UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 23-CV-24050-MOORE/Elfenbein

CHERYL WILKERSON,

Plaintiff,

v.

CARNIVAL CORPORATION,

Defendant.
_____/

OMNIBUS REPORT AND RECOMMENDATION ON MOTIONS FOR SANCTIONS

THIS CAUSE is before the Court on Defendant Carnival Corporation's ("Defendant") Motion for Spoliation Sanctions against Plaintiff Cheryl Wilkerson (the "Motion for Spoliation Sanctions"), ECF No. [91], and Defendant's *Ore Tenus* Motion for Sanctions Against Plaintiff's Counsel (the "Motion for Sanctions Against Plaintiff's Counsel"), ECF No. [148]. The Honorable K. Michael Moore referred the Motion for Spoliation to me "to take all necessary and proper action as required by law and/or to issue a Report and Recommendation regarding Defendant's Motion for Sanctions." ECF No. [92].

The Court set the Motion for Spoliation Sanctions for an evidentiary hearing on May 7, 2025, *see* ECF No. [96], ECF No. [140], which continued into May 8, 2025, *see* ECF No. [141], (collectively, the "Hearing"). Upon development of the factual record at the Hearing, Defendant requested additional relief, *ore tenus*, seeking sanctions against Plaintiff's counsel, Aronfeld Trial Lawyers ("the Aronfeld Firm"), for their own discovery violations. *See* ECF No. [148]. The undersigned ordered additional supplemental briefing on Defendant's Motion for Sanctions Against Plaintiff's Counsel. *See* ECF No. [144]; ECF No. [148]; ECF No. [150].

For the reasons explained below, the undersigned respectfully **RECOMMENDS** that the Motion for Spoliation Sanctions, **ECF No. [91]**, and the Motion for Sanctions Against Plaintiff's Counsel, **ECF No. [148]**, be **GRANTED IN PART and DENIED IN PART**.

I. BACKGROUND[1]

This lawsuit arises from Plaintiff's alleged slip and fall aboard Defendant's cruise ship on October 26, 2022, while disembarking the Carnival Glory on a gangway ramp (the "Incident"). *See* ECF No. [19] at ¶13. Plaintiff alleges that the gangway was "unreasonably slippery" and the gangway lacked the adequate anti-slip strip and slip-guard. *See id*. As a result of the "dangerous conditions," Plaintiff "sustained severe injuries that include, but are not limited to, a complex tear of the anterior horn of her right knee, a midbody region lateral meniscus, injuries to her right knee, pain, suffering, and other serious injuries, which require surger(ies) including, but not limited to, a total knee replacement." *See* ECF No. [19] at ¶¶14-15. Plaintiff first retained an attorney to represent her regarding the Incident around November 2022. *See* Day 1 Hr'g. Tr. at 60:12-16. On February 20, 2023, Plaintiff's initial counsel sent a letter of representation to Defendant. *See* ECF No. [91-2]. On April 10, 2023, Defendant sent a preservation demand letter to Plaintiff's initial counsel, specifically demanding that Plaintiff preserve evidence relating to the Incident, including footwear and clothing worn at the time of the Incident. *See* ECF No. [145-2]. In or around October 2023, Plaintiff replaced her initial counsel with her current counsel of record, the Aronfeld Firm. *See* Day 1 Hr'g Tr. at 60:24-61:8.

[1] The Court takes the details it provides in this Section from the Parties' pleadings where the detail is undisputed and from the evidence presented at the evidentiary hearing that occurred on May 7 and 8, 2025 where the detail was disputed and requires a factual finding. *See* ECF No. [91]; ECF No. [99]; ECF No [112]; ECF No. [145]; ECF No. [148]; ECF No. [150]; ECF No. [152]; Rough Hr'g Tr. May 7, 2025 ("Day 1 Hr'g Tr."); Rough Hr'g Tr. May 8, 2025 ("Day 2 Hr'g Tr."); *see also Didie v. Howes*, 988 F.2d 1097, 1105 n.8 (11th Cir. 1993) (implying that a hearing is necessary on a motion for sanctions when there are "contradictory statements in the various motions and responses").

