.g., *FDIC v. Conner*, 20 F.3d 1376, 1380 (5th Cir. 1994) (noting that the court's own precedents instruct that sanctions should not be used lightly and citing a 1984 decision stating that dismissal is proper only if lesser sanctions have not worked).

¹²¹ See, e.g., *Malone v. United States Postal Serv.*, 833 F.2d 128, 132 (9th Cir. 1987) ("We have indicated a preference for explicit discussion by the district court of the feasibility of alternatives when ordering dismissal. However, we have never held that explicit discussion of alternatives is necessary for an order of dismissal to be upheld.") (emphasis added) (citation omitted), cert. denied, 488 U.S. 819 (1988); see also *supra* notes 65, 74-75. In the now famous case *In re Professional Hockey Antitrust Litig.*, 531 F.2d 1188, 1192 (3d Cir. 1976), *rev'd sub nom.*, *National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639 (1976), the Third Circuit stated that it was incumbent on the court to review the possible use of a less drastic sanction. The Supreme Court in *National Hockey*, however, never mentioned the efficacy of lesser sanctions. Instead the Supreme Court focused on the amount of time involved and the fact that the sanctioned party had been warned that failure to comply might result in Rule 37 sanctions. *Id.* at 640-41.

¹²² 833 F.2d 128 (9th Cir. 1987).

¹²³ *Id.* at 132; see *Hyde & Drath v. Baker*, 24 F.3d 1162, 1167 (9th Cir. 1994) (reiterating the factors to consider enumerated by the *Malone* court).

¹²⁴ *Malone*, 833 F.2d at 129.

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.* at 130.

¹²⁸ *Id.* at 131.

Ninth Circuit rejected this argument but discussed at length the circuit's approach to assessing this factor:

[T]he following factors are of particular relevance in determining whether a district court has considered alternatives to dismissal: (1) Did the court explicitly discuss the feasibility of less drastic sanctions and explain why alternate sanctions would be inadequate? (2) Did the court implement alternative methods of sanctioning or curing the malfeasance before ordering dismissal? (3) Did the court warn the plaintiff of the possibility of dismissal before actually ordering dismissal?¹²⁹

Apparently, with respect to these "common" factors, the circuits' policies mirror one another. But the various circuits employing a fixed test also differ from one another. An examination of certain factors that are not shared by these circuits follows.

3. Unique Factors

a. General Deterrence

Only the Fourth Circuit explicitly has identified general deterrence as a factor to be considered before imposing a litigation-ending sanction.¹³⁰ Its reason for including deterrence in its test is summarized by the following statement: "In [some] cases, not only does the noncomplying party jeopardize his or her adversary's case by such indifference, but to ignore such bold challenges to the district court's power would encourage other litigants to flirt with similar misconduct."¹³¹ It appears that the Fifth Circuit also evaluates general deterrence when making discovery sanction determinations.

In *FDIC v. Conner*,¹³² the Fifth Circuit stated that "dismissal is usually improper if a less drastic sanction would substantially achieve the desired deterrent effect."¹³³ Howev-

¹²⁹ *Malone*, 833 F.2d at 132.

¹³⁰ *Mutual Fed. Sav. & Loan Ass'n v. Richards & Assocs., Inc.*, 872 F.2d 88, 92 (4th Cir. 1989); see *infra* pp. 657-59 concerning the deterrence requirement recommended for the Second Circuit to follow.

¹³¹ *Richards*, 872 F.2d at 92 (citing *National Hockey*).

¹³² 20 F.3d 1376 (5th Cir. 1994).

¹³³ *Id.* at 1381; see *Prince v. Poulos*, 876 F.2d 30, 32 (5th Cir. 1989) ("[D]ismissal is proper only in situations where the deterrent value of Rule 37 cannot be substantially achieved by the use of less drastic sanctions.").

er, nowhere in *Conner* does the court expound on this statement, nor is deterrence mentioned in other Fifth Circuit litigation-ending sanction cases.¹³⁴

b. *History of Dilatoriness*

Although several circuits undoubtedly consider a party's history of abusive behavior, only the Third Circuit has definitively articulated that prior conduct must be considered. In *Poulis v. State Farm Fire and Casualty Co.*,¹³⁵ the Third Circuit reluctantly affirmed dismissal with prejudice based on the plaintiffs' counsel's failure to meet court imposed deadlines as well as other procedural requirements.¹³⁶ Even though the Third Circuit affirmed the harsh sanction, it also engaged in a lengthy discussion of the various factors which the district court balanced before reaching its decision, including a history of dilatoriness.¹³⁷ Rather than restrictively considering only the motion to compel before it, the district court weighed what it deemed a pattern of dilatoriness justifying the imposition of a harsh sanction.¹³⁸ This pattern included the following noncompliant acts by the plaintiffs: failing to respond to interrogatories propounded by the defendant, failing to file a pre-trial statement by the date specified by the district court, and subsequently failing to file the pre-trial statement after being warned about it by the district court.¹³⁹

¹³⁴ In *Conner*, without ever mentioning or discussing deterrence, the Fifth Circuit held that dismissal was not warranted under the circumstances of the case for the following reasons: (1) court found no record of delay or contumacious conduct sufficient to warrant dismissal of FDIC's claims; (2) FDIC served supplemental answers and provided all requested information prior to the district court's hearing on the motion for sanctions; (3) FDIC's conduct, though admittedly in violation of the court's order, did not cause defendants to suffer substantial prejudice. 20 F.3d at 1381; see *Pressey v. Patterson*, 898 F.2d 1018, 1023-24 (5th Cir. 1990) (without mentioning deterrence, concluding that sanction striking answer that was imposed against City for failure to comply with more than one discovery order was too severe, but remanding for trial court to consider an appropriate lesser sanction).

¹³⁵ 747 F.2d 863 (3d Cir. 1984).

¹³⁶ *Id.* at 870.

¹³⁷ *Id.* at 868. For a critique of this requirement, see *infra* pp. 656-57 and accompanying notes.

¹³⁸ *Poulis*, 747 F.2d at 868.

¹³⁹ *Id.* at 865.

c. *Warning the Party that Dismissal or Default Is Imminent*

The Tenth and Sixth Circuits specifically incorporate a warning requirement into their imposition of litigation-ending sanctions.¹⁴⁰ Neither circuit concerns itself with the paternalism of such a requirement. Moreover, neither circuit specifically discusses its reasons for including the warning requirement.¹⁴¹ Strong pronouncements regarding the imposition of litigation-ending sanctions in general may provide some insight or guidance. The Tenth Circuit has proclaimed that "[b]ecause dismissal with prejudice defeats altogether a litigant's right to access to the courts, it should be used as a weapon of last, rather than first, resort."¹⁴² Thus, the warning is a way of ensuring due process fairness in that the weapon is used only as a last resort.

d. *Client Versus Attorney Misconduct*

Authority in the circuits is split regarding the propriety of imposing litigation-ending sanctions when noncompliance is the result of dilatory conduct by counsel and not the client.¹⁴³

¹⁴⁰ But see *FDIC v. Conner*, 20 F.3d 1376, 1383 (5th Cir. 1994) ("Like all court orders, discovery orders are to be obeyed when issued, and sanctions for violating such orders may be imposed without an explicit prior warning or a litany of precautionary instructions.").

¹⁴¹ For example, in the following four Tenth Circuit cases, the warning requirement is mentioned but there is no discussion regarding why the requirement exists: *United States v. A&P Arora, Ltd.*, 46 F.3d 1152 (10th Cir. 1995) (unpublished opinion); *Mobley v. McCormick*, 40 F.3d 337 (10th Cir. 1994); *Jones v. Thompson*, 996 F.2d 261 (10th Cir. 1993); *Ehrenhaus v. Reynolds*, 965 F.2d 916 (10th Cir. 1992). *Ehrenhaus* established the Tenth Circuit's "test" and nowhere explains the court's rationale for including a warning requirement. Likewise, the Sixth Circuit does not discuss the reason for its warning requirement. See *Beil v. Lakewood Eng'g & Mfg. Co.*, 15 F.3d 546 (6th Cir. 1994); *Regional Refuse Sys. v. Inland Reclamation Co.*, 842 F.2d 150 (6th Cir. 1988).

¹⁴² *Ehrenhaus*, 965 F.2d at 920 (citation omitted).

¹⁴³ See, e.g., *Coleman v. American Red Cross*, 23 F.3d 1091, 1095 (6th Cir. 1994) ("[W]e have increasingly emphasized directly sanctioning the delinquent lawyer rather than an innocent client."); *Prince v. Poulos*, 876 F.2d 30, 32 (5th Cir. 1989) ("[D]ismissal may be inappropriate when neglect is plainly attributable to an attorney rather than a blameless client . . ."); *Malone v. United States Postal Serv.*, 833 F.2d 128, 134 (9th Cir. 1987) (commenting that the court has repeatedly rejected arguments that dismissal unfairly punishes a client for the misdeeds of its attorney); *Carter v. Albert Einstein Medical Ctr.*, 804 F.2d 805, 808 (3d Cir. 1986) ("[W]e do not favor dismissal of a case when the attorney's delin-

Some circuits strictly adhere to the principle of *Link v. Wabash Railroad Co.*,¹⁴⁴ that a litigant chooses counsel at his or her peril.¹⁴⁵ On the other hand, this maxim and its potentially harsh consequences have been highly criticized.¹⁴⁶ Not surprisingly, therefore, some circuits simply do not adhere to it.¹⁴⁷ The circuits that have departed from the *Link* rule con-

quencies—not the client's—necessitate sanctions.”); *Cine Forty-Second St. Theatre Corp. v. Allied Artists Pictures Corp.*, 602 F.2d 1062, 1068 (2d Cir. 1979) (“Considerations of fair play may dictate that courts eschew the harshest sanctions provided by Rule 37 where failure to comply is due to a mere oversight of counsel amounting to no more than simple negligence.”) (citations omitted); *Edgar v. Slaughter*, 548 F.2d 770, 773 (8th Cir. 1977) (“[T]he courts should investigate the attorney’s responsibility as an officer of the court and, if appropriate, impose on the client sanctions less extreme than dismissal or default, unless it is shown that the client is deliberately or in bad faith failing to comply with the court’s order.”).

¹⁴⁴ 370 U.S. 626 (1962).

¹⁴⁵ The Ninth Circuit rejects arguments that dismissal unfairly punishes a litigant for the misdeeds of its attorney. *Malone v. United States Postal Serv.*, 833 F.2d 128, 134 (9th Cir. 1987) (citing other Ninth Circuit cases holding the same). As discussed *supra* pp. 598-99, the First Circuit also rejects such arguments. The Second Circuit, likewise, adheres to the *Link* doctrine. *Cine*, 602 F.2d at 1067.

¹⁴⁶ See generally Earl C. Dudley, Jr., *Discovery Abuse Revisited: Some Specific Proposals to Amend the Federal Rules of Civil Procedure*, 26 U.S.F. L. REV. 189, 216 (1992) (“*Link*, however, was decided by a four-to-three vote and has been criticized heavily. . . . [S]ome lower courts limit its application in the discovery context.”) (citing *Carter*, 804 F.2d at 807-08); Susan Marie Lapenta, Note, *Inryco, Inc. v. Metropolitan Eng’g Co.: Inexcusable Neglect by Whom?*, 45 U. PITT. L. REV. 695, 695 (1984) (“When the attorney’s conduct is grossly negligent, clients should not be bound by their attorney’s behavior.”); William R. Mureiko, Note, *The Agency Theory of the Attorney-Client Relationship: An Improper Justification for Holding Clients Responsible for Their Attorneys’ Procedural Errors*, 1988 DUKE L.J. 733 (arguing that the agency theory espoused in *Link* is inconsistent with many policies that our judicial system holds important and therefore should have no place in the courts’ calculus for fashioning sanctions); Miriam Riskind, Comment, *Can a Client Be Held Liable for Attorney’s Misconduct? Let the Client Beware!*, 15 T. MARSHALL L. REV. 103 (1990).

¹⁴⁷ The Eighth Circuit does not adhere to the *Link* rule. See *supra* notes 90-91. Likewise, the Third, Fourth, Fifth, Sixth and D.C. Circuits do not mechanically apply the *Link* rule. See *Carter v. Albert Einstein Medical Ctr.*, 804 F.2d 805, 808 (3d Cir. 1986) (“We do not favor dismissal . . . when the attorney’s delinquencies—not the client’s—necessitate sanctions.”); *Lolatchy v. Arthur Murray, Inc.*, 816 F.2d 951 (4th Cir. 1987) (same); *Chilcutt v. United States*, 4 F.3d 1313, 1323 (5th Cir. 1993) (“This Court has often emphasized that an innocent party should not be severely penalized for the misconduct of its counsel.”); *Regional Refuse Sys. v. Inland Reclamation Co.*, 842 F.2d 150, 155 (6th Cir. 1988) (“[T]his circuit has been more ready than others to reverse dismissals . . . when it appears that the party is blameless”). In *Shea v. Donohoe Constr. Co.*, 795 F.2d 1071 (D.C. Cir. 1986), dismissal was reversed by the circuit because the plaintiff was unaware of its attorney’s failure to attend three status calls. The *Shea* court discussed the attorney-client issue at length, citing a number of authorities both in and out of

sider whether misconduct is solely the attorney's fault before imposing a harsh sanction that would deprive an innocent party of its day in court.¹⁴⁸ Only the Fifth Circuit, however, has articulated explicitly that prior to imposing litigation-ending sanctions a court must consider whether the misconduct is attributable to the client instead of the attorney.¹⁴⁹ The Fifth Circuit requires its district courts to do so because it deems it unfair to make a blameless client suffer for the attorney's misconduct.¹⁵⁰ This consideration has its limits, though. In *Prince v. Poulos*,¹⁵¹ the Fifth Circuit affirmed a dismissal against a plaintiff who repeatedly refused to comply with a series of discovery orders. In so doing the Fifth Circuit noted that the attorney-client consideration did not apply because the plaintiff *himself* was an attorney "fully aware of his discovery obligations."¹⁵² In short, considering attorney versus client misconduct is meant to be a shield not a sword.

e. Policy Factors

While other circuits' factors indirectly address the policy issues being balanced when a court must decide whether to impose litigation-ending sanctions,¹⁵³ only the Ninth Circuit's test includes factors with direct policy implications. The Ninth Circuit requires its district courts to weigh the public's interest in expeditious resolution of litigation, the court's need to manage its docket, and the public policy favoring disposition of cases on their merits.¹⁵⁴ However, it would be erroneous to draw the conclusion that the other circuits ignore policy impli-

the circuit to support its proposition. *Id.* at 1077-78 & n.5. In *Jones v. Thompson*, the Tenth Circuit also intimated that whether noncompliance is the attorney's or client's fault merits consideration. 996 F.2d 261, 265 (10th Cir. 1993) ("[Defendants] have not convinced us they are blameless victims . . .").

¹⁴⁸ See *supra* note 147.

¹⁴⁹ See, e.g., *FDIC v. Conner*, 20 F.3d 1376, 1380 (5th Cir. 1994). The author suggests that the Second Circuit implement a similar requirement. See *infra* Part VI.B.4.

¹⁵⁰ *Prince v. Poulos*, 876 F.2d 30, 33 (5th Cir. 1989).

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ For example, the Sixth Circuit engaged in a rather extensive discussion of policy concerns in *Coleman v. American Red Cross*, 23 F.3d 1091, 1094-95 (6th Cir. 1994), *reh'g denied*.

¹⁵⁴ See *supra* note 107.

cations. Rather, each circuit's combination of factors should be viewed as manifestations of their policy concerns regarding severe sanctions. The very fact that a test is in place demonstrates a circuit's acknowledgment of the need to balance competing policies inherent in the decision to impose these types of discovery sanctions.

4. Analysis of Circuits Employing a Test

Every circuit employing a test has identified different factors its district courts must or should consider prior to imposing a litigation-ending sanction. These specific tests guide district courts, litigants and appellate courts on the propriety of imposing a severe sanction. By looking at a single litigation-ending sanction case in the circuit, litigants would know what factors a district court will consider when determining whether to levy harsh sanctions for discovery abuse. Some of the elements considered by the circuits are alike. Many are different. Currently, no one test can be characterized as the ideal combination of essential factors. However, the Ninth Circuit and Fifth Circuit seem to have the most comprehensive tests.¹⁵⁵ Arguably, between these two tests, every important consideration can be found.

The fixed standards employed by these circuits stand in stark contrast to the indiscriminate practice employed by the Second Circuit. The Second Circuit would benefit from setting forth a test that incorporates the positive aspects of the circuits' various approaches. Before analyzing what would be the ideal test for the Second Circuit, it is first necessary to

¹⁵⁵ The factors considered by the Ninth Circuit are as follows: (1) public's interest in expeditious resolution of litigation; (2) court's need to manage its dockets; (3) risk of prejudice to party seeking sanctions; (4) public policy of favoring disposition of cases on their merits; and (5) availability of less drastic sanctions. *Henry v. Gill Indus., Inc.*, 983 F.2d 943, 948 (9th Cir. 1993) (quoting *Porter v. Martinez*, 941 F.2d 732, 733 (9th Cir. 1991)). The Fifth Circuit considers the following: (1) refusal to comply must result from willfulness or bad faith accompanied by clear record of delay or contumacious conduct; (2) violation of the discovery order must be attributable to the client instead of the attorney; (3) violating party's misconduct must substantially prejudice the opposing party; and (4) a less drastic sanction would not substantially achieve the desired deterrent effect. *FDIC v. Conner*, 20 F.3d 1376, 1380-81 (5th Cir. 1994).

detail the history and current state of affairs with respect to litigation-ending sanctions in the Second Circuit.

III. LITIGATION-ENDING SANCTIONS CASES IN THE SECOND CIRCUIT LEADING UP TO *BAMBU*

The Second Circuit is no stranger to the trend of increased use of Rule 37(b)(2) discovery sanctions. In fact, it has led the way in many respects. There are numerous Second Circuit cases favoring the imposition of litigation-ending sanctions.¹⁵⁶ Of course, there are also cases where the Second Circuit reversed the imposition of default or dismissal.¹⁵⁷ Nonetheless, its decisions seem to mirror the changes and amendments to Rule 37 and Supreme Court precedent regarding sanction imposition in the context of discovery abuse. The cases seem to lack a sense of certainty or predictability. Naturally, it would be impossible to achieve absolute certainty without stripping a court of its discretionary powers to levy sanctions. Yet, in order to achieve a deterrent effect, the cases should be more instructive to litigants regarding what conduct constitutes abuse warranting dismissal or default. That a court can or may impose a litigation-ending sanction is clear. However, if there is no standard by which to measure the various forms of abuse, it is difficult to envision how any random imposition of sanctions, harsh or otherwise, could possibly achieve a deterrent effect. If the outcome depends entirely on a court's discretion, then sanction imposition has the potential to become a game of chance—a "roll of the dice"—rather than an effective tool meant to curb abuse in an individual case *and* in other cases.¹⁵⁸

¹⁵⁶ See *infra* note 202.

¹⁵⁷ See *infra* note 203.

¹⁵⁸ See *Bambu Sales, Inc. v. Ozak Trading Inc.*, 58 F.3d 849, 853 (2d Cir. 1995) (The Second Circuit in affirming the default sanction noted that "[d]efendants rolled the dice on the district court's tolerance for deliberate obstruction, and they lost.") (emphasis added); Heiderscheit *supra* note 54, at 66-67. ("Deterrence theory, if it is to work at all, requires . . . [that] litigants must have a reasonable ability to accurately perceive the likelihood that their conduct will be punished and the severity of likely punishments."); Williams, *supra* note 35 at 182-83 (noting that for discovery process to function properly, Rule 37 must be utilized in a way that is not too permissive or overly arbitrary).

The *Bambu* case is the latest in a series of cases illustrating the Second Circuit's approach to imposing litigation-ending sanctions. Supreme Court precedent, particularly *National Hockey*, heavily influenced Second Circuit policy regarding harsh sanctions. Since *National Hockey*, the Second Circuit's policies have been both reinforced and refined. Nonetheless, the approach taken with respect to litigation-ending sanction cases wavers, and the results in these cases are inconsistent. What follows is a brief summary of the history of litigation-ending sanction cases in the Second Circuit as well as a synthesis of recent cases in the circuit.

A. Pre-National Hockey

Prior to the Supreme Court's holding in *National Hockey*, general deterrence was not a goal espoused by the Second Circuit with respect to sanction imposition. In fact, it appears that Second Circuit courts, at that time, cautiously reviewed the imposition of harsh sanctions and disfavored their use.¹⁵⁹

Apparently conscious of the constitutional and general fairness concerns enumerated by the Supreme Court in *Hovey v. Elliott*¹⁶⁰ and *Hammond Packing Co. v. Arkansas*,¹⁶¹ the Second Circuit placed great emphasis on a party's willfulness regarding compliance.¹⁶² For example, in *Gill v. Stollow*, the Second Circuit opined, "in [the] final analysis, a court has the responsibility to do justice between man and man; and general principles cannot justify denial of a party's fair day in court except upon a *serious* showing of *willful* default."¹⁶³ In *Gill*, the trial judge entered default judgment against a foreign defendant for failure to come to New York City to be deposed.¹⁶⁴ The Second Circuit noted its reluctance to disturb the district

¹⁵⁹ See *infra* notes 163-166 and accompanying text.

¹⁶⁰ 167 U.S. 409 (1897).

¹⁶¹ 212 U.S. 322 (1909).

¹⁶² See, e.g., *Vindigni v. Meyer*, 441 F.2d 376 (2d Cir. 1971) (reversing dismissal for evidentiary hearing to determine if plaintiff failed to prosecute suit because his attorney disappeared and defendants intentionally continued to send all motions, notices and orders to the attorney rather than plaintiff).

¹⁶³ 240 F.2d 669, 670 (2d Cir. 1957) (emphasis added); see *SEC v. Research Automation Corp.*, 521 F.2d 585, 588 (2d Cir. 1975) (court recognizing what it calls "the policy against a grant of relief by default except in a clear case").

¹⁶⁴ 240 F.2d at 670.

court's discretion to properly discipline a party.¹⁶⁵ However, viewing the record in hindsight, the court concluded that the assessed penalty was too harsh.¹⁶⁶

Nowhere is the Second Circuit's philosophy in this pre-deterrence era clearer than in its strong statements regarding willfulness in *Flaks v. Koegel*.¹⁶⁷ In *Flaks*, the district court struck defendant's answer and entered default judgment against the defendant for his failure to appear at a deposition.¹⁶⁸ The Second Circuit reversed, finding that the district court clearly abused its discretion¹⁶⁹ because it did not consider whether the failure was willful.¹⁷⁰

The *Flaks* court rejected the plaintiff appellee's arguments that the 1970 amendments to Rule 37 eliminated the prerequisite of willfulness to impose harsh sanctions.¹⁷¹ The Supreme Court had already resolved in *Societe Internationale*¹⁷² that willfulness was a prerequisite to the imposition of a litigation-ending sanction, and the Second Circuit subscribed to and was bound by *Societe Internationale*'s holding. The *Flaks* Court pointed out that the provisions of Rule 37 had to be read in light of the Fifth Amendment's due process provision because "there [was] no question but that dismissal of a pleading is the most drastic sanction provided by the Rule."¹⁷³ The foregoing demonstrates that prior to *National Hockey*, the Second Circuit concentrated solely on the individual parties in the case and strongly disfavored the imposition of severe sanctions.¹⁷⁴

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* Undoubtedly, such a review of the entire record would today offend the abuse of discretion standard. Similarly, in another early case, the court held that compliance with the discovery order obviated the need for a sanction and reversed a dismissal order. *Independent Prods. Corp. v. Loew's Inc.*, 283 F.2d 730, 732 (2d Cir. 1960). Here, the court explained its reversal by noting that "[t]he dismissal of an action with prejudice or the entry of judgment by default are drastic remedies, and should be applied only in extreme circumstances." *Id.* at 733.

¹⁶⁷ 504 F.2d 702 (2d Cir. 1974).

¹⁶⁸ *Id.* at 704.

¹⁶⁹ *Id.* at 711.

¹⁷⁰ *Id.* at 709 (citing *Societe Internationale Pour Participations Industrielles et Commerciales, S.A. v. Rogers*, 357 U.S. 197, 212 (1958)).

¹⁷¹ *Id.* at 708.

¹⁷² 357 U.S. 197 (1958).

¹⁷³ *Flaks*, 504 F.2d at 708-09.

¹⁷⁴ See, e.g., *Rosenberg*, *supra* note 42, at 494 ("Reluctant as we are' has been the characteristic approach of the judges when wielding their powers under Rule 37.").

B. National Hockey and the Ushering in of a New Era of Sanctions

National Hockey League v. Metropolitan Hockey Club dramatically influenced Second Circuit case law involving discovery sanctions by diminishing the court's hesitation to impose harsh sanctions.¹⁷⁵ The circuit unequivocally adopted and applied *National Hockey's* holding. In fact, less than three months after *National Hockey*, the Second Circuit cited it as support in *Paine, Webber, Jackson & Curtis, Inc. v. Inmobiliaria Melia de Puerto Rico, Inc.*,¹⁷⁶ to affirm a \$285,000 default judgment against the defendant for failure to produce documents and appear for depositions.¹⁷⁷ After failing to comply with several specific discovery orders, the magistrate judge assigned to the case recommended to the district judge that the defendants be afforded another opportunity to comply.¹⁷⁸ The district judge rejected the proposal and granted plaintiff's motion for default judgment under Rule 37(b)(2).¹⁷⁹ Citing *National Hockey*, the Second Circuit warned against the tendency¹⁸⁰ of a reviewing court to be heavily influenced by the severity of Rule 37 sanctions, and held that defendant's willful failure to appear for a deposition for seven months and its failure to produce documents deemed readily obtainable justified the sanction imposed by the district court.¹⁸¹

¹⁷⁵ 427 U.S. 639 (1976). General deterrence is undeniably a purpose of sanction imposition in the Second Circuit. See, e.g., *Envirotech Corp. v. Bethlehem Steel Corp.*, 729 F.2d 70, 77 (2d Cir. 1984) (citing *National Hockey*, 427 U.S. 639, and recognizing the goal of general deterrence with respect to sanction imposition); *United States Freight Co. v. Penn Cent. Transp. Co.*, 716 F.2d 954, 955 (2d Cir. 1983) (same); *Litton Sys., Inc. v. American Telephone & Telegraph Co.*, 700 F.2d 785, 827 (2d Cir. 1983) (same); *Lyell Theatre Corp. v. Loews Corp.*, 682 F.2d 37, 43 (2d Cir. 1982) (same); *Penthouse Int'l, Ltd. v. Playboy Enter., Inc.*, 663 F.2d 371, 387 (2d Cir. 1981) (same); *Cine Forty-Second St. Theatre Corp. v. Allied Artists Pictures Corp.*, 602 F.2d 1062, 1066-68 (2d Cir. 1979).

¹⁷⁶ 543 F.2d 3 (2d Cir. 1976).

¹⁷⁷ *Id.* at 4.

¹⁷⁸ *Id.* at 5.

¹⁷⁹ *Id.*

¹⁸⁰ This was the Second Circuit's own tendency from *Gill v. Stelow*, 240 F.2d 669, 670 (2d Cir. 1957).

¹⁸¹ *Paine*, 543 F.2d at 6.

A landmark case in the Second Circuit, *Cine Forty-Second St. Theatre Corp. v. Allied Artists Pictures Corp.*,¹⁸² merits specific attention. *Cine* is one of the Second Circuit's most influential cases concerning discovery sanctions.¹⁸³ In *Cine*, the Second Circuit held, for the first time ever, that "grossly negligent failure to obey an order compelling discovery may justify the severest disciplinary measures available under [Rule] 37."¹⁸⁴ In *Cine*, a movie theater charged eleven competitors with antitrust violations, seeking treble damages and an injunction for alleged anticompetitive practices.¹⁸⁵ The plaintiff failed to respond adequately to defendants' interrogatories. Plaintiff then failed to obey two subsequent court orders compelling discovery issued by the magistrate judge assigned to the case.¹⁸⁶ *Cine* was assessed \$500 in costs for its willful disobedience concerning these two orders, and the court also specifically warned the plaintiff that any further noncompliance "would result in dismissal."¹⁸⁷

Despite the warning, the plaintiff failed to comply with a third order that set a specific deadline for compliance.¹⁸⁸ Thus, the magistrate judge recommended that *Cine* be precluded from introducing evidence with respect to its damages—a sanction that was tantamount to a dismissal of *Cine*'s damage claim.¹⁸⁹ The district judge agreed that drastic sanctions were justified for this repeated failure to comply with court discovery orders.¹⁹⁰ The district judge, however, did not accept fully the magistrate's finding of willfulness, and determined that it

¹⁸² 602 F.2d 1062 (2d Cir. 1979).

¹⁸³ The case has been cited in over 20 Second Circuit discovery sanction cases since it was decided in 1979. Of all the cases decided in the Second Circuit concerning this issue, *Cine* has the lengthiest discussion by the court of its policy with respect to imposing harsh sanctions for discovery abuse. The opinion devotes three entire pages of discussion to sanction imposition. *Id.* at 1066-68.

¹⁸⁴ *Id.* at 1066 (emphasis added). The First Circuit, on the other hand, disagrees with this holding and requires strict willfulness as opposed to grossly negligent behavior. See, e.g., *Velazquez-Rivera v. Sea-Land Serv., Inc.*, 920 F.2d 1072, 1077-79 (1st Cir. 1990) (reversing dismissal despite fact that fault could be found).

¹⁸⁵ *Cine*, 602 F.2d at 1064.

¹⁸⁶ *Id.*

¹⁸⁷ *Id.* (emphasis added).

¹⁸⁸ *Id.*

¹⁸⁹ *Id.* at 1065.

¹⁹⁰ *Cine*, 602 F.2d at 1065 (The judge wrote, "If there were ever a case in which drastic sanctions were justified, this is it.")

was inappropriate to impose the extreme sanction recommended.¹⁹¹ In order to confirm that he correctly perceived the controlling law in the Second Circuit, the district judge certified an interlocutory appeal to the Second Circuit.¹⁹²

The Second Circuit described the purpose of preclusionary sanctions as threefold: (1) to ensure that a party will not be able to profit from its own failure to comply;¹⁹³ (2) to secure compliance with the particular order at hand (much like a civil contempt order); and (3) to consider the general deterrent effect that court orders may have on the instant case and on other litigation, provided that the party against whom the sanction is imposed is at fault.¹⁹⁴ The Second Circuit decided that Rule 37 must be perceived as a credible deterrent rather than a "paper tiger,"¹⁹⁵ and held that grossly negligent wrongs were fit subjects for general deterrence.¹⁹⁶ The fact that the abuse was attributable to counsel, and not the client, did not affect the circuit's holding because the party against whom the sanction was imposed chose its counsel at its own peril.¹⁹⁷

The stern philosophy underlying the *Cine* decision remains a vital force in the Second Circuit regarding the imposition of harsh sanctions.¹⁹⁸ The closest it comes to formulating a test

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ This is a universal maxim of equity that one should never be able to profit from one's own wrongdoing. See, e.g., *Mischalski v. Ford Motor Co.*, No. 94-CV-3553, 1996 WL 467170, at *2 (E.D.N.Y. July 25, 1996) (noting the "widely recognized principle that a person should not be permitted to take advantage of his or her own wrongdoing by predicated a legal or equitable claim on the person's own fraudulent, immoral or illegal conduct.")

¹⁹⁴ *Cine*, 602 F.2d at 1066 (citations omitted); see *Cady*, *supra* note 18, at 515 (citing *Cine* for the proposition that the three central purposes of sanctions identified in the case apply to Rule 37 in general).

¹⁹⁵ *Cine*, 602 F.2d at 1064 (citation omitted).

¹⁹⁶ *Id.* at 1067. Actually the court stated, "[N]egligent, no less than intentional, wrongs are fit subjects for general deterrence." *Id.* (citation omitted). However, in *Cine* it is clear that the negligence involved was not mere negligence but was gross negligence. Despite the fact that the opinion in *Cine* appears to leave the question open whether ordinary negligence ought to be the subject of harsh, deterrent sanctions, no court has endorsed such a view in the Second Circuit.

¹⁹⁷ *Id.* at 1068 (citing *Link v. Wabash R.R. Co.*, 370 U.S. 626, 633-34 (1962)). For further discussion regarding the attorney versus client responsibility for discovery misconduct, see *supra* Part II.B.3.d and *infra* Part VI.B.4.

¹⁹⁸ *Cine* has been cited in over 60 district and circuit court cases in the Second Circuit alone. The *Bambu* court also cited *Cine* as support for its conclusion that

concerning the propriety of harsh sanctions is a determination that fault is the one element that must be found by a district court prior to implementing a litigation-ending sanction. However, in the Second Circuit gross negligence constitutes fault. Thus, the Second Circuit threshold for this ultimate sanction appears quite low.

Although the *Cine* opinion mentions the standard phraseology that dismissal and default are the harshest sanctions that exist,¹⁹⁹ in actuality it does little to acknowledge the competing policy interests involved when a suit is dismissed prior to a trial on its merits. *Cine* could have addressed the competing policy concerns associated with discovery sanctions but failed to do so. The only policy enunciated in *Cine* relates to the Circuit's refusal to allow pretrial discovery abuse to "engulf the entire litigative process,"²⁰⁰ and its belief that the view espoused in the circuit opinion advances the basic purposes of Rule 37.²⁰¹ This policy is undeniably momentous and vital. Equally important are policies that favor deciding disputes on their merits and providing litigants with full and fair chances to have cases heard on their merits. However appropriate or deserving the sanction imposed in *Cine* appeared to be, the tension between these competing policies was too quickly dismissed.

C. Sanctions Affirmed and Sanctions Reversed

Since *National Hockey* and *Cine*, several Second Circuit cases have been decided that involved litigation-ending sanctions. In a number of cases, the circuit affirmed the judgments below imposing litigation-ending sanctions.²⁰² In several oth-

the district court did not abuse its discretion by granting a default judgment against the defendants in the case. *Bambu Sales, Inc. v. Ozak Trading Inc.*, 58 F.3d 849, 853 (2d Cir. 1995).

¹⁹⁹ *Cine*, 602 F.2d at 1066.

²⁰⁰ *Id.* at 1064.

²⁰¹ *Id.* at 1067.