On October 23, 2023, Plaintiff filed this action through the Aronfeld Firm. *See* ECF No. [1]. On January 19, 2024, Defendant propounded its Initial Request for Production to Plaintiff ("First RFP"), which specifically requested that Plaintiff produce "[t]he shoes Plaintiff was wearing at the time of the incident alleged in Plaintiff's Complaint" ("Request 26"). *See* ECF No. [145-4]. On April 18, 2024, Plaintiff served her Responses to Defendant's First RFP, and in her response to Request 26, Plaintiff stated that "Plaintiff is currently in possession. However, Plaintiff will make the items available to her attorney for inspection by Defendant. Discovery is ongoing, and Plaintiff reserves the right to supplement and/or amend her answers." *See id*. During Plaintiff's deposition on April 25, 2024, she testified that she no longer possesses the shoes as she sold them at a yard sale in May or June 2023. *See* Day 1 Hr'g Tr. at 65:21-66:24. On December 3, 2024, Plaintiff served her Supplemental Response to Request 26, which stated: "None in Plaintiff's possession, custody, or control. Discovery is ongoing, and Plaintiff reserves the right to supplement and/or amend her answers." *See* ECF No. [145-5].

On March 17, 2025, Defendant discovered that Plaintiff failed to produce photos of the shoes to Defendant but had produced them to Plaintiff's expert, Dr. Francisco De Caso ("Dr. De Caso"), almost one year prior. *See* Day 1 Hr'g Tr. at 40:16-25. The deadline to exchange expert disclosures in this case was February 20, 2025 while the discovery completion deadline was March 21, 2025. *See* ECF No. [40]. On March 21, 2025, at 5:44 p.m., after the deadline to exchange expert disclosures and the day of the discovery deadline, Plaintiff's counsel informed Defendant that Plaintiff found her shoes. *See* ECF No. [152-3]. On April 11, 2025, Defendant filed the Motion for Spoliation Sanctions, arguing that Plaintiff's misconduct prejudiced Defendant by preventing its liability expert from inspecting the shoes, assessing its interaction with the gangway's slip resistance, and determining whether it was the proximate cause of the alleged fall.

See ECF No. [91]. Accordingly, Defendant requests that this Court sanction Plaintiff by dismissing her claims with prejudice due to her misconduct. *See id*. Alternatively, Defendant seeks a non-rebuttable adverse inference instruction at trial, exclusion of the shoes and related photos at trial, and an award of attorney's fees and costs incurred in bringing the Motion. *See id*.

During the first day of the Hearing, the Court heard testimony for more than six hours from five witnesses: Maurice Vega, Dr. De Caso (Plaintiff's Expert), Cheryl Wilkerson, David J. Martyn (Defendant's Expert), and Abbey Ivey. *See* ECF No. [140]. The testimony continued into May 8, 2025, *see* ECF No. [141], where the Court heard testimony spanning an additional four hours from five more witnesses: Matthias Hayashi, Spencer Aronfeld, Jamie Barrier, and Michael Gordon[2], *see* ECF No. [144]. The witnesses testified as follows:

A. Cheryl Wilkerson

Ms. Wilkerson testified that she was on a Carnival cruise on October 26, 2022, and first retained an attorney in November 2022 to pursue a claim against Defendant. *See* Day 1 Hr'g Tr. at 60:1–6; 60:7–15. She initially hired Daniel Mars of Mars, Mars, and Mars in Mississippi, then switched counsel to the Aronfeld Firm around October 2023. *See id*. at 60:7–15; 61:1–5. According to Ms. Wilkerson, the shoes presented at the Hearing, a pair of Hoka brand sneakers admitted as Exhibit 1, were the ones she wore during the Incident. *See id*. at 129:2-6. Ms. Wilkerson purchased the shoes three to four months before the cruise and wore them daily to her job at Neshoba County Gin, where she routinely got gravel and molasses on the soles. *See id*. at 61:10–19; 62:1–7. Because of that daily wear, she eventually replaced those shoes after the cruise. *See id*. at 62:16–19.

[2] The Court acknowledges that testimony was also elicited from Defendant's counsel, Michael Gordon; however, upon careful consideration, the Court concludes that such testimony is neither relevant nor persuasive to the determination of the issues at hand.