²⁰² See, e.g., *Valentine v. Museum of Modern Art*, 29 F.3d 47, 50 (2d Cir. 1994) (dismissal of action affirmed against plaintiff after repeated and explicit warnings); *Douge v. Commissioner of Internal Revenue*, 899 F.2d 164, 167 (2d Cir. 1990) (affirming dismissal of plaintiff's action under Tax Court rules by following standards for dismissal under Rule 37(b)(2), and stating that dismissal was supported by finding that noncompliance was due to willfulness, bad faith or fault of party

er cases, an error or abuse of discretion was found, resulting in either reversal or the cases being remanded to the district court.²⁰³ Unfortunately, these cases make it difficult to dis-

for refusal to follow several orders of the court); *Minotti v. Lensink*, 895 F.2d 100, 103 (2d Cir. 1990) (affirming dismissal against plaintiff for failing to comply with at least four discovery orders); *Sieck v. Russo*, 869 F.2d 131, 134 (2d Cir. 1989) (upholding million dollar default judgments against defendants for repeated refusal to attend depositions and after milder monetary sanctions already imposed); *McDonald v. Head Criminal Court Supervisor Officer*, 850 F.2d 121, 124 (2d Cir. 1988) (dismissing pro se plaintiff's claim for failing to comply with court orders and responding to request to comply with statement that "the Judge can go to hell"); *Hull v. Waterbury Petroleum Prods., Inc.*, 845 F.2d 1172, 1177 (2d Cir. 1988) (affirming dismissal against plaintiff after failing to comply with three orders and several warnings that noncompliance would result in dismissal); *Update Art, Inc. v. Modiin Publishing, Ltd.*, 843 F.2d 67, 72 (2d Cir. 1988) (affirming imposition of preclusive sanctions tantamount to dismissal against defendant after numerous failures to comply with discovery orders); *Jones v. Niagara Frontier Transp. Auth.*, 836 F.2d 731, 735 (2d Cir.), *cert. denied*, 488 U.S. 825 (1987) (dismissing plaintiff's case for repeated refusal, in the face of several orders, to appear for and answer questions in a deposition despite advice from counsel); *In re "Agent Orange" Prod. Liability Litig.*, 818 F.2d 210, 212 (2d Cir. 1987), *cert. denied*, 484 U.S. 1004 (1988) (dismissing plaintiff's complaint for refusal to complete deposition); *Mone v. Commissioner of Internal Revenue*, 774 F.2d 570, 574 (2d Cir. 1985) (warning taxpayer who failed to comply with order that noncompliance might lead to dismissal); *United States Freight Co. v. Penn Central Transp. Co.*, 716 F.2d 954, 954-55 (2d Cir. 1983) (entering default judgment in amount of \$10,000 against defendants for single pretrial violation of discovery order); *Lyell Theatre Corp. v. Loews Corp.*, 682 F.2d 37 (2d Cir. 1982) (affirming dismissal against plaintiff on both Rule 37 and Rule 41(b) grounds); *Penthouse Int'l, Ltd. v. Playboy Enter., Inc.*, 663 F.2d 371, 391 (2d Cir. 1981) (affirming dismissal of plaintiff complaint for refusal to comply with order to furnish relevant records and misrepresenting truth regarding whether documents even existed); *Chira v. Lockheed Aircraft Corp.*, 634 F.2d 664, 667 (2d Cir. 1980) (affirming dismissal based on failure to prosecute but discussing plaintiff's 37(b) failure as well); *Independent Investor Protective League v. Touche Ross & Co.*, 607 F.2d 530, 533-34 (2d Cir.), *cert. denied*, 439 U.S. 895 (1978) (affirming dismissal against plaintiffs because answers to interrogatories were not filed in accordance with court order and plaintiffs made false statements and gave false testimony regarding timeliness of service of answers); *Paine, Webber, Jackson & Curtis, Inc. v. Inmobiliaria Melia de Puerto Rico, Inc.*, 543 F.2d 3, 6 (2d Cir.), *cert. denied*, 430 U.S. 907 (1976) (affirming default judgment against defendant who willfully failed to appear for his deposition for more than seven months and who failed to produce readily obtainable records); *Ali v. A&G Co.*, 542 F.2d 595, 596-97 (2d Cir. 1976) (affirming dismissal of complaint for failure to appear at trial and other delinquencies). As would be expected considering the standard of review, more cases can be found in the Second Circuit since *National Hockey* affirming litigation-ending sanctions than reversing the imposition of them.

²⁰³ See, e.g., *Bobal v. Rensselaer Polytechnic Inst.*, 916 F.2d 759, 764 (2d Cir. 1990) (stating pro se plaintiff has no right to ignore or violate court order but must be made aware of the possible consequences of action and that before district court could impose harsh sanction of dismissal it should have informed plaintiff

cern any overarching principles or standards regarding the imposition of litigation-ending sanctions. Except for the requirement that a litigation-ending sanction be imposed only if fault is found, the reasoning and approaches differ from case to case.²⁰⁴

Once a district court finds fault, how it determines whether the circumstances of the case warrant default or dismissal varies greatly. A number of different factors, including the following, are *sometimes* taken into consideration: (1) the history of abuse, including the number of prior orders or warnings with which a party has failed to comply;²⁰⁵ (2) the efficacy of

that violation of court order would result in dismissal of case with prejudice); *Luft v. Crown Publishers, Inc.*, 906 F.2d 862, 866 (2d Cir. 1990) (the court decides that "in light of the record" the striking of defendant's answer was not supported); *Salahuddin v. Harris*, 782 F.2d 1127, 1131-33 (2d Cir. 1986) (action improperly dismissed because element of willfulness missing and plaintiff did not technically fail to follow order); *DeCrescenzo v. Maersk Container Serv. Co.*, 741 F.2d 17, 21 (2d Cir. 1984) (holding that despite district court's authority to dismiss case for failure to comply with discovery orders, the "extreme" sanction was too drastic in this case against plaintiff for failing to submit to an examination); *Fonseca v. Regan*, 734 F.2d 944, 947-49 (2d Cir.), *cert. denied*, 469 U.S. 882 (1984) (reversing dismissal of claim despite claimant's failure to respond to discovery requests because the information sought was not properly discoverable, so district court could not impose a Rule 37 sanction for failure to comply with order); *Foley v. United States*, 645 F.2d 155, 157 (2d Cir. 1981) (reversing denial of plaintiff's motion to vacate dismissal because court finds that errors and inefficiencies by plaintiff, although they delayed the prosecution of the dispute, did not approach "inexcusable neglect" to justify denying the motion to vacate); *In re Attorney General of the United States*, 596 F.2d 58, 67 (2d Cir. 1979) (writ of mandamus granted because court abused its discretion in holding party in contempt and not investigating reasonable alternative sanctions); *Israel Aircraft Indus., Ltd. v. Standard Precision*, 559 F.2d 203, 208 (2d Cir. 1977) (holding that evasive and incorrect answers in questionnaire not the equivalent of failing to answer or fraud, thus dismissal against plaintiffs not warranted); *Securities & Exch. Comm'n v. Research Automation Corp.*, 521 F.2d 585, 588-90 (2d Cir. 1975) (defendant did appear for his deposition, and absent a court order default judgment not appropriate under Rule 37(b) or Rule 37(d)).

²⁰⁴ This is a standard requirement which, if not found, would necessarily require the circuit to reverse any litigation-ending sanction. *See, e.g., Simmons v. Abruzzo*, 49 F.3d 83, 88 (2d Cir. 1995) (noting that court must find willfulness, bad faith or fault on the part of the party refusing discovery in order to impose dismissal or the like as a sanction).

²⁰⁵ In nearly every case cited *supra* note 202, the party against whom a litigation-ending sanction was imposed had refused to comply with more than one court order. As for the cases with only one violation of a court order, other egregious circumstances existed. *See Jones v. Niagara Frontier Transp. Auth.*, 836 F.2d 731, 735 (2d Cir. 1987) (plaintiff refused to answer deposition questions despite court order and advice from his own counsel in a lawsuit that had been pending for

lesser sanctions; (3) the amount of time involved due to non-compliance and its resultant delay in the case;²⁰⁶ and (4) whether the party had received prior warnings that future noncompliance would result in dismissal or default.²⁰⁷ The

seven years, primarily because of plaintiffs dilatory conduct); *In re "Agent Orange"*, 818 F.2d at 212 (plaintiff refused to continue deposition despite having been examined and deemed perfectly capable of so doing and being warned of the consequences for failing to comply); *United States Freight Co. v. Penn Central Transp. Co.*, 716 F.2d 954, 954-55 (2d Cir. 1983) (noting that "a single pre-trial violation, such as this party's failure to respond to a document request by the date ordered, would not ordinarily result in an imposition of a sanction of such finality as . . . entering default judgment," but does here because of party's continuing saga of dilatory conduct).

²⁰⁶ See *Minotti v. Lensink*, 895 F.2d 100, 103 (2d Cir. 1987) (failure to heed four discovery orders delays case two years); *Jones*, 836 F.2d at 735 (plaintiff misconduct occurred in context of lawsuit pending for seven years); *Lyell Theatre Corp. v. Loews Corp.*, 682 F.2d 37 (2d Cir. 1982) (discovery not complete ten years after action instituted and thus dismissed for failure to prosecute).

²⁰⁷ This holds particularly true for pro se plaintiffs. See, e.g., *Valentine v. Museum of Modern Art*, 29 F.3d 47, 48-49 (2d Cir. 1994) (affirming dismissal for repeated failure to comply with orders despite being directly warned on at least four separate occasions that failure to comply would result in dismissal); *Bobal*, 916 F.2d at 761 ("[W]e conclude that the district court abused its discretion by dismissing with prejudice . . . without first warning this pro se plaintiff that such a harsh sanction was in the offing."). However, it holds equally true even if the party involved is not pro se. When the plaintiff is the party failing to comply with court orders, failure to prosecute is also a basis upon which a court justifies dismissal of an action. See FED. R. CIV. P. 41(b), which permits involuntary dismissal of a plaintiff's claim by a court "[f]or failure of the plaintiff to prosecute or comply with these rules or any order of court[;] a defendant may move for dismissal of an action or of any claim against the defendant" Several dismissal cases in the Second Circuit discuss Rule 41(b) in addition to Rule 37(b)(2). See, e.g., *Mackensworth v. S.S. American Merchant*, 28 F.3d 246, 253 (2d Cir. 1994) ("Dismissal of a claim may, of course, be an appropriate sanction for failure to prosecute a claim or failure to comply with discovery orders."); *Harding v. Federal Reserve Bank of New York*, 707 F.2d 46 (2d Cir. 1983); *Lyell Theatre*, 682 F.2d at 41-42 (affirming dismissal of case in accordance with Rule 41(b), but indicating in dicta that delinquencies in case may well have provided sufficient basis for imposition of dismissal under Rule 37(b)(2)); *Chira v. Lockheed Aircraft Corp.*, 634 F.2d 664, 667 (2d Cir. 1980) (dismissal appropriate not only for plaintiff's failure to comply with a discovery order, but for his failure to prosecute case at all). But see *Salahuddin v. Harris*, 782 F.2d 1127, 1134 (2d Cir. 1986) (citing *Societe Internationale*, holding that whether a court has the power to dismiss a complaint because of failure to comply with a discovery order depends *exclusively* on Rule 37, so "there is no need to resort to Rule 41(b)"). The holding in *Salahuddin* should apply with equal force to a court's inherent power to sanction. See generally Adam Behar, Note, *The Misuse of Inherent Powers When Imposing Sanctions for Discovery Abuse: The Exclusivity of Rule 37*, 9 CARDOZO L. REV. 1779 (1988); see also Maurice Rosenberg, *Sanctions to Effectuate Pretrial Discovery*, 58 COLUM. L. REV. 480, 483-86 (1958) (arguing that there is no justification for a court to bypass

circumstances which appear to be particularly persuasive in the Second Circuit are the history of abuse and whether the party against whom the sanction is being imposed had been warned that such a sanction might be imposed.²⁰⁹

One might be tempted to conclude that because some of the above factors are generally considered by the Second Circuit district courts, no *formal* test is needed.²⁰⁹ Such a conclusion is not warranted. Even though some courts do consider similar factors when deciding the propriety of litigation-ending sanctions, the Second Circuit does not *require* that any of these factors be considered. Not surprisingly, then, no specified set of factors is examined with any regularity or consistency among Second Circuit courts. Whether a litigation-ending sanction is imposed depends almost entirely upon the judge. Therefore, cases either affirming or reversing the imposition of litigation-ending sanctions do not indicate what circumstances the courts will consider. Rather, they only illuminate the Second Circuit's policy concerning discovery abuse and discovery sanctions.

Since *Cine*, the Second Circuit has repeatedly pronounced, in rather strong terms, that failure to comply with discovery orders is intolerable. For instance, in *Sieck v. Russo*,²¹⁰ a one million dollar default judgment was entered against defendants for repeatedly failing to appear for scheduled deposi-

Rule 37 and that discovery should be enforced exclusively by Rule 37); Rebecca Gandolfi Moore, Comment, *Chambers v. Nasco, Inc.—Judicial Discipline Wields a Big Stick*, 37 LOY. L. REV. 1043 (1992) (discussing Supreme Court decision which held that a federal court has inherent power to impose as sanctions the entire amount of the opposing party's fees).

²⁰⁹ However paternalistic one may think this is, the fact remains that in the majority of cases affirming litigation-ending sanctions in the Second Circuit, the party against whom the sanction is imposed was warned prior to imposition that failure to comply with the order in question may (or would) lead to dismissal, default or the like. As discussed *infra* Part IV.B and accompanying text, there was no prior warning in *Bambu* that a default judgment might be entered for failure to comply with the order that was the subject of the litigation-ending sanction.

²⁰⁹ Certainly, a majority of the important factors to consider appear to be considered by Second Circuit courts. However, as discussed in greater detail *infra* pp. 648-53, greater consistency is desirable with respect to the most drastic of sanctions, and would promote the purposes underlying their imposition. Even if the decisions to impose litigation-ending sanctions to date are appropriate under the circumstances in each case, the net result is that litigants and judges still have no measure or yardstick to guide them.

²¹⁰ 869 F.2d 131 (2d Cir. 1989).

tions. The recalcitrant parties had already been sanctioned monetarily for their noncompliance prior to the entry of default.²¹¹ However, on appeal, the defendants argued that the district court abused its discretion because softer sanctions were available. The court sarcastically responded to this argument by stating:

Apparently, defendants perceive that the function of a reviewing court is to search, like Goldilocks, for a sanction that is not too hard, not too soft, but one that is just right. We, however, prefer to play the other role in that story, and provide the teeth to enforce discovery orders by leaving it to the district court to determine which sanction from among the available range is appropriate.²¹²

Similarly, in *Update Art, Inc. v. Modiin Publishing, Ltd.*,²¹³ sanctions of approximately \$475,000 were imposed against defendants, thereby awarding plaintiffs summary judgment on its copyright infringement claim. The circuit asserted that the issue in the case was whether it intended to strictly enforce sanctions for discovery noncompliance, and stated that the case was a stern warning that it did.²¹⁴ The Second Circuit noted that the defendants had violated a series of court orders and were repeatedly warned that sanctions would be imposed if they continued their noncompliance.²¹⁵ It therefore held that the case fell far short of one in which the magistrate judge abused her discretion in imposing a sanction, and her decision was unconditionally warranted.²¹⁶ The Second Circuit summarized its position with the following forceful statements regarding its policy of strict compliance with discovery orders:

In holding as we do, we wish to emphasize the importance we place on a party's compliance with discovery orders. Such compliance is necessary to the integrity of our judicial process. A party who flouts discovery orders does so at his peril. If one suggests that our decision today is strong medicine, that is precisely what it is intended to be.²¹⁷

²¹¹ *Id.* at 134.

²¹² *Id.*

²¹³ 843 F.2d 67, 68 (2d Cir. 1988).

²¹⁴ *Id.*

²¹⁵ *Id.* at 70.

²¹⁶ *Id.* at 72.

²¹⁷ *Id.* at 73.

A particularly strict application of this policy can be found in *United States Freight Co. v. Penn Central Transportation Co.*²¹⁸ Here, although plaintiffs agreed to settle for lost or damaged shipments and defendants' counsel agreed to recommend the settlement figure to his clients, the defendants refused to settle.²¹⁹ The district court had to vacate its prior dismissal, entered on the belief that the parties had settled. The magistrate judge then ordered that discovery continue and be completed by a certain date. Defendants failed to comply with this order.²²⁰ The court acknowledged that ordinarily a single pretrial violation does not result in the imposition of default judgment.²²¹ However, the imposition of default was affirmed based on the defendants' "continuing saga of dilatory conduct."²²² The defendants' dilatory conduct included impeding and extending court proceedings by seeking three extensions before answering the complaint, and engaging the court in four pretrial conferences on the belief that the parties would complete settlement, which they never did.²²³ The Second Circuit held that the unconditional sanction imposition was necessary to deter other parties from ignoring discovery orders.²²⁴

Although not as common, there are also cases in the Second Circuit since *National Hockey* and *Cine* reversing the imposition of litigation-ending sanctions. In these cases, the Second Circuit either explicitly found that the district court abused its discretion²²⁵ or, acknowledging the abuse of discretion standard, found that the district court did not see the facts of the case in the "proper light."²²⁶ For example, in *Luft*

²¹⁸ 716 F.2d 954 (2d Cir. 1983).

²¹⁹ *Id.* at 954.

²²⁰ *Id.*

²²¹ *Id.* But see *infra* note 304 and accompanying text.

²²² *Penn Central*, 716 F.2d at 955.

²²³ *Id.* at 954-55.

²²⁴ *Id.* at 955.

²²⁵ See, e.g., *Bobal v. Rensselaer Polytechnic Inst.*, 916 F.2d 759, 761 (2d Cir. 1990). Here, the court held that the district court abused its discretion by dismissing with prejudice part of the pro se plaintiff's suit without first warning that such a harsh sanction was in the offing; see also *In re Attorney General of the United States*, 596 F.2d 58, 67 (2d Cir. 1979) (holding district court abused discretion by not investigating more thoroughly reasonable alternative sanctions to contempt for party's failure to disclose certain files).

²²⁶ See *infra* notes 227-230 and accompanying text. A strong argument can be

v. Crown Publishers, Inc.,²²⁷ the Second Circuit found that the district court failed to find the extent of defendants' non-compliance with discovery orders sufficient to justify striking defendants' answer. The court acknowledged that several of the defendants' arguments intended to challenge the district court's exercise of discretion were meritless.²²⁸ Nonetheless, the Second Circuit held that the district court's decision did not "in light of the record" support the imposition of sanctions.²²⁹ Thus, the Second Circuit remanded the case for further findings regarding compliance with the order.²³⁰

D. *Summary of Second Circuit Law Just Prior to Bambu*

Seminal cases like *Cine* are the exception, not the rule. Undoubtedly, because of the nature of the abuse of discretion standard of review, the majority of Second Circuit cases concerning the imposition of litigation-ending sanctions does not include lengthy discussions concerning policy implications or considerations.²³¹ Most cases contain standard language regarding the harshness of the sanction and whether the district court judge concluded that the particular circumstances justi-

made that in several cases in which the imposition of a litigation-ending sanction has been reversed by the Second Circuit, the court did not follow the abuse of discretion standard in so doing. Save for making a finding that the party against whom sanctions were imposed did not act in bad faith or with fault (itself a difficult finding on appeal unless the factual determination by the trial judge is clearly erroneous), there is no basis for the reviewing court to overturn a decision below. The Second Circuit does not have a pronounced method of determining the propriety of imposing these types of sanctions. Thus, unless the appellate court determines that the noncompliance was without fault, there would appear to be no justification for overturning a decision by the district court.

²²⁷ 906 F.2d 862 (2d Cir. 1990).

²²⁸ *Id.* at 866. For instance, the court rejected the argument (as did the district court) that discovery was not directed toward one of the defendants. In addition, the court agreed with the district court that the failure to comply was willful or culpable.

²²⁹ *Id.* at 866-67.

²³⁰ *Id.* Likewise, in *DeCrescenzo v. Maersk Container Serv. Co.*, 741 F.2d 17, 18 (2d Cir. 1984), the court acknowledged that the district court has the authority to dismiss a case for failure to comply with discovery orders, but stated that "the extreme sanction of dismissal is too drastic . . ."

²³¹ This Note focuses on Second Circuit cases. Admittedly, it is the district courts that are really delving into the imposition of litigation-ending sanctions. However, any policy or direction with regard to imposing harsh sanctions must come from the Second Circuit itself, not its district courts.

fied the imposition of the sanction. However, unlike the Third, Fourth, Fifth, Sixth, Ninth and Tenth Circuits,²³² district courts in the Second Circuit are not required to consider fixed standards when imposing litigation-ending sanctions.

As in every other circuit, there are cases both affirming and reversing the imposition of litigation-ending sanctions in the Second Circuit. What stands out is the Second Circuit's decisions in cases such as *Cine*, *Sieck*, *Update Art* and the like. These cases represent the Second Circuit's explicit position that discovery orders must be followed. Moreover, the *National Hockey* deterrence goal is a driving force behind sanction imposition in the Second Circuit. What makes the cases difficult to reconcile is the manner in which sanctions are imposed. The inconsistency in approach and result belies the goal stated by the Second Circuit regarding compliance with discovery orders. However unyielding the Second Circuit holds itself out to be, many judges actually have a rather paternalistic approach to litigation-ending sanctions. In several instances, Second Circuit courts do not impose litigation-ending sanctions against a recalcitrant party unless the party has: (1) been warned of the possibility; (2) failed to comply with several orders; or (3) been given a specific and clear deadline for compliance.²³³

²³² See *supra* notes 103-108.

²³³ See, e.g., *Valentine v. Museum of Modern Art*, 29 F.3d 47, 48-49 (2d Cir. 1994) (prior to dismissal, pro se plaintiff "repeatedly warned" of sanctions that could be imposed if he refused to comply with orders, and the court informed plaintiff after several transgressions that if he failed to appear for a deposition his case would be dismissed); *Thomas E. Hoar, Inc. v. Sara Lee Corp.*, 900 F.2d 522, 524 (2d Cir. 1990) (plaintiff violated several court orders; a deadline was set for compliance with another order and party was warned that failure to comply would result in automatic affirmation of magistrate judge's earlier order recommending preclusion of evidence at trial); *Minotti v. Lensink*, 895 F.2d 100, 102 (2d Cir. 1990) (affirming dismissal for plaintiff's failure to comply with order that set deadline and warned that case would be dismissed for failure to comply); *Sieck v. Russo*, 869 F.2d 131, 133 (2d Cir. 1989) (default judgment entered against party who failed to comply with initial order and then failed to comply with order specifying a date for appearance and warning that failure to appear would result in a default judgment); *John B. Hull, Inc. v. Waterbury Petroleum Prods., Inc.*, 845 F.2d 1172, 1175 (2d Cir. 1988) (recalcitrant party warned twice that failure to comply with order would result in action's dismissal); *Update Art, Inc. v. Modlin Publishing, Ltd.*, 843 F.2d 67, 70 (2d Cir. 1988) (sanction imposed after series of court orders is not followed and party repeatedly warned that sanctions would be imposed for continued noncompliance); *Jones v. Niagara Frontier Transp. Auth.*, 836 F.2d 731, 733 (2d Cir. 1987) (dismissal based on order specifying deadline for compliance and party was warned by both the court and counsel to comply); *Mone*

It is against this judicial philosophy and approach—a tough but somewhat “nurturing” approach—that the *Bambu* case collides. On one hand, the default judgment entered against the defendants in *Bambu*, after failure to comply with a single discovery order, certainly embodies the circuit’s stated goal with respect to “strong medicine.” However, in light of Second Circuit precedent, the *Bambu* court may have gone too far, and the default judgment entered may have been too harsh under the circumstances. Certainly the bigger issue is how *Bambu* and cases in the future can be reconciled with past precedents in the Second Circuit. The *Bambu* case is significant, therefore, for two reasons. First, it represents a somewhat stark departure from other cases involving litigation-ending sanctions in the Second Circuit. Even though the defendants’ conduct in the *Bambu* case warranted some type of remedial action by the court, default appears too harsh a sanction under the circumstances. Second, and more importantly, the case epitomizes the flaws in the Second Circuit’s approach to litigation-ending sanctions and underscores the desirability for greater uniformity. The *Bambu* case is a prime example of why a more cohesive approach to imposing litigation-ending sanctions is desirable.²³⁴

v. Commissioner of Internal Revenue, 774 F.2d 570, 572 (2d Cir. 1985) (dismissal was preceded by explicit warning that failure to comply with order might lead to dismissal); Independent Investor Protective League v. Touche Ross & Co., 607 F.2d 530, 533-34 (2d Cir.), cert. denied, 439 U.S. 895 (1978) (affirming dismissal against plaintiffs and counsel for failure to comply with an order requiring service of answers to interrogatories by a specified date); see also National Hockey League v. Metropolitan Hockey Club, Inc., 427 U.S. 639, 641 (1976) (“This action was taken in the face of warnings that their failure to provide certain information could result in the imposition of sanctions . . .”).

²³⁴ Obviously, the decision to impose sanctions for discovery abuse in any case is predominantly a fact specific inquiry. The opinions dealing with these cases do not, indeed cannot, make the factual record come alive because it is usually rather long and detailed. What follows in Part IV is a detailed account of what transpired in the *Bambu* case in an effort to illustrate how the entire sanctioning process appears to operate.

IV. *BAMBU SALES V. OZAK TRADING*—AN IN-DEPTH ANALYSIS OF SECOND CIRCUIT LITIGATION-ENDING SANCTION CASE

Most notable about litigation-ending sanction cases in the Second Circuit is not what they *do* say, but rather what they *do not* say. Second Circuit opinions involving discovery sanctions generally tend to be short, straightforward and terse.²²⁵ The court usually mentions the severity or drastic nature of the sanction, the appropriate standard of review and then proceeds to affirm or reverse without expanding on the policies or particular facts that prompted the decision.²²⁵ The reported *Bambu* decision is no exception.²³⁷ However, a closer examination of the record in *Bambu* provides greater insight into the Second Circuit's approach to imposing litigation-ending sanctions. What emerges from this analysis is that the current approach has weaknesses.

A. *Bambu*—Background and Chronology Leading Up to the Motion to Compel

On March 2, 1990, *Bambu Sales, Inc.*²³³ ("Bambu") filed suit in the Southern District of New York against *Ozak Trading Company* ("Ozak") and its president, Doron Gratch, for al-

²²⁵ The Second Circuit is not alone with respect to terse opinions. See, e.g., *Muzakkir v. Villasenor*, 65 F.3d 175 (9th Cir. 1995) (affirming dismissal of discovery sanction in one and a half page opinion); *United States v. A&P Arora, Ltd.*, 46 F.3d 1152 (10th Cir. 1995) (affirming default sanction based on district judge's memorandum). Understandably, however, some cases on appeal do not include lengthy discussions probably because the opinions below thoroughly address all of the important factors and considerations.

²²⁶ Of course, this is not always the case. In *Cine Forty-Second Street Theatre Corp. v. Allied Artists Pictures Corp.*, 602 F.2d 1062 (2d Cir. 1979), the Court engaged in a lengthy policy discussion regarding its decision and its holding concerning the level of culpability necessary for the imposition of litigation-ending sanctions. However, due in part to the abuse of discretion standard of review, the majority of cases dealing with this issue offer only conclusory statements and provide little in the way of guidance from a policy perspective as to why the choice to impose litigation-ending sanctions is fair and appropriate or not.

²³⁷ *Bambu Sales, Inc. v. Ozak Trading Co., Inc.*, 58 F.3d 849 (2d Cir. 1995). The only portion of the *Bambu* decision that deals with the propriety of the sanction imposed is one paragraph long, the majority of which is citations to other cases. *Id.* at 853-54.

²³⁸ *Bambu Sales, Inc.* is a company that imports and sells cigarette rolling paper under a federally registered trademark. *Id.* at 850.

leged trademark infringement.²³⁹ Bambu sought, inter alia, a preliminary and permanent injunction enjoining Ozak from using Bambu's trademark in connection with the sale of any unauthorized goods, as well as damages and costs for the irreparable harm Bambu claimed it had suffered.²⁴⁰ On April 5, 1990, Ozak answered the complaint by denying every allegation, asserting three affirmative defenses and setting forth its own counterclaims.²⁴¹

Shortly before Ozak filed its answer and counterclaims, Bambu moved for expedited discovery. The district judge held a conference on March 8, 1990, and granted Bambu's motion.²⁴² Discovery then commenced. The plaintiff served two sets of interrogatories and requests for production of documents on the defendants.²⁴³ The defendants responded to each discovery request.²⁴⁴ In addition, Ozak's president,

²³⁹ Plaintiffs Amended Complaint at 5, *Bambu Sales, Inc. v. Ozak Trading, Inc.*, 58 F.3d 849 (2d Cir. 1995) (No. 93-7913). The complaint averred that Ozak Trading Co. had used the Bambu trade name on lightweight cigarette paper that was being sold improperly in the United States. The complaint also alleged violations of the Trademark Act of 1946 and of New York common law relating to trademark infringement and unfair competition. *Id.* at 6-7. Bambu had discontinued the sale of its lightweight cigarette paper in the United States, but permitted its foreign manufacturer to sell it on the condition that it be sold only to a Nigerian buyer. *Bambu*, 58 F.3d at 851. Apparently, Ozak was in the chain of distribution that brought some of the Bambu cigarette paper back into the United States. *Id.*

²⁴⁰ Plaintiffs' Amended Complaint at 9-10, *Bambu*, (No. 93-7913). Plaintiffs also sought to enjoin Ozak Trading Co. from competing unfairly and from using any reproduction or colorable imitation of its trademark. *Id.* at 6-8, 10.

²⁴¹ Defendants' Answer and Counterclaims. Ozak Trading Co. imports and distributes brand-name goods as well as "off brand-name" goods and "closeouts." *Bambu*, 58 F.3d at 850; Defendants' Answer and Counterclaims at 3, 4-11. One of Ozak's major claims against Bambu was that it had notified Ozak's customers, and/or prospective customers, that Ozak's products were counterfeit or illegal. Ozak claimed these actions caused it irreparable harm and injury. Defendants' Answer and Counterclaims at 9.

²⁴² Record at 2, 10, *Bambu Sales, Inc. v. Ozak Trading, Inc.*, No. 90 Civ. 1426 (S.D.N.Y. Mar. 8, 1990). However, there was a caveat to the granting of the motion. Expedited discovery would be allowed only with the understanding that the plaintiff not be permitted to bother any Ozak customers. *Id.* at 9-11. The order dated March 19, 1990 required defendant to produce documents from "January 1, 1989 to date regarding the purchase, importation, or sale of cigarette paper bearing the Bambu trademark," and to produce Doron Gratch, Ozak's president, for a deposition on March 14, 1990. *Bambu*, Civ. No. 90-1426 (S.D.N.Y. Mar. 19, 1990).

²⁴³ See Plaintiffs First Request for Production of Documents and Things to Defendant, Mar. 19, 1990; Plaintiffs First Set of Interrogatories to Defendant (undated); Plaintiff's Second Request for Production of Documents, Jan. 29, 1991; Plaintiffs Second Set of Interrogatories, Feb. 15, 1991.

²⁴⁴ See Defendants' Response to First Request for Production of Documents and

Doron Gratch, was deposed a number of times.²⁴⁵ Apparently, the plaintiff encountered difficulties deposing Gratch in that he refused to answer a number of questions,²⁴⁶ and his attorney

Things, May 18, 1990; Defendants' Response to First Set of Interrogatories, May 18, 1990. Ozak responded rather briefly to the plaintiff's second discovery request. Apparently Bambu wanted Ozak to produce copies of certain documents, and Ozak wanted the plaintiff to inspect the documents at the defendants' attorney's office. See Defendants' Response to Second Set of Interrogatories, Mar. 12, 1991; Defendants' Response to Second Request for Production of Documents and Things, Mar. 15, 1991. Local Rule 46 in the Southern District of New York does not set a deadline for a response to an interrogatory request. Presumably, Ozak's May 18, 1990 response can be considered timely in accordance with local rules. MCKINNEY'S NEW YORK RULES OF COURT, STATE AND FEDERAL, *Southern & Eastern Districts Civil Rules*, Rule 46, at 766-67 (West 1995). But see FED. R. CIV. P. 34(b) ("The party upon whom the request is served shall serve a written response within 30 days after the service of the request . . ."). The responses were clearly untimely in accordance with the Federal Rules of Civil Procedure.

²⁴⁵ Actually, Gratch was deposed three times in this case before a default judgment was entered against the defendants—on March 14, 1990, February 6, 1991, and February 5, 1992. Brief for Defendants at 6, *Bambu*, 58 F.3d 849 (2d Cir. 1995) (No. 93-7913) [hereinafter Brief for Defendants]. Ironically, the third deposition took place approximately two weeks prior to the magistrate judge's recommendation that default judgment be entered. In her report, the magistrate judge stated that "[i]t does not appear from the papers on file that [the] deposition [of Gratch] ever took place." Magistrate Judge's Report and Recommendation at 6 n.5, *Bambu Sales, Inc. v. Ozak Trading, Inc.*, No. 89 Civ. 1426 (S.D.N.Y. Feb. 18, 1992) (No. 89-1426) [hereinafter Report and Recommendation].

²⁴⁶ For instance, the parties agreed that Gratch's second deposition, scheduled for 2:00 p.m. on February 6, 1991, would go into the evening hours. Memo from Defendant's Counsel to H. Pitman, Jan. 23, 1991. In its brief argued before the Second Circuit, however, plaintiff claimed that Gratch and his counsel "unilaterally terminated the deposition at 6:10 p.m. and refused to answer numerous questions on the ground of relevance." Brief for Plaintiff-Appellee at 7-8, *Bambu*, 58 F.3d 849 (2d Cir. 1995) (No. 93-7913) [hereinafter Brief for Plaintiff]. Another example of inappropriate behavior during the February 6, 1991 deposition follows:

Q: Who provided you with the goods that were the subject matter of the [TIC-TAC] lawsuit [a separate lawsuit involving Ozak]?

A: None of your business, sir.

[DEFENDANT'S COUNSEL]: You don't have to answer that question.

A: I am not going to answer, I am not going to deal with this fucking thing.

Q: Who provided you with the articles that are the subject matter of that lawsuit?

[DEFENDANT'S COUNSEL]: That is not relevant to this case at all. I'm going to instruct the witness not to answer.

Id. at 8. A deponent's use of such an expletive can hardly be considered "appropriate" behavior. However, it certainly seems that the deponent in the *Bambu* case was emboldened to respond in such a manner by the direction given to him from his counsel that he need not answer the question posed. In light of the instruction by counsel, the deponent's belligerent attitude is understandable to some degree.

directed him not to respond to questions based solely on relevance.²⁴⁷ The district court, however, was not aware of these difficulties until June 5, 1991, when the plaintiff moved to compel discovery.²⁴⁸

Shortly after discovery commenced, the district judge referred the case to a magistrate judge for pre-trial settlement and supervision.²⁴⁹ During a May 30, 1990, pretrial conference, the magistrate judge set September 28, 1990, as the discovery deadline.²⁵⁰ The parties were ordered to submit a letter to the magistrate judge by June 25, 1990, outlining discovery progress and matters still in dispute.²⁵¹ The parties *jointly applied* to extend the discovery deadline. The magistrate judge granted the application and extended the deadline to

The deponent was obviously led by his counsel to believe that the line of questioning being pursued by opposing counsel was inappropriate. Thus, the deponent responded accordingly, even if too brusquely. Strangely, plaintiffs counsel did not move to compel the deponent to answer any questions during the deposition or right after it was terminated.

²⁴⁷ During a deposition, "a party may instruct a deponent not to answer only when necessary to preserve a privilege." FED. R. CIV. P. 30(d)(1).