Ms. Wilkerson testified that her family conducts about two or three yard sales a year. *See id*. at 64:16-19. At first, she testified that she sold the shoes at a yard sale in May or June 2023, which was consistent with her deposition testimony. *See id*. at 62:20–25; 65:1–8. She later testified that the subject yard sale actually occurred in December 2022. *See id*. at 64:13-21. Then, Ms. Wilkerson testified that the shoes did not sell at the December 2022 yard sale, and she mistakenly thought that Ms. Barrier, her daughter, donated most unsold items (including the shoes) to a local charity. *See id*. at 64:13-21; 65:1–13. She then explained that Ms. Barrier later found the shoes in the shed at her house sometime in the second half of 2024. *See id*. at 68:1-11; 107:3-7 (stating Ms. Barrier found them in the summer of 2024); 136:15-25 (testifying that Ms. Barrier may have found the shoes in November or December 2025 and that she doesn't "remember a lot of dates and times"). When Ms. Barrier found the shoes, she called Ms. Wilkerson and Ms. Wilkerson immediately called the Aronfeld Firm informing them of the shoes' discovery. *See id*. at 107:8-21; 121:2-21; 122:3-8. She then mailed the shoes to the Aronfeld Firm sometime around March 5 or 8, 2025. *Id.* at 132:9-133:3.

Regarding photographs of the shoes, Ms. Wilkerson stated that Ms. Barrier took two photos in December 2022 to show a potential buyer, but she could not recall the exact date or where the photos were taken. *See id*. at 67:16–25; 71:10–18; 73:1–8. Ms. Wilkerson insisted that she sent her attorneys any photos she had of the shoes when her counsel asked her for them before March 2024. *See id*. at 93:21–94:11; 94:24-95:10; 97:1–8. Throughout her testimony, she could not clarify the timeline surrounding the shoes' possession, the photos, or who took them and was often inconsistent and confused about dates.

B. Jamie Barrier

Ms. Barrier, Plaintiff's daughter, testified that she was with Plaintiff at the time of the

Incident and that the shoes presented at the Hearing, Exhibit 1, were the shoes Plaintiff was wearing during the Incident. *See* Day 2 Hr'g Tr. at 98:15-21; 101:11-20; 109:12-20. According to Ms. Barrier, the shoes remained in essentially the same condition as when her mother wore them on the cruise. *See id*. at 101:11-102:2. After the Incident, Ms. Barrier testified that Plaintiff brought the shoes, along with other items to sell at a yard sale, in early 2023. *See id*. at 102:12-21. When questioned whether the yard sale could have occurred in December 2022, Ms. Barrier confirmed that it could have been at that time, but she was unsure. *See id*. at 102:22-6. After the yard sale, leftover items —including the shoes — were intended to be donated. *See id*. at 103:7-104:15. She believed all leftover shoes had been donated following the yard sale until she found the shoes again in March 2025. *See id*. Ms. Barrier explained that she went through a separation and divorce in early 2024, remarried in February 2025, and during the process of moving her new husband into her house, she cleared out the shed and discovered a box with multiple pairs of shoes. *See id*. at 104:16-105:21. Upon opening the box in mid-March 2025, she recognized the shoes and immediately called her mother to report she had found them. *See id*. She gave the shoes to her mother shortly thereafter. *See id*. Ms. Barrier testified that she was unaware at the time of the yard sale that her mother had retained an attorney or that the shoes were relevant to a legal claim. *See id*. at 115:5-8; 115:23-116:25. She only learned about the legal claim and of the shoes' importance during the first part of 2023, but after the yard sale had occurred. *See id*. She said she did not know the shoes needed to be preserved until sometime later, though she could not specify exactly when she learned this. *See id* at 120:2-14.

As for the photos, Ms. Barrier was shown the photos of the shoes provided to Plaintiff's expert. *See* ECF No. [145-3]. She testified that the first two photos may be cropped versions of pictures she may have taken because her mother and stepfather are in them. *See* Day 2 Hr'g Tr. at

112:11-113:8. Ms. Barrier could not conclusively confirm whether she took them, explaining that any photos she took would typically include her mother's full body, not cropped shots. *See id*. Regarding the third photo, she had no memory of taking it and suggested it may have been taken by her mother, possibly to promote a yard sale. *See id*. at 113:9-114:4.

Ms. Barrier also testified that her mother has struggled with memory in recent years. *See id*. at 99:12-101:7. She described her as someone who often forgets plans, cannot remember dates or sequences of events, and gets frustrated by her own memory lapses. *See id*. She recounted needing to remind her mother of the same things multiple times and acknowledged that Plaintiff has trouble recalling past events with consistency. *See id*.