²⁴⁸ It is curious that plaintiffs counsel did nothing with respect to this behavior at the time it occurred. A potent argument could be made that plaintiffs counsel acted inappropriately as well as defendants' counsel. He had a duty to his own client to ensure that all necessary information was being obtained, and he certainly could have and should have moved to compel the deponent *at the time this incident occurred*. See *Ali v. A&G Co.*, 542 F.2d 595, 596 (2d Cir. 1976) ("Under Rule 37 . . . it was appellants' responsibility to raise the defendants' lack of cooperation in discovery Had a timely motion been made, the court might have entered an appropriate order against the defendants"). One wonders whether the information being requested by the plaintiffs was truly necessary if opposing counsel so easily gave up the "fight" to obtain the information. One of the primary reasons the magistrate judge in the *Bambu* case chose default judgment as opposed to a lesser sanction was her determination that information improperly withheld by the defendants was sought by plaintiff to prove its case, and that any sanction short of default would "permit the recalcitrant parties to benefit from their tactical obstruction" Report and Recommendation at 14, *Bambu* (No. 89-1426). For an interesting commentary on attorney misconduct with respect to discovery by a partner in a Tennessee law firm, see Donald F. Paine, *Sanctions for Discovery Abuse*, TENN. BAR J., Nov/Dec. 1991, at 19 ("Have you ever 'instructed' a witness not to answer a deposition question? I have, and I was flat wrong."); see also Ward Wagner, Jr. & Helen Wagner McAfee, *Combating Discovery Abuse*, 14 TRIAL DIPL. J., Winter 1992, at 197, 198-99 (warning practitioners not to wait when discovery abuse occurs because to maximize results with the judge, "you want the judge to follow along with the course of discovery").

²⁴⁹ Report and Recommendation at 1, *Bambu* (No. 89-1426) (case was referred on April 26, 1990).

²⁵⁰ *Id.* at 2.

²⁵¹ *Id.*

December 28, 1990.²⁵² Shortly after the December 1990 deadline passed, with discovery incomplete, the magistrate judge transferred the case back to the district judge for trial.²⁵³

The case was returned to the magistrate judge on February 20, 1991 for settlement.²⁵⁴ The district judge orally directed the parties to complete discovery by March 28, 1991,²⁵⁵ and scheduled a settlement conference for April 3, 1991.²⁵⁶ On March 26, 1991, defendants' attorney submitted a request for a thirty-day extension in order to depose one of plaintiffs' officers.²⁵⁷ At this point, after two deadlines for discovery completion already had passed, Bambu's attorney responded by "reciting various outstanding discovery requests to defendants, including the failure of defendant Gratch to appear for the conclusion of his deposition."²⁵⁸ Meanwhile, defendants' counsel requested that the April 3, 1991 settlement conference be rescheduled.²⁵⁹ The magistrate judge denied the request and ordered the parties to appear on that date.²⁶⁰ Defendants' counsel failed to appear April 3, 1991, and offered no explanation or excuse for this failure.²⁶¹ A settlement conference was

²⁵² *Id.* It is curious that so little is made of this point by the magistrate judge in her report and recommendation. Part of the reason that a default judgment was recommended and entered in this case was the purported evasive and dilatory tactics by the defendants. However, the plaintiff did not once make a motion to the magistrate judge during the initial period in which discovery was to be completed. Furthermore, the parties *jointly* applied for an extension of the discovery deadline.

²⁵³ *Id.* at 2-3. The magistrate judge noted in her report and recommendation that neither party had applied to her to settle any outstanding disputes. *Id.* at 2.
²⁵⁴ Report and Recommendation at 3, *Bambu* (No. 89-1426).

²⁵⁵ Again, the record does not indicate that the desire to extend the deadline was not mutual, or that either party was experiencing any problems with respect to discovery.

²⁵⁶ Report and Recommendation at 3, *Bambu* (No. 89-1426).

²⁵⁷ *Id.*

²⁵⁸ *Id.*

²⁵⁹ *Id.* at 3-4.

²⁶⁰ *Id.* at 4.

²⁶¹ Report and Recommendation at 4 & n.4. This failure to appear or show cause for such failure is not mentioned by the district judge in her decision to enter a default judgment, see *Bambu Sales Inc. v. Ozak Trading, Inc.*, No. 90 Civ. 1426 (S.D.N.Y. May 15, 1992), or by the Second Circuit in its opinion in this case. See *Bambu*, 58 F.3d 849 (2d Cir. 1995). Although not cited as such in the report and recommendation, one cannot help but think that this dereliction of counsel's duty played a larger role in the magistrate judge's decision to recommend entry of default. Prior to the scheduled conference, it appeared that both parties were to blame for the fact that discovery was not yet complete. Plaintiff had complaints

held on May 22, 1991, and the magistrate judge set a schedule for the outstanding discovery disputes "since it appeared that counsel were unable or unwilling to comply with [her] directions regarding informal resolution of discovery disputes."²⁶²

B. Motion to Compel Discovery and Motion for Default Judgment

On June 5, 1991, plaintiff's counsel moved for an order pursuant to Rule 37 to compel the defendants to produce certain documents and to produce Doron Gratch to complete his deposition.²⁶³ Defendants responded to this motion on June 12, 1991, arguing that Gratch should not have been compelled to attend a third deposition because the plaintiff had refused to produce a Bambu officer for a deposition for over a year.²⁶⁴ Moreover, defendants alleged the following: (1) that all relevant documents relating to the purchase or acquisition of Bambu-branded products had already been produced;²⁶⁵ (2) that plaintiff's counsel had violated the district judge's March 19, 1990 order regarding contact with Ozak customers;²⁶⁶ (3) that the information requested with respect to an unrelated lawsuit was to harass defendants;²⁶⁷ and (4) that identification of privileged materials in that file would be too burden-

regarding noncompliance, which he ultimately brought forward in a motion to compel. But the record reveals that the defendants complained of noncompliance as well—namely, that defendants were not permitted to depose certain plaintiff officers in this matter. Defendants' eventual motion to compel was summarily rejected by the magistrate judge because of a procedural, rather than substantive, error. See Magistrate's Endorsed Memorandum, Feb. 18, 1992 (denying defendants motion to compel on grounds that the representations of fact on which it was based were not included in an affidavit or declaration under penalty of perjury).

²⁶² Report and Recommendation at 4. Interestingly, this comment was addressed to counsel for both parties.

²⁶³ Notice of Motion by Attorneys for Plaintiff, June 5, 1991; see *supra* notes 245-248 and accompanying text.

²⁶⁴ Response to Application by Plaintiff Bambu Sales, Inc. for Further Discovery at 1, June 12, 1991 [hereinafter Defendants' Response to Motion to Compel]. Curiously, the defendant refers to plaintiff's motion as a "request" for the third deposition of Gratch. Nowhere in this response did defendants concede or even acknowledge that the deposition had not been deemed completed by plaintiff.

²⁶⁵ *Id.*

²⁶⁶ *Id.* at 2-3.

²⁶⁷ *Id.* at 4-5.

some to produce.²⁶⁸ Finally, defendants requested that plaintiff reply to defendants' alleged "interrogatories and notice of deposition that had been outstanding for over a year."²⁶⁹ The magistrate judge granted the plaintiff's motion to compel in its entirety and rejected defense counsel's self-help explanations for its actions.²⁷⁰ The August 30, 1991 court order, memo-

²⁶⁸ *Id.* at 7-8.

²⁶⁹ Defendants' Response to Motion to Compel at 9, June 12, 1991. Nothing in the record supports this contention.

²⁷⁰ The magistrate judge issued an endorsed memorandum on August 30, 1991. It reads, in pertinent part:

Plaintiff's motion is granted in all respects, provided that plaintiff shall promptly reimburse defendant for the reasonable expenses of photocopying documents. Compliance with local Civil Rule 46 is not optional. A deponent may not refuse to answer a question on grounds other than privilege. [Defendants' allegations that plaintiff has violated the March 1990 order with respect to customer contact is] not a legally sufficient basis for refusing to respond to relevant discovery requests.

Magistrate's Endorsed Memorandum, Aug. 30, 1991. Civil Rule 46 in the Southern District of New York reads, in pertinent part, as follows:

(e)(1) Where an objection is made to any interrogatory or sub-part thereof or to any document request under Fed. R. Civ. P. 34, the objection shall state *with specificity* all grounds. Any ground not stated . . . shall be waived.

(2) Where a claim of privilege is asserted in objecting to any interrogatory or document demand . . . and an answer is not provided on the basis of such assertion,

(i) the attorney asserting the privilege shall . . . identify the nature of the privilege . . . ; and

(ii) the following information shall be provided in the objection, unless divulgence of such information would cause disclosure of the allegedly privileged information:

(A) for documents: (1) the type of document; (2) general subject matter of the document; (3) the date of the document; (4) such other information as is sufficient to identify the document . . . [such as] the author . . . the addressee . . . the relationship of the author and addressee to each other

. . . .
S.D.N.Y. Civ. R. 46 (McKinney 1996) (emphasis added). The Federal Rules of Civil Procedure authorize district courts to make and amend rules governing procedure provided that any local rules implemented by the district court are not "inconsistent with [the federal] rules." FED. R. CIV. P. 83. A great deal of controversy in recent years has developed with respect to implementing local rules because the term "inconsistent" is ambiguous. A major issue facing courts today regarding inconsistent approaches with respect to the Federal Rules of Civil Procedure concerns the 1993 Amendments to Rule 26 and automatic disclosure. Because mandatory disclosure is optional, critics argue that it has led to a balkanization of the system. For a recent discussion on civil disclosure and the skepticism it has engendered since Rule 26 was amended in 1993, see Ron Coleman, *Civil Disclosure*, A.B.A. J., Oct. 1995, at 76; see also William O. Bertelsman, *The 1994 Annual Meeting of the Association of American Law Schools: Changing the Rules of Pretri-*

rializing the magistrate judge's determination, contained no warning of sanctions contemplated by the magistrate judge for failure to comply and did not specify a deadline for compliance.²⁷¹

On September 27, 1991, plaintiffs' counsel notified the defendants that because they had not complied with the August 1991 order, plaintiff would move for entry of a default judgment pursuant to Rule 37.²⁷² On November 5, 1991, defendants' counsel submitted its opposition to the motion for default judgment accompanied by an affirmation from defendants' attorney, Gerard Dunne. In the affirmation, Dunne alleged that he was not able to meet with Gratch (or presumably any officer of Gratch's company) to arrange for his continued deposition and the production of documents until late October 1991 because Gratch was seriously ill.²⁷³

C. Magistrate Judge's Report & Recommendation Leading to District Court Entry of Default Judgment

The magistrate judge assigned to the case issued a lengthy, sixteen-page memorandum in support of her recommendation that plaintiffs' motion for default judgment pursuant to Rule 37(b)(2)(c) should be granted.²⁷⁴ After setting out the facts in some detail,²⁷⁵ the magistrate judge described the purpose of sanctions and the "standard" to be followed in imposing sanctions. The magistrate judge identified three purposes of Rule 37 sanctions with respect to failing to follow a discovery order: (1) to ensure a party will not benefit from its own failure to comply; (2) to be a specific deterrent and seek to

al Fact Disclosure, 46 FLA. L. REV. 105 (1994) (explaining the new disclosure rules); Rochelle C. Dreyfuss, *The What and Why of the New Discovery Rules*, 46 FLA. L. REV. 9 (1994).

²⁷¹ *But see supra* notes 207-208, 233 and accompanying text.

²⁷² Notice of Motion for Plaintiff and accompanying Declaration of H. Pitman, Sept. 27, 1991. The declaration stated that after three weeks had passed from the August 30, 1991 order, a letter was sent to defendants demanding production of documents. It also stated that defendants failed to respond to the letter; thus, they failed to comply with the August 30, 1991 order. Curiously, this letter is not included in the docket sheets or record.

²⁷³ Dunne Affidavit, Nov. 5, 1991.

²⁷⁴ Magistrate Judge's Report and Recommendation, *Bambu Sales, Inc. v. Ozak Trading, Inc.*, No. 89 Civ. 1426 (S.D.N.Y. Feb. 18, 1992).

²⁷⁵ *Id.* at 1-7.

obtain compliance with the particular order issued; and (3) to serve as a general deterrent, provided that the party against whom sanctions are imposed was, in some sense, at fault.²⁷⁶ The magistrate judge stated that the greater the fault, the greater the severity of the sanction.²⁷⁷ She further explained that due process comes into play, *inter alia*, to provide the party against whom sanctions are being contemplated with a "fair chance to be heard."²⁷⁸ In addition, the magistrate judge noted that gross negligence, not simple negligence or mere oversight of counsel, constitutes fault in the Second Circuit.²⁷⁹

The part of the recommendation that actually addressed the default sanction and the reason for its appropriateness in the case was relatively short.²⁸⁰ In this portion of the recommendation, the magistrate judge acknowledged that a default judgment should be imposed only when no lesser sanction would be "efficacious."²⁸¹ However, the magistrate judge also pointed out that the Second Circuit had repeatedly emphasized that the "strong medicine" of default judgment must be administered in "appropriate cases" to prevent Rule 37 from becoming a "paper tiger."²⁸² Citing *National Hockey*,²⁸³ the magistrate judge noted that selecting an appropriate sanction required consideration of the entire record in the case.²⁸⁴ After

²⁷⁶ *Id.* at 8 (citing *Update Art, Inc. v. Modiin Publishing, Ltd.*, 843 F.2d 67, 71 (2d Cir. 1988)).

²⁷⁷ *Id.* at 9.

²⁷⁸ *Id.* (citing *Societe Internationale v. Rogers*, 357 U.S. 197, 209 (1958); *Alvarez v. Simmons Mkt. Research Bureau, Inc.*, 839 F.2d 930, 932 (2d Cir. 1988)).

²⁷⁹ Report and Recommendation, (citing *Cine Forty-Second St. Theatre Corp. v. Allied Artists Pictures Corp.*, 602 F.2d 1062, 1067 (2d Cir. 1979)); *see supra* note 184 and accompanying text.

²⁸⁰ Report and Recommendation at 9-15.

²⁸¹ *Id.* at 9 (citation omitted).

²⁸² *Id.* (citations omitted).

²⁸³ 427 U.S. 639, 641-43, *reh'g denied*, 429 U.S. 874 (1976).

²⁸⁴ Report and Recommendation at 10, *Bambu* (No. 89-1426). According to the magistrate judge's report and recommendation, as late as February 20, 1991, *both* parties in this litigation had advised the district judge that further discovery was needed. *Id.* at 3 n.2. Furthermore, the magistrate judge noted that when defendants requested an extension in March of 1991, followed by a letter from plaintiff noting outstanding discovery requests, "[n]either letter explained why these disputes had not been submitted, or discovery completed, prior to the previous deadline" *Id.* at 3 n.3. It seems disingenuous to claim that an exploration of the *entire* record in this case would lead one to conclude that defendants willfully violated discovery for the time frame stated in the report and recommendation. It

considering the entire record, the magistrate judge concluded that: (1) defendants and their attorney acted with the requisite degree of fault necessary to justify entry of default judgment; (2) defendants and their attorney had adequate notice²⁸⁵ that persistence in their "obstructive course of conduct" could result in a loss of opportunity to defend on the merits; and (3) no lesser sanctions would be efficacious in bringing about compliance or deterring similar conduct in the future.²⁸⁶ A brief summary of the magistrate judge's conclusions follows.

1. Fault Is Found

The magistrate judge acknowledged that the culpable conduct in this case was, "on the face of it, that of defendant [] [Gratch's] attorney."²⁸⁷ However, she correctly identified the Second Circuit's position that attorney misconduct is no basis for relieving a client of consequences associated with such misconduct.²⁸⁸ The magistrate judge found that defense counsel's actions were not mere oversight or simple negligence. Rather, she characterized the conduct as a pattern of tactical obstruction that proved that the defendants' claims lacked merit.²⁸⁹ But the magistrate judge never addressed the fact that defendants had complained of tactical obstruction by the plaintiff for its failure to produce a Bambu officer for deposition.²⁹⁰ In addition, it appears that she ignored the fact that both parties were at fault for failing to comply with discovery

is unclear from the record what was going on during this time frame. Some documents were produced and others apparently were not. Gratch attended his depositions, although he was improperly instructed not to respond to questions based on relevance. The only bona fide, identifiable "abuses" were counsel's failure to appear for the settlement conference in April of 1991 and the failure to comply with the August 30, 1991 discovery order. *Id.* at 4-5.

²⁸⁵ As used by the magistrate judge, "notice" is to be distinguished from "warn" or "warning." Report and Recommendation at 13-14, *Bambu* (No. 89-1426).

²⁸⁶ *Id.* at 10.

²⁸⁷ *Id.* at 11.

²⁸⁸ *Id.* at 12 (citing, inter alia, *Link v. Wabash R.R.*, 370 U.S. 626, 633-34 (1962); *Cine Forty-Second St. Theatre Corp. v. Allied Artists Pictures Corp.*, 602 F.2d 1062, 1068 (2d Cir. 1979)).

²⁸⁹ *Id.* at 13 (citations omitted).

²⁹⁰ See *supra* note 257 and accompanying text.

deadlines and for failing to notify her of difficulty in completing discovery within the originally prescribed deadlines.²³¹

2. Proper Notice Received

Citing *Thomas E. Hoar, Inc. v. Sara Lee Corp.*,²³² the magistrate judge tersely concluded that defendants' due process rights had been satisfied.²³³ Not only did the defendants take full advantage of their opportunity to be heard by opposing the motion to dismiss, but they also would have another opportunity to be heard by filing an objection to the recommendation.²³⁴ The fact that the defendants were not warned by the court that default judgment might result for failure to comply with the August 30, 1991 order was not addressed.²³⁵

3. Inefficacy of Lesser Sanctions

The magistrate judge decided that no lesser sanction was adequate to address the seriousness of the violation in this case. She determined that any sanction short of default would permit the recalcitrant parties to benefit from their misconduct, which could not be tolerated.²³⁶ The magistrate judge

²³¹ See *supra* notes 252, 264 and accompanying text.

²³² 882 F.2d 682, 688 (2d Cir. 1989).

²³³ Report and Recommendation at 13, *Bambu* (No. 89-1426). The due process issue raised by the plaintiff in *Thomas Hoar* was the fact that the district court did not hold a hearing to determine fault and allocate sanctions between client and counsel. *Thomas Hoar, Inc. v. Sara Lee Corp.*, 900 F.2d 522, 526 (2d Cir.), *cert. denied*, 498 U.S. 846 (1990). The Second Circuit rejected this due process argument because the record revealed that plaintiff had been afforded the opportunity to submit oppositions to every motion to compel and objections to every order imposed by the court. *Id.* at 527. Thus, plaintiff could not validly be heard to complain that it did not have notice of, or the opportunity to be heard about, the sanction. *Id.* The argument raised in the *Bambu* case is not comparable because the notice complained of by defendants' counsel concerns a warning by the court as opposed to notice and opportunity to be heard. Despite the fact that such a requirement is paternalistic—Rule 37 ought to be warning enough—the fact is that usually courts warn parties prior to imposing severe sanctions. The Second Circuit is no stranger to this practice. See *supra* notes 207-208, 233.

²³⁴ Report and Recommendation at 14, *Bambu* (No. 89-1426).

²³⁵ The issue was not addressed by the magistrate judge, district judge or Second Circuit in its opinion. In its Second Circuit brief, the defendants specifically argue that there was no notice of the "imminence or possibility of . . . default" given by the magistrate judge. Brief for Defendants at 18, 20.

²³⁶ Report and Recommendation at 14, *Bambu* (No. 89-1426).

also concluded that no useful purpose would be served by another order directing discovery.²⁹⁷ She noted that the case should have been ready for trial on December 28, 1990.²⁹⁸ Rather than issue another order, she decided it was time to put an end to what she deemed was procrastination.²⁹⁹

The defendants objected to the magistrate judge's report and recommendation largely because Doron Gratch had been too ill to appear for a third deposition and because defendants did not *deliberately* or *willfully* delay the proceedings in this matter.³⁰⁰ Affirmations by both defendants' counsel and Doron Gratch accompanied the objection. In addition, a number of Gratch's medical bills and insurance statements were submitted to substantiate the claim that he was too ill to be deposed.³⁰¹

The district judge accepted the magistrate's report and recommendation and entered default judgment against the defendants.³⁰² The district judge indicated that she had reviewed

²⁹⁷ *Id.* at 14.

²⁹⁸ *Id.* But see *supra* Part IV.A indicating that the record does not demonstrate that the initial delay concerning discovery in the case can be attributed solely to "obstructionist tactics" by the defendants. The order of August 30, 1991 is the only order that the defendants failed to comply with save for counsel not appearing at the April 1991 settlement conference.

²⁹⁹ Report and Recommendation at 14-15, *Bambu* (No. 89-1426). One cannot help but wonder if procrastination can truly be characterized as contumacious, justifying the striking of a defense on the merits.

³⁰⁰ Objections by Defendants to Report and Recommendation at 1-5, *Bambu Sales, Inc. v. Ozak Trading, Inc.*, No. 90 Civ. 1426 (S.D.N.Y. Mar. 2, 1992). Unfortunately, deliberate and willful failure is not the standard in the Second Circuit. As discussed *supra* note 184 and accompanying text, gross negligence constitutes fault in the Second Circuit. Thus, deliberate or willful failure is not a necessary precursor to the imposition of a litigation-ending sanction.

³⁰¹ One bill seemed to demonstrate that Gratch received emergency hospital consultation from Dr. Ronald E. Strobal on August 26, 1991, and was not discharged until August 27, 1991. Statement of Ronald E. Strobal, M.D. Another bill for \$1500 showed that heart treatment of some sort was received by Gratch on August 29, 1991. Cardiovascular Authorization Billing Service for Service Received, August 29, 1991. Numerous other bills seem to demonstrate that Gratch was also in the hospital from August 28 through August 30, 1991, and visited his doctor on several occasions in September as well as October 1991. See Appendix to Defendants' Appeal to the Second Circuit at 256-282a, *Bambu* (No. 93-7913).

³⁰² Order Accepting Magistrate Judge's Report & Recommendation, No. 93 Civ. 7913 (S.D.N.Y. May 15, 1992) [hereinafter Default Order]. Just prior to the district judge's decision on the Rule 37 motion from September 27, 1991, the plaintiff again moved to certify defendants' continuing failure to comply with the August 30, 1991 order. Notice of Motion for Plaintiff, Mar. 20, 1992. Defendants objected

de novo the portions of the report and recommendation concerning Doron Gratch's alleged illness during September and October 1991. Despite evidence of the medical bills and other statements, the district judge held that Gratch's illness was not established by defendants' submissions.³⁰³ The district judge agreed with the report's recommendation to grant plaintiff's motion for default judgment "on the grounds that defendants had failed to comply with a discovery order entered on August 30, 1991."³⁰⁴ Apparently, the district judge did not recommend default judgment on the grounds that defendants had deliberately and willfully failed to comply with discovery throughout the course of the litigation. Rather, she affirmed the default strictly on the ground that defendants had failed to comply with the August 30, 1991 order.³⁰⁵

D. Bambu on Appeal—Second Circuit Affirms

On June 26, 1995, the Second Circuit affirmed the default judgment entered against the defendants in *Bambu*.³⁰⁶ It characterized the discovery proceedings in the case as a "Stalingrad battle,"³⁰⁷ and noted that "[a]fter defendants violated a discovery order, and *in light of other acts of delay and obstruction spanning more than one year*, the magistrate judge recommended entry of a default judgment pursuant to [Rule] 37."³⁰⁸ The court reiterated the findings in the magistrate judge report and recommendation and then held that the defendants' arguments with respect to abuse of discretion were "meritless."³⁰⁹ The court rejected what it characterized as all three of defendants' claims regarding the impropriety of the

to this motion by letter dated April 2, 1992. The magistrate judge denied the motion without prejudice on April 10, 1992. See Appendix to Defendants' Appeal to the Second Circuit at 285a-321a, *Bambu* (No. 93-7913).

³⁰³ Default Order at 1 n.1.

³⁰⁴ *Id.* at 1.

³⁰⁵ Of course it might be that the failure to comply was deemed gross negligence and that such conduct warrants severe sanctions in the Second Circuit. However, this issue was not addressed in this case.

³⁰⁶ *Bambu Sales, Inc. v. Ozak Trading Inc.*, 58 F.3d 849 (2d Cir. 1995).

³⁰⁷ *Id.* at 851.

³⁰⁸ *Id.* at 850 (emphasis added).

³⁰⁹ *Id.* at 851-53.

default judgment order.³¹⁰ First, the defendants argued that they had complied with the discovery order.³¹¹ Second, they maintained that the order was inadequate because it failed to specify a deadline for compliance.³¹² Lastly, they claimed that they had produced the documents called for by the August 30, 1991 order.³¹³ Numerous other arguments put forward by defendants in their moving brief, however, were not mentioned. For instance, defendants repeatedly argued that default was not appropriate because the magistrate judge failed to warn them of its likelihood or even possibility.³¹⁴ Defendants also correctly pointed out that the magistrate judge based her conclusion regarding their recalcitrance on the fact that there were numerous postponements of discovery deadlines in the case,³¹⁵ but both parties shared the blame for these delays.³¹⁶

Acknowledging the extremity of a measure such as the entry of default judgment, the court explained its policy that discovery orders are meant to be followed and that one who flouts such orders does so at his or her own peril.³¹⁷ As noted previously,³¹⁸ the court explained the result in the *Bambu* case by likening it to a game of mere chance: "Defendants rolled the dice on the district court's tolerance for deliberate obstruction, and they lost. We have no intention of letting them return to the table."³¹⁹

³¹⁰ *Id.*

³¹¹ See Brief for Defendants at 6-7, 10, 15, 19, 20-25.

³¹² *Id.* at 8, 17, 20, 25.

³¹³ *Id.* at 6-7, 10, 15, 19, 20-25.

³¹⁴ *Id.* at 17, 18, 20. However paternalistic, there is a great deal of case precedent in the Second Circuit that intimates warnings ought to be given prior to imposing litigation-ending sanctions. See *supra* notes 207-208, 233 and accompanying text.

³¹⁵ Brief for Defendants at 18.

³¹⁶ *Id.*

³¹⁷ *Bambu*, 58 F.3d at 849, 853 (citing *Update Art, Inc. v. Modiin Publishing, Ltd.*, 843 F.2d 67, 73 (2d Cir. 1988)).

³¹⁸ See *supra* notes 101, 158.

³¹⁹ *Bambu*, 58 F.3d at 853.

V. ANALYSIS OF SECOND CIRCUIT APPROACH IN LIGHT OF *BAMBU*

The entry of default judgment in the *Bambu* case seems wrong even though the defendants clearly failed to comply with the August 30, 1991 discovery order. For one thing, the *Bambu* result is extreme in comparison with other Second Circuit cases. Unlike several other cases in the Second Circuit, *Bambu* involved a failure to comply with only one court order,³²⁰ and there was no indication that failure to comply would lead to a default judgment remedy.³²¹

Although Rule 37 provides for such sanctions, and the Second Circuit has affirmed such sanctions in other cases, the facts in *Bambu* do not appear to fit comfortably within the facts of other Second Circuit cases affirming litigation-ending sanctions.³²² Even though the court did not accept the proffered documents as a valid excuse for noncompliance, there was some proof that defendant Gratch was ill shortly after the entry of the order.³²³ In addition, prior to the motion to com-

³²⁰ See *supra* notes 202, 205.

³²¹ See *supra* notes 207-208, 233.

³²² See, e.g., *Valentine v. Museum of Modern Art*, 29 F.3d 47, 50 (2d Cir. 1994) (dismissing action against plaintiff after repeated and explicit warnings affirmed); *Minotti v. Lensink*, 895 F.2d 100, 103 (2d Cir. 1990) (affirming dismissal against plaintiff for failing to comply with at least four discovery orders); *Sieck v. Russo*, 869 F.2d 131, 134 (2d Cir. 1989) (upholding million dollar default judgments against defendants for repeated refusal to attend depositions and after milder monetary sanctions already imposed); *McDonald v. Head Criminal Court Supervisor Officer*, 850 F.2d 121, 124 (2d Cir. 1988) (dismissing pro se plaintiffs claim for failure to comply with court orders and responding to request to comply with statement that "the Judge can go to hell"); *John B. Hull, Inc. v. Waterbury Petroleum Prods., Inc.*, 845 F.2d 1172, 1177 (2d Cir. 1988) (affirming dismissal against plaintiff after failure to comply with three orders and several warnings that non-compliance would result in dismissal); *Update Art, Inc. v. Modin Publishing, Ltd.*, 843 F.2d 67, 72 (2d Cir. 1988) (affirming imposition of preclusive sanctions tantamount to dismissal against defendant after numerous failures to comply with discovery orders); *Jones v. Niagara Frontier Transp. Auth.*, 836 F.2d 731, 735 (2d Cir. 1987) (dismissing plaintiffs case for repeated refusal, in the face of several orders, to appear for and answer questions in a deposition despite advice from counsel); *Independent Investor Protective League v. Touche Ross & Co.*, 607 F.2d 530, 533-34 (2d Cir.) (affirming dismissal against plaintiffs because answers to interrogatories were not filed in accordance with court order and plaintiffs made false statements and gave false testimony regarding timeliness of service of answers), *cert. denied*, 439 U.S. 895 (1978).

³²³ See *supra* notes 273, 301 and accompanying text.

pel, it appeared that both parties frustrated the discovery process by refusing to produce information³²⁴ and delaying the completion of discovery by the district court's initial deadlines.³²⁵ The record makes it appear as if these facts were brushed aside by the magistrate judge, the district judge and the Second Circuit.

Furthermore, this is not a case where the party against whom the order was entered refused to comply outright.³²⁶ The *Bambu* defendants did not sit idly by ignoring interrogatories or other discovery requests. In fact, a great deal of discovery had already been conducted smoothly between the parties, another fact neither mentioned nor considered by the courts. Thus, unlike other cases where the Second Circuit deemed a litigation-ending sanction appropriate, this is not a case where the party against whom the order was entered refused to com-

³²⁴ The plaintiff complained that its interrogatories were not being answered fully and that Doron Gratch had not been properly deposed. The defendants repeatedly tried to depose an officer of plaintiff's company who the plaintiff did not produce. Although not substantiated by the judge, it also appears in the record that the defendants complained that plaintiff had told defendants' customers that it was engaged in illegal activity. The magistrate judge in her report and recommendation expressly noted that the parties were not complying with her order to try and achieve settlement. See *supra* notes 263-273 and accompanying text.

³²⁵ The parties jointly applied to move discovery deadline from June 1990 to December 1990. When the deadline passed, neither party requested another deadline or sought judicial resolution of discovery disputes. It was only in March of 1991 that "problems" surfaced and only because defendant took an affirmative step to extend the deadline to complete discovery. Defendant's attorney sought a 30-day extension so that he could depose an officer of the plaintiff, who apparently had not been made available to defendants. Plaintiff's attorney responded the next day, citing various outstanding discovery requests, which ultimately led to a motion to compel in August of 1991. Certainly, the record indicates that defendants did not comply with this order. However, it is equally valid to state the plaintiff did not comply with the court's initial orders regarding the discovery deadline. It was his duty to inform the court in December of 1990 that discovery was not complete and why. One wonders what would have happened had defendant not moved to extend the deadline again in March of 1991. See *supra* notes 263-273 and accompanying text.

³²⁶ See, e.g., *Commodity Futures Trading Comm'n v. Noble Metals Int'l*, 67 F.3d 766, 775-99 (9th Cir. 1995) (Reinhardt, J., dissenting) (The dissenting judge argued that ordering plaintiff's complaint to be taken as established as a Rule 37(b)(2) sanction for discovery failure was an abuse of discretion: The district court failed to adequately warn parties of extreme measure, did not consider less harsh sanctions, and default judgment is reserved for defendants who make any type of discovery virtually impossible. The disobedient party here failed to appear at depositions but had not failed to produce documents as well.), *cert. denied*, 117 S. Ct. 64 (1996).

ply without a legitimate reason. As previously mentioned, it was the defendants' request to extend the discovery deadline a second time, in order to depose plaintiff's officer, that prompted the plaintiff to complain about discovery problems.³²⁷ The fact that the plaintiff never produced this officer was not addressed by the magistrate judge, district judge or the Second Circuit.³²⁸

The magistrate judge concluded that the information sought by the plaintiff in the *Bambu* case was crucial to the plaintiff's case. This conclusion partly justified her determination that any lesser sanction against the defendants would be inefficacious.³²⁹ However, the *Bambu* plaintiff never indicated to the court that the information sought was crucial to its case. Indeed, as already noted above, the facts regarding extending the discovery deadline proved to the contrary. Based on these facts and Second Circuit precedent, it seems that the entry of default judgment for failure to comply with the magistrate judge's order was simply too harsh.³³⁰ In addition, although not in accordance with Second Circuit case law, it also seems unfair that defendant Gratch lost his chance to defend the case on its merits because of his counsel's conduct.³³¹

Yet, it is reasonable, on the other hand, to agree with the court that some other sanction was appropriate for the non-compliance by the defendants. The defendants failed to take any steps to comply with the August 30, 1991 discovery order. Even though discovery problems in the case are partially attributable to the plaintiff, it is clear that the defendants participated in delaying the case well beyond the time the court determined necessary to complete discovery. One need only

³²⁷ See *supra* notes 257-258 and accompanying text.

³²⁸ Cf. *Amernational Indus. v. Action-Tungsum, Inc.*, 925 F.2d 970, 978 (6th Cir.) (reversing default judgment and noting that both sides were not model litigants), *cert. denied*, 501 U.S. 1233 (1991).

³²⁹ Report and Recommendation at 14-15, *Bambu* (No. 89-1426).

³³⁰ See *supra* Parts III.C, III.D for a discussion on Second Circuit precedent regarding the imposition of litigation-ending sanctions.

³³¹ Although no recommendation or opinion in the *Bambu* case so suggests, it seems likely that the history of abuse which prompted the magistrate judge to impose, and Circuit to affirm, default was largely influenced by defense counsel's conduct regarding depositions, failing to appear for a settlement conference, and failing to notify the court that Gratch was ill just subsequent to the April 1991 discovery order.

examine several of defendants' arguments in their brief to see that failure to comply, or even gross negligence with respect to compliance, with the discovery order is the only way to categorize their conduct.³³² Defense counsel's conduct during depositions and his failure to appear for a settlement conference are just two telling examples of inappropriate behavior warranting a remedial measure.³³³ Moreover, defendants' counsel offered no viable explanation or excuse for his failure to contact the judge during the period when Doron Gratch was purportedly ill.³³⁴ The majority of arguments raised by defendants in their brief before the Second Circuit was premised on the claim that they had complied with the order by the time the magistrate judge issued her report and recommendation.³³⁵ Defendants failed to acknowledge, therefore, what *National Hockey* and its Second Circuit progeny made clear: Flouting discovery orders is not permissible despite tardy compliance.

How can these simultaneous notions—that the sanction appears too harsh and, yet, that perhaps it or some other harsh sanction may have been appropriate nonetheless—be reconciled? What can be said or done with respect to litigation-ending sanctions in the Second Circuit that would alleviate dissatisfaction with the result in these types of cases? Ironically, in order to preserve the circuit's strong policy disfavoring discovery abuse, a less discretionary rule is necessary to provide some consistency to this area of discovery law. The magistrate judge and district judge in *Bambu* acted within their discretion in making the tough determination to enter default judgment. But the message the case sends to other litigants

³³² For example, defendants attempted to obfuscate their own wrongdoing by arguing that plaintiff provided no explanation for the need to review certain records and documents. Brief for Defendants at 8.

³³³ See *supra* notes 246-247, 261 and accompanying text discussing defense counsel's improper actions in the *Bambu* case.

³³⁴ In an affirmation in opposition to plaintiff's motion for default judgment, Mr. Gerard Dunne explains that he tried to reach his client numerous times after the August 30, 1991 discovery order was issued but was unable to do so because of Gratch's illness. Affirmation of Gerard Dunne, Nov. 5, 1991. Mr. Dunne offers no explanation for his failure to notify the court about this situation, and his claim that he kept plaintiff's counsel apprised of the situation is not supported by any document or evidence in the record. See Brief for Defendants at 9-10.

³³⁵ Brief for Defendants at 6-9, 19, 20-25.

and judges is that sanction imposition may be a game of chance or a roll of the dice.³³⁵

The Second Circuit, beyond the *Societe Internationale* requirements,³³⁷ has no set policy or approach for its district courts when assessing the propriety of imposing a litigation-ending sanction for failure to comply with a discovery order pursuant to Rule 37(b)(2).³³⁸ As a result, the outcomes in cases involving litigation-ending sanctions are inconsistent, and the message intended for litigants regarding discovery abuse is far from clear. Considering the limited standard of review,³³⁹

³³⁵ *Bambu Sales, Inc. v. Ozak Trading, Inc.*, 58 F.3d 849, 853 (2d Cir. 1995).

³³⁷ See *supra* notes 36-45 and accompanying text discussing the holding in *Societe Internationale*. However, with respect to the client's misconduct, it seems clear that the failure to comply was not necessarily due to any willfulness or bad faith. Right or wrong, Mr. Gratch was not available shortly after the order was entered due to illness. His counsel did nothing to remedy the situation. At the least, defense counsel's inaction during this critical time frame can be characterized as inexcusable neglect which, under *Cine*, would justify the imposition of a harsh sanction against both counsel and client. But see *Cine Forty-Second St. Theatre Corp. v. Allied Artists Pictures Corp.*, 602 F.2d 1062, 1069 (2d Cir. 1979) (Oakes, J., concurring) ("It would be with the greatest reluctance, however, that I would visit upon the client the sins of counsel, absent client's knowledge, condonation, compliance, or causation.").

Ironically, the Second Circuit has delineated five factors that are pertinent for its courts to consider prior to a Rule 41(b) dismissal, which is an involuntary dismissal for failure of "plaintiff to prosecute or to comply with these rules or any order of the court": (1) the duration of plaintiff's failures; (2) whether plaintiff has received notice that further delays would result in dismissal; (3) whether defendant is likely to be prejudiced by further delay; (4) the balance between alleviating court calendar congestion and protecting a party's right to due process and a fair chance to be heard; and (5) the efficacy of lesser sanctions. See, e.g., *Martin v. Metropolitan Museum of Art*, 158 F.R.D. 289, 292 (S.D.N.Y. 1994) (citing *Alvarez v. Simmons Mkt. Research*, 839 F.2d 930, 932 (2d Cir. 1988)); see also *Jackson v. City of New York*, 22 F.3d 71, 74-96 (2d Cir. 1994) (applying five factors as guidelines and determining that district court incorrectly dismissed complaint—"a harsh remedy to be utilized only in extreme situations") (citing *Harding v. Federal Reserve Bank of New York*, 707 F.2d 46, 50 (2d Cir. 1972) (quoting *Theilmann v. Rutland Hosp., Inc.*, 455 F.2d 853, 855 (2d Cir. 1972) (per curiam))); *FED. R. CIV. P.* 41(b). Why the Second Circuit has not implemented a similar set of factors to be considered in the Rule 37(b)(2) context is not clear.

³³⁸ "Indeed, the sources of judges' sanctioning power are diverse, and the standards invoked have not always been either clear or consistently applied." *Oliveri v. Thompson*, 803 F.2d 1265, 1271 (2d Cir. 1986), cert. denied, 480 U.S. 918 (1987).

³³⁹ It is rare for circuit courts to find that district courts abuse their discretion. "[D]istrict judges have broad discretion in imposing sanctions." *Corporation of Lloyd's v. Lloyd's U.S.*, 831 F.2d 33, 36 (2d Cir. 1987). "The concept of discretion implies that a decision is lawful at any point within the outer limits of the range of choices appropriate to the issue at hand" *Eastway Constr. Corp. v. City*

district court discretion is simply too broad. Some type of standard approach is needed in the Second Circuit to guide both lower court judges and litigants.

A case as simple as *Bambu* presents a perfect example of the Second Circuit's shortcomings in this area, particularly with respect to deterrence.³⁴⁰ The defendants in the *Bambu* case can hardly be said to have been deterred from further discovery abuse by the decision. In fact, their arguments before the Second Circuit indicate a blatant *disregard* of this goal.³⁴¹ For other litigants, this case, like most of the others in the circuit, seems to represent not that litigation-ending sanctions will be imposed against a party failing to comply with an order, but rather that litigation-ending sanctions may be imposed.³⁴²

A more systematic approach to imposing litigation-ending sanctions under Rule 37 is desirable. With a more methodical approach courts can come closer to generally deterring discovery abuse. If parties believe that sanction imposition is a matter of chance, the potential for deterrence is undermined.³⁴³

of New York, 821 F.2d 121, 123 (2d Cir.) (emphasis added), *cert. denied*, 484 U.S. 918 (1987).

³⁴⁰ The *Bambu* decision is short and straightforward. The discussion with respect to entering default judgment for failure to comply with a discovery order covers, at most, two and one half pages of double-spaced text.

³⁴¹ The brief submitted by defendants demonstrates their belief that compliance, regardless of its timeliness, obviates the propriety of sanction imposition. Last minute compliance does not serve the deterrent purpose of sanction imposition. See, e.g., William Wayne Kilgarlin & Don Jackson, *Sanctions for Discovery Abuse under New Rule 215*, 15 ST. MARY'S L.J. 767, 772 (1984) (citing *Cine* as support for this proposition).

³⁴² In this respect, it would seem that Rule 37 sanctions mirror Rule 11 sanctions. See FED. R. CIV. P. 11(c) ("If, after notice and a reasonable opportunity to respond, the court determines that [there has been a violation], the court may, subject to the conditions stated below, impose an appropriate sanction upon the attorneys, law firms, or parties that . . . are responsible for the violation.") (emphasis added). However, unlike Rule 37, Rule 11 does not contemplate, discuss or even authorize the severe sanction of dismissal or default. See FED. R. CIV. P. 11(c)(2) (discussing the nature and limitations of sanctions in terms of monetary sanctions only). Comparing Rule 11 and Rule 37 may be appropriate for some purposes. But clearly the application of Rule 11 is not particularly useful with respect to analyzing the propriety of litigation-ending sanctions. Less certainty and greater flexibility is acceptable in the Rule 11 context precisely because it does not contemplate the use of harsh or severe sanctions like dismissal and default.

³⁴³ In a compelling article proposing to enforce strict deadlines and make sanction imposition mandatory in certain situations as a way to decrease what the author perceives as serious discovery abuse problems, it is noted that "lawyers

While fear of the unknown might deter some litigants, it is more probable that if there is no consistency in application, deterrence cannot be achieved. This is particularly undesirable when dealing with litigation-ending sanctions,³⁴⁴ where critical policies like judicial efficiency³⁴⁵ and the avoidance of abuse of process are at odds with other policies that favor hearing a case on its merits. A truly careful balancing of competing interests must occur, lest other equally compelling policies inherent in the Federal Rules will be hampered.³⁴⁶

behave badly when they think their clients stand to gain from abusive behavior and when courts tacitly allow it." Earl C. Dudley, Jr., *Discovery Abuse Revisited: Some Specific Proposals to Amend the Federal Rules of Civil Procedure*, 26 U.S.F. L. REV. 189, 193 (1992). By admitting that sanction imposition merely depends upon the patience of the judge, the message sent to litigators seems to be some form of tacit approval of discovery delay—provided that the litigant is lucky enough to have a judge who allows it. Mr. Dudley states that one of the major impediments to eliminating discovery abuse is the "collectively hostile attitude of judges to discovery disputes." *Id.* at 211 (citation omitted).

³⁴⁴ See *Estate of Spear v. Commissioner of Internal Revenue Serv.*, 41 F.3d 103, 110 (3d Cir. 1994) (discussing the distinction between sanctions that end a case and those that make a party's ability to prevail more difficult).

³⁴⁵ The Federal Rules of Civil Procedure are to be "construed and administered to secure the just, speedy, and inexpensive determination of every action." FED. R. CIV. P. 1.

³⁴⁶ It seems as if courts that were once perhaps too hesitant to impose sanctions might be too quick to do so now. As alluded to *supra* note 1 and accompanying text, there is a great push to contain what is perceived as rampant discovery abuse. See Craig Enoch, *Incivility in the Legal System? Maybe It's the Rules*, 47 SMU L. REV. 199, 222 (1994) ("Concerns regarding manipulative litigation practices (especially discovery abuses) spawned the amendment and increased use of Rule 37 of the Federal Rules of Civil Procedure in the 1970's."); Carl Tobias, *Common Sense and Other Legal Reforms*, 48 VAND. L. REV. 699, 703 (1995) (noting that in mid-1970's concerns about abuse of civil litigation process came to the fore and courts were urged to sanction attorneys and parties who engaged in abuse of the process). The goal is laudable, but competing policies must not be overlooked. Litigation-ending sanctions are meant to be a last, not a first, resort. They should be utilized only when necessary, and the policies disfavoring their imposition should not be forgotten or buried in the zeal to keep trial calendars tidy. "[A]ny time a trial court contemplates disposal of a lawsuit on procedural grounds rather than on the merits it must exercise caution." Kilgarlin & Jackson, *supra* note 341, at 802 (discussing extreme sanctions under Texas rules of civil procedure). The Third Circuit discussed this issue at length in a case where it upheld a dismissal for discovery abuse:

We recognize that recent literature exhorting the district judge to move litigation expeditiously by taking firm control and the 1983 amendments of the Federal Rules of Civil Procedure with their numerous references to sanctions may have contributed to premature dismissals or defaults. Although sanctions are a necessary part of any court system, we are concerned that the recent preoccupation with sanctions and the use of dis-

For all these reasons, the policies that are important to the Second Circuit can better be preserved if a consistent approach is followed when imposing severe sanctions. The Second Circuit would, therefore, benefit from adopting a test similar to the ones used by the Third, Fourth, Fifth, Sixth, Ninth and Tenth Circuits. The Second Circuit could fashion its test to embody its policies concerning compliance and, at the same time, require district courts to specifically consider various factors prior to imposing litigation-ending sanctions. Finding fault, as prescribed by *Societe Internationale*, is simply not enough. What follows is a proposal for a Second Circuit test to be applied whenever determining the propriety of a litigation-ending sanction.

VI. PROPOSAL

A. Preface

Discovery abuse cannot and should not be tolerated. The Supreme Court made this clear in 1976 when it specifically endorsed the imposition of litigation-ending sanctions as a response to noncompliance with discovery orders by stating that "the most severe in the spectrum of sanctions provided by statute or rule must be available to the district court"³⁴⁷ Rule 37 of the Federal Rules of Civil Procedure also acknowledges that discovery abuse should not be tolerated by providing judges with a mechanism to sanction parties who fail to meet their discovery obligations.

Courts undeniably have authority under Rule 37(b)(2) to dismiss a disobedient party's action or render a default judgment against it for failure to comply with a discovery order. This authority has been exercised by courts in every circuit. What is bothersome is not that a court has the power to im-

missal as a necessary "weapon" in the trial court's "arsenal" may be contributing to or effecting an atmosphere in which the meritorious claims or defenses of innocent parties are no longer the central issue. It does not further the goal of a court system, that of delivering evenhanded justice to litigants

Poulis v. State Farm Fire and Casualty Co., 747 F.2d 863, 867 (3d Cir. 1984).

³⁴⁷ National Hockey League v. Metropolitan Hockey Club, Inc., 427 U.S. 639, 643 (1976) (per curiam).

pose a litigation-ending sanction, or even that many courts exercise that power. They should. Perhaps, as many critics suggest, they should do so more often.³⁴⁸ But depriving a litigant of any chance to try a case on its merits is a serious matter. Regardless of the circumstances and however deserving or necessary, the imposition of such a drastic measure must comport with basic notions of fairness and justice. Moreover, if such sanctions are to have any deterrent effect, they must be imposed more consistently.

The Second Circuit, among others, allows district courts to determine on a case-by-case basis what to consider in making the determination of whether discovery misconduct warrants default or dismissal. Other circuits have well-settled factors that its district courts are required to consider when imposing litigation-ending sanctions. The danger inherent in the Second Circuit's current approach is that the decision to impose the harshest sanctions, as demonstrated by the *Bambu* case, may simply be a matter of chance. District court judges are neither required to take certain matters into consideration, nor are they given any guidance with respect to what should be considered prior to imposing a litigation-ending sanction.

Clearly articulating factors a court must consider will resolve some of the ambiguity that exists between the Second Circuit's position that orders are meant to be followed, and the actual and inconsistent manner in which litigation-ending sanction cases are decided. Even though requiring district courts to weigh fixed standards will not guarantee absolute uniformity in result, at least there will be uniformity in approach. This uniformity will ensure some consistency and simultaneously preserve judicial discretion. The tools with which to fashion a Second Circuit test can be found in the Third, Fourth, Fifth, Sixth, Ninth and Tenth Circuits' approaches.³⁴⁹ Simply copying one circuit, however, is not desirable because no circuit's test adequately addresses all of the important factors that need to be considered. In addition, some courts

³⁴⁸ See, e.g., Meade W. Mitchell, Comment, *Discovery Abuse and a Proposed Reform: Mandatory Disclosure*, 62 MISS. L.J. 743, 748 (1993) ("Surveys of attorneys and judges demonstrate the severity of discovery problems in modern litigation . . .").

³⁴⁹ See *supra* notes 103-108.

consider factors that, arguably, are not necessary nor critical to making a decision regarding the imposition of litigation-ending sanctions.³⁵⁰

Prior to imposing a litigation-ending sanction, the Second Circuit should require³⁵¹ its district courts to consider and specifically articulate findings³⁵² with respect to the following four factors: (1) whether the disobedient party acted willfully or was at fault; (2) the history of abuse on both sides, including the efficacy of lesser sanctions; (3) whether the sanction is necessary for general deterrence; and (4) the client's awareness of or involvement in the abuse. The district court should not be required to assign a fixed amount of weight to any single factor. Imposing such a requirement would unnecessarily restrict discretion. Furthermore, each factor need not be present in order for a district court to impose a litigation-ending sanction. This, too, would encroach excessively upon the district court's

³⁵⁰ For instance, a specific warning requirement is not necessary. *See infra* discussion at Part VI.B.2 regarding the first factor of the proposed test for the Second Circuit. In addition, requiring a court to consider the amount of prejudice to the opposing party, while important, is not critical. *See infra* Part VI.B.3 discussing the general deterrence factor in the proposed Second Circuit test.

³⁵¹ It is interesting to note that some circuits say district courts "should" consider certain factors and other circuits say that district courts "must" consider certain factors. *See, e.g.,* *Beil v. Lakewood Eng'g and Mfg. Co.*, 15 F.3d 546, 552 (6th Cir. 1994) ("[T]his court has announced several factors that it *should* consider when deciding whether the district court abused its discretion by imposing sanctions.") (emphasis added); *Ehrenhaus v. Reynolds*, 965 F.2d 916, 921 (10th Cir. 1992) ("Before choosing dismissal as a just sanction, a court should ordinarily consider a number of factors These factors do not constitute a rigid test; rather they represent criteria for the district court to consider . . . [and t]he court should ordinarily evaluate these factors on the record."). *But see* *FDIC v. Conner*, 20 F.3d 1376, 1380 (5th Cir. 1994) ("[W]e have articulated several factors that *must* be present before a district court may dismiss a case as a sanction for violating a discovery order.") (emphasis added); *Henry v. Gill Indus.*, 983 F.2d 943, 948 (9th Cir. 1993) ("Because the sanction of dismissal is such a harsh penalty, the district court *must* weigh five factors before imposing dismissal") (emphasis added) (citing *Porter v. Martinez*, 941 F.2d 732, 733 (9th Cir. 1991)); *Wanderer v. Johnston*, 910 F.2d 652, 656 (9th Cir. 1990) (stating that a district court need not make explicit findings regarding each factor, but if it does not then the appellate court must review the record independently); *Mutual Fed. Sav. & Loan Ass'n v. Richards & Assocs.*, 872 F.2d 88, 92 (4th Cir. 1989) ("[C]ompeting interests *require* the application of a four-part test") (emphasis added). Ideally, the consideration of certain factors should be mandatory. However, saying a court should do something as opposed to saying it must seems to preserve judicial discretion.

³⁵² This is also required by Rule 11: "When imposing sanctions, the court shall describe the conduct determined to constitute a violation of this rule and explain the basis for the sanction imposed." FED. R. CIV. P. 11(c)(3).

discretion. What is important is that the various factors be carefully and consistently considered. To ensure this, district court judges ought to be required to articulate how each factor was considered and why a particular result was reached. Not only is it desirable to have a fixed set of standards, but it is also desirable for each factor to be as unambiguous as possible. District courts would, therefore, benefit from guidance regarding what constitutes adequate consideration of any given factor.

B. *The Proposed Factors for the Second Circuit*

1. Willfulness or Fault

The Supreme Court requires willfulness or fault to be present before a litigation-ending sanction can justly be imposed on a disobedient party.³⁵³ Interestingly, only the Second Circuit has held that gross negligence meets the willfulness or fault requirement.³⁵⁴ The difference between simple negligence and gross negligence is a matter of degree that defies precise description or definition. Because of this, requiring only gross negligence, as opposed to deliberate, intentional or wanton conduct, seems extreme. Nonetheless, gross negligence should continue to suffice to prove willfulness or fault for a number of reasons.

First, gross negligence as the standard for willfulness coheres with the Second Circuit's policy regarding intolerance for discovery failures. Furthermore, it does not offend due process. Additionally, it preserves judicial discretion by permitting its district courts to determine what constitutes gross negligence as opposed to simple negligence. Finally, it no longer would be the only required consideration concerning imposing a litigation-ending sanction. The fact that district courts would be required to consider the remaining three factors, and articulate their determinations regarding the relevancy or

³⁵³ See *supra* Part I for a discussion regarding due process considerations and imposing ultimate sanctions on parties.

³⁵⁴ See *supra* notes 182-184 and accompanying text.

weight of every factor, eliminates the potential unfairness in requiring only gross negligence to justify a default or dismissal.

2. History of Abuse Including the Efficacy of Lesser Sanctions

It is sensible to make it clear to every litigant that the entire discovery record will be considered when fashioning an appropriate sanction for a failure to comply with a discovery order. Rule 37(b)(2) discusses possible sanctions for failure to comply with a discovery order. But it mentions nowhere that a litigant's prior record regarding discovery failures can or should be taken into consideration. It is more than likely that several courts in the Second Circuit already take a party's history of abuse and the efficacy of lesser sanctions into consideration prior to imposing a litigation-ending sanction. However, the Second Circuit does not clearly require its court to engage in such an analysis. It should require this analysis for two major reasons: to protect litigants, and to provide district courts with the flexibility to impose a severe sanction for the failure to comply with even a single order.

Because dismissal, default and the like are such extreme measures, the district court must be convinced that the given sanction is warranted and necessary. In some situations, a party's prior record may be an essential indicator of the party's fault and whether a lesser sanction is appropriate under the circumstances. A court should not be constrained in every case to impose lesser sanctions prior to imposing a litigation-ending sanction. However, if a lesser sanction will both correct the deficiency and advance the general goals of sanction imposition, clearly it should be imposed rather than a dismissal or default. The district or magistrate judge involved in parties' discovery proceedings ought to be in a position to assess accurately whether a lesser sanction is appropriate, and should be required affirmatively to make that assessment in fairness to the recusant party.

Making clear to litigants that the entire history of abuse will be considered is also important for purposes of proper notice. Admittedly, Rule 37 and cases which have already affirmed harsh sanctions provide notice that failure to comply

with a discovery order may result in harsh consequences. But the current reality is that it is not wholly clear to litigants what a court will consider prior to imposing a harsh sanction, or what the litigants are entitled to in the way of warnings and notice.³⁵⁵ This factor should make it clear that actions throughout the discovery process—not just failures to comply with discovery orders, but other transgressions as well—will be considered. If a party has any history of dilatoriness or delay, even if not occasioned by failures to follow official court orders, doubts should and can be resolved in favor of imposing a harsh sanction.

The purpose of sanction imposition is to ensure that parties respect the judicial process and judicial authority. Thus, if a party has a history of contumaciousness with respect to these issues, a harsh sanction is justified. The paternalism that is present in much of the Second Circuit's case law in this area is unnecessary. Like all court orders, discovery orders should be complied with when issued, and sanctions for violating discovery orders should not have to be preceded by explicit warnings or the imposition of other, lesser sanctions.³⁵⁶ To require otherwise seems contrary to sanction imposition and Rule 37 in general. Likewise, a district court should not feel bound to wait until numerous orders have been ignored or disobeyed before imposing a sanction on a party. It should have the freedom to impose even the harshest sanction for one violation of a court order if the circumstances warrant it. Permitting the district court to consider the entire record bolsters its freedom in this regard.

Thus, this requirement strikes a reasonable balance between putting litigants on notice of possible consequences and

³⁵⁵ See *supra* Parts IV, V regarding the *Bambu* case.

³⁵⁶ In *Daval Steel Prods. v. M/V Fakredine*, the Second Circuit affirmed an order of sanctions and rejected the sanctioned party's argument that prior warnings are required before imposing severe sanctions. 951 F.2d 1357, 1366 (2d Cir. 1991). The Second Circuit unequivocally stated, "Parties and counsel have no absolute entitlement to be 'warned' that they disobey court orders at their peril." *Id.* (emphasis added); see *Commodity Futures Trading Comm'n v. Noble Metals Int'l, Inc.*, 67 F.3d 766, 771 (9th Cir. 1995) (stating that warning concerning possibility of sanctions not necessary), *cert. denied*, 117 S. Ct. 64 (1996). But see *supra* notes 207-208, 233; *Hathcock v. Navistar Int'l Transp. Corp.*, 53 F.3d 36, 40 (4th Cir. 1995) ("[T]his circuit has emphasized the significance of warning a defendant about the possibility of default before entering such a harsh sanction.").

affording the district judge discretion in fashioning a sanction. Courts should not be required to hold litigants' hands. But litigants should not be unfairly disillusioned by the current case law to think that warnings, deadlines and numerous failures are required before a case will be dismissed or default judgment will be entered.

3. General Deterrence

General deterrence may not be a primary policy goal of various other circuits, but it is a critical Second Circuit policy. Thus, it makes sense to include it as a factor to be considered prior to imposing a litigation-ending sanction.³⁵⁷ The difference between general and specific deterrence is critical to note because only general deterrence ought to be included in the Second Circuit's test.

Specific deterrence—ensuring compliance with an order by the actual parties in the dispute at issue—is not technically relevant when a court contemplates taking away a litigant's suit altogether, because compliance at that stage in the process is inconsequential.³⁵⁸ Specific deterrence is more important when assessing lesser sanctions. Litigants must respect the process and must comply with orders in a timely fashion. The deterrent effect a harsh sanction has on the particular litigants in a case is not about compliance with the order in question in the case. The goal is to ensure that the recalcitrant party in the case and all other litigants do not flout discovery obligations in the future. If courts focus solely on the litigants in a particular case, sanction imposition will not advance the goal of general deterrence.

Unlike other circuits that require district courts to examine the amount of prejudice to the opposing party,³⁵⁹ the prejudice factor is not included in this proposed test because it weakens the general deterrence goal and the Supreme Court's

³⁵⁷ See *supra* Part II.B.3a regarding general deterrence as a unique factor among the circuits with a test.

³⁵⁸ See, e.g., *New York Bay Co. v. State Bank of Patiala*, No. 93 Civ. 6075, 1995 WL 567357, at *4 (S.D.N.Y. Sept. 25, 1995). The court cited *Bambu* for the proposition that merely complying with an order does not protect a party from sanctions. Other courts have intoned similar statements. *Id.* at *5.

³⁵⁹ See *supra* Part II.B.2.

clear message from *National Hockey*. While arguably important, the focus on prejudice is not consistent with the purposes behind sanctions: to punish the recalcitrant party, to be a general deterrent and to ensure judicial efficiency. Technically, it should not make a difference whether the recalcitrant party's misconduct has seriously prejudiced the opposing party. The point is that willful failure to comply with discovery orders is intolerable. Thus, including a prejudice factor might actually serve to encourage contumacious conduct. It tells a party that refusing to comply with perhaps less consequential orders is more acceptable than refusal to comply with other types of orders. Parties should comply with every valid order. General deterrence against noncompliance can only be effective if courts require compliance with every order regardless of consequence. Thus, the proposed test for the Second Circuit does not include a prejudice factor.

4. Attorney Versus Client Misconduct

The Second Circuit should require its district courts to consider whether a discovery failure is occasioned by the attorney or client, as well as the client's awareness of the failure when determining the propriety of imposing a litigation-ending sanction. In spite of the unequivocal message in *Link v. Wabash Railroad Co.*³⁶⁰ that a party selects counsel at its own peril, some circuits have refused to apply this rule in the context of imposing litigation-ending sanctions.³⁶¹ This refusal is based on the conclusion that it is unfair for an innocent client to be deprived of an opportunity to litigate a case on its merits through no fault of his or her own.³⁶² In order to preserve

³⁶⁰ 370 U.S. 626 (1962). In *Link*, a sharply divided Court held:

There is certainly no merit to the contention that dismissal of petitioner's claim because of his counsel's unexcused conduct imposes an unjust penalty on the client. [The client] voluntarily chose this attorney as his representative in the action, and he cannot now avoid the consequences of the acts or omissions of this freely selected agent.

Id. at 633-34.

³⁶¹ See *supra* notes 90-91 discussing the Eighth Circuit; *supra* Part II.B.3.d.

³⁶² See *supra* note 146 for a representative sample of articles and commentaries criticizing the *Link* rule. The District of Columbia Circuit has enunciated three basic justifications for dismissing an action because of counsel's misconduct: (1) dismissal is necessary because the opposing party has been so prejudiced that it

general deterrence and maximize fairness, the Second Circuit should follow suit, despite the fact that this goes against its current policy.³⁶³

It is important when imposing sanctions to ensure that the proper individuals are being sanctioned or deterred.³⁶⁴ Imposing a litigation-ending sanction on a faultless client does not advance general deterrence fairly. Attorneys should not be deterred from discovery abuse at the expense of their innocent clients. It is therefore suggested that prior to levying the harshest sanction available against a client, a court should ensure that the client was either aware of or an active participant in the conduct warranting the severe sanction. In addition, a court should consider whether it would be more useful to punish the attorney in question rather than his or her client.³⁶⁵ One warning or notification is all that is necessary. Once a court is satisfied that the client has notice that his or her attorney's actions will be held against him or her, the client will not later be heard to complain of any ignorance or

would be unfair to require her to proceed; (2) dismissal is appropriate where resort to any lesser sanction would not mitigate the severe burden that the misconduct has placed on the judicial system; or (3) dismissal may serve as an ultimate sanction, aimed at punishing abuses of the system and deterring future misconduct. *Shea v. Donohoe Constr. Co.*, 795 F.2d 1071, 1074 (D.C. Cir. 1986).

³⁶³ The Second Circuit did not consider attorney versus client misconduct in the *Bambu* case. It clearly appears from the record that defendant Gratch was not responsible for the failure to comply with the order or the prior transgressions identified by the magistrate judge in her report and recommendation. In defendant's moving brief before the Second Circuit, it was stated that "Mr. Gratch [client] was unaware of the Magistrate's ruling [discovery order dated August 30, 1991] because he suffered a heart attack." Brief for Defendants at 9. As already discussed *supra* Part IV.A, it was defendant's counsel who improperly instructed the client not to answer deposition questions based on relevance and who failed to attend a settlement conference as clearly ordered by the magistrate judge. This should have been considered by the district court and by the Second Circuit.

³⁶⁴ *Shea*, 795 F.2d at 1077.

³⁶⁵ See, e.g., David W. Pollack, *Sanctions Imposed by Courts on Attorneys Who Abuse the Judicial Process*, 44 U. CHI. L. REV. 619, 640 (arguing that greater use of sanctions against attorneys could provide an effective deterrent); Robert E. Sarazen, *An Ethical Approach to Discovery Abuse*, 4 GEO. J. LEGAL ETHICS 459, 459 (1990) ("A lawyer abuses the discovery process because his personal ethics, coupled with a lack of effective, meaningful deterrent, allow him to continually abuse the process.") (emphasis added). But see Nicholas B. Katzenbach, *Modern Discovery: Remarks from the Defense Bar*, 57 ST. JOHN'S L. REV. 732, 732 (1983) (arguing that even though sanctioning attorneys may have some impact on curbing discovery abuse, it is doubtful that the sanctions are a solution to discovery problems).

unfairness. Numerous commentators support this proposal.³⁶⁶ Although it runs contrary to current views in the Second Circuit, this is an essential factor that all courts should consider prior to depriving a litigant of the chance to defend a case on its merits.

C. *Proposal Summary and Application to Bambu*

Requiring willfulness or fault, examining the history of a party's abuse, and determining the general deterrent effect of a sanction all comport with the Second Circuit's current philosophy regarding discovery sanctions. Assessing whether the abuse is occasioned by the attorney rather than an unknowing client represents a departure from current thinking in the circuit. In its totality, however, the proposed test advances the Second Circuit's policies regarding litigation-ending sanction imposition and ameliorates the deficiencies in the circuit's current approach. An application of this test to the *Bambu* case demonstrates this point.

The result in *Bambu* seems wrong for a number of reasons discussed in Parts IV and V of this Note. A different result might have occurred if the proposed test were applied. First, it is clear that the requisite willfulness or fault existed. The defendants in *Bambu* failed to comply with the discovery order at issue amounting to "fault" as defined by the Second Circuit.³⁶⁷ The second factor could weigh either in favor of or against the defendants. Considering the defense attorney's directions to his client during depositions,³⁶⁸ his failure to appear for a conference,³⁶⁹ and the failure to comply with the

³⁶⁶ See, e.g., Susan Marie Lapenta, Note, *Inryoc, Inc. v. Metropolitan Eng'g Co.: Inexcusable Neglect by Whom?*, 45 U. PITT. L. REV. 695, 696 (1984) (arguing that providing notice of attorney's negligence to client and sanctioning the attorney before entering a default judgment would "take the sting out of cases involving gross attorney neglect").

³⁶⁷ Even though the failure to comply was not deliberate, it can hardly be questioned that ignoring the court order merely because defendants' attorney could not reach his client was grossly negligent. Defendants' attorney could have and should have notified both the opposing party and the magistrate judge of the purported illness.

³⁶⁸ See *supra* notes 246-248 and accompanying text regarding defendants' failure to answer questions during depositions based on relevance.

³⁶⁹ See *supra* note 261 and accompanying text regarding Dunne's failure to attend a conference.

discovery order in a timely fashion,³⁷⁰ it is entirely plausible to conclude that lesser sanctions would not be efficacious. On the other hand, one might be inclined to consider the fact that both parties appeared to be less than forthcoming with discovery information. Accepting the magistrate judge's findings, it can be assumed that the second factor also weighs against the defendants.

Unfortunately, as the records stands, general deterrence was not advanced in the *Bambu* case.³⁷¹ However, this Note suggests that this is partly attributable to the Second Circuit's mixed messages to litigants regarding litigation-ending sanctions—its tough stand but nurturing approach with respect to such issues as warnings and setting specific deadlines.³⁷² In addition, the Second Circuit undermined general deterrence in *Bambu* by likening the sanctioning process to a game of chance, a roll of the dice.³⁷³ Assuming the proposed test had been in place when *Bambu* was decided, general deterrence would have been advanced because questions regarding warnings and specific deadlines would not have been at issue.

The attorney-client consideration in *Bambu* weighs heavily in favor of imposing a less harsh sanction. That is, the misconduct that did, or would, justify a default in the case seems to be entirely that of defendants' attorney. He directed defendant Gratch not to respond to questions during his deposition based on relevance. He failed, without any reason, to appear for a scheduled conference. Finally, he failed to notify the opponents or the court of Gratch's purported inability to comply with the discovery order in question. However, it is important to note that it is not entirely clear whether Gratch was aware of, or actively participated in, the misconduct of his attorney as the magistrate judge, district judge and circuit court were not concerned with such an inquiry. In her report and recommendation, however, the magistrate judge acknowledged that defendants' attorney was mostly to blame for what she deemed to be contumacious conduct warranting a default.³⁷⁴ There-

³⁷⁰ See *supra* Part IV.A complete discussion of events leading up to default judgment in the *Bambu* case.

³⁷¹ See *supra* notes 332-335 and accompanying text.

³⁷² See *supra* notes 207-208, 233.

³⁷³ *Bambu Sales, Inc. v. Ozak Trading Inc.*, 58 F.3d 849, 853 (2d Cir. 1995).

³⁷⁴ See *supra* Part IV.C.1 and accompanying notes.

fore, absent proof that Gratch was specifically notified or warned concerning the unacceptable behavior, a default judgment would not have been appropriate.

Application of the proposed test demonstrates the reasons *Bambu* appears to have been wrongly decided and that its result would likely be different under the proposed test. More importantly, however, it also demonstrates that if a few key facts were different, a default judgment would have seemed perfectly appropriate without the sense that any injustice or unfairness occurred. It is for this reason that the proposed test, or something resembling it, is desirable.

The proposed test effectively balances the competing interests at play when a district court must decide whether to dismiss a case against one party based on a procedural failure rather than on the merits of the case. Judicial discretion is preserved by allowing the district courts to weigh and analyze the competing factors as they see fit. Certainty, consistency and a greater sense of fairness to litigants are also maintained by requiring that each factor be considered and weighed, and by requiring district courts to specify their determinations and findings. It is, therefore, a fitting approach for the Second Circuit to adopt.

CONCLUSION

Entering default judgment against a party for failure to comply with a discovery order is both contemplated and authorized by the Federal Rules of Civil Procedure. The Second Circuit is committed to making certain that litigants coming before its judges follow discovery orders and do not abuse the discovery process. Nonetheless, depriving a litigant of the opportunity to defend a case on its merits is an extreme response to noncompliance with a discovery order.³⁷⁵ In order to maximize fairness, consistency and certainty, a systematic approach to determining the propriety of imposing a litigation-ending sanction is expedient. The result in the *Bambu* case highlights

³⁷⁵ The Fifth Circuit characterized the levying of a harsh sanction as involving a "question of life or death, or to be or not to be We are thus loathe to approve of the dismissal of a case as a sanction . . . without evidence of the maleficent conduct that justifies death." *FDIC v. Conner*, 20 F.3d 1376, 1381, 1383 (5th Cir. 1994) (emphasis added).

the reasons why the Second Circuit would benefit from requiring its district courts to consider a fixed set of factors prior to imposing a litigation-ending sanction on a party under Rule 37(b)(2).

What remains to be decided is whether all the circuits should be required to follow the same test regarding litigation-ending sanctions, and whether Rule 37 should be amended to include this standard test. As criticism regarding discovery abuse mounts,³⁷⁶ and courts increasingly employ severe sanctions to curb the abuse, the critical role Rule 37 will play in federal courts cannot be overstated. Perhaps it is time to reconsider the lack of specificity and guidance in Rule 37(b)(2) with respect to litigation-ending sanctions, and conform it to the process and approach already employed by a majority of circuits.

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³⁷⁶ One need only look at the cover of the November 1995 issue of the *American Bar Association Journal* to see how discovery is being viewed by the bench and bar. The cover states in large, bold, black letters, "HARDBALL DISCOVERY: There are no rules anymore . . ." A.B.A. J., Nov. 1995.

* The author would like to thank Professor Jennifer L. Rosato, Michelle Cucuzza and Benjamin Kessler for their invaluable assistance with earlier drafts.