C. Maurice Vega

Mr. Vega has worked for Defendant for eight years and has served as a Guest and Crew Claims Adjuster since April 2023. Day 1 Hr'g. Tr. at 8:25-9:17. His role involves handling claims, gathering incident details, and negotiating settlements. *See id*. Mr. Vega prepared the April 10, 2023 email, *see* ECF No. [145-1], and the preservation letter sent to Plaintiff's original counsel, instructing them to preserve evidence, such as photos, videos, footwear, and clothing, *see* ECF No. [145-2]. *See id*. at 11:2-12:16. Mr. Vega confirmed that, at the time of the Incident, Defendant would not have requested that Plaintiff preserve the shoes nor would Defendant request to keep the shoes. *See id*. at 18:24-19:2. Mr. Vega also confirmed that, at the time of the Incident, Defendant took photos of the gangway and could have taken photos of the shoes but did not. *See id*. at 17:8-13. He confirmed that any communications regarding Plaintiff's shoes would have been in the April 10, 2023 letter but not before. *See id*. at 21:19-22:2.

D. Abbey Ivey

Ms. Ivey, an attorney formerly employed at the Aronfeld Firm, testified about her limited

involvement in this matter, primarily focused on initial discovery tasks. She prepared and signed Plaintiff's Initial Disclosures on January 30, 2024, *see id*. at 173:6-12, and Plaintiff's Responses to Defendant's First RFP on April 18, 2024, including Request 26, which requested the shoes Plaintiff wore at the time of the Incident, *see id*. at 175:20-176:4, 178:7-20. Ms. Ivey stated that the Initial Disclosures and First RFP Responses were accurate to the best of her knowledge at the time. *See id*. at 174:20-176:13.

Ms. Ivey stated her understanding — based on her conversation with Plaintiff before the lawsuit was filed — was that Plaintiff had the shoes in her possession. *See id*. at 187:9-188:23, 189:6-12. Ms. Ivey relied on this earlier conversation and did not expressly confirm with Plaintiff whether that remained true before signing and serving the Initial Disclosures or the First RFP Responses months later. *See id*. at 174:20-176:13. Ms. Ivey testified that the First RFP requests were sent to Plaintiff for review, and she received no indication from Plaintiff that she no longer had the shoes. *See id*. at 185:22-187:3, 190:20-191:13. She also testified that she advised Plaintiff on the initial call about the importance of preserving the shoes but had no documentation of that call. *See id*. at 187:22-188:5. Ms. Ivey did not participate in preparing the December 2024 Supplemental Responses, which stated that Plaintiff was no longer in possession of the shoes, and she was unaware of what changed between the two responses. *See id*. at 183:16-23.

E. Matthias M. Hayashi

Mr. Hayashi, an attorney at the Aronfeld Firm, testified about his role in the case and the timeline concerning both the shoes and the photos of the shoes. His testimony revealed significant confusion and miscommunication within his firm regarding the possession and disclosure of both items.

As to the shoes, Mr. Hayashi testified that he did not discuss Plaintiff's possession of the

shoes until after Plaintiff's deposition on April 25, 2024, which he attended. *See* Day 2 Hr'g. Tr. at 57:19-58:22. Mr. Hayashi was aware that Plaintiff testified at her deposition that she did not have the shoes and they were sold at a yard sale in the summer of 2023. *See id*. at 58:16-17. Although Plaintiff testified that she did not have the shoes at her deposition, Ms. Ivey sent an email to Defendant's counsel on May 21, 2024, *see* ECF No. [145-6], advising that Plaintiff had the shoes and Mr. Hayashi, who was copied on that email and sat through Plaintiff's deposition, did not correct that misrepresentation. *See id*. at 33:16-36:19. Mr. Hayashi claimed he was unaware that "Request 26" within the email referred to the shoes. *See id*. at 35:1-14. The next day, the Court granted Plaintiff's Amended Unopposed Motion to Stay the case for 120 days and the Parties' tabled their discussion of the shoes. *See* ECF No. [33]; ECF No. [34]. On September 17, 2024, the Court lifted the stay. *See* ECF No. [38]. Mr. Hayashi testified that thereafter, on October 29, 2024, Defendant's counsel inquired about Request 26 and the location of the shoes. *See id*. at 38:1-9, 38:24-39:1. Later that day, Mr. Hayashi conferred with Plaintiff and determined that she did not have the shoes. *See id*. at 38:13-18; 42:15-23. On December 3, 2024, Mr. Hayashi served the First Supplemental Response to Request 26 stating that Plaintiff is not in possession of the shoes. *See* ECF No. [145-5].

Mr. Hayashi testified that the first time Plaintiff told him she had the shoes was between March 21, 2025 and March 26, 2025. *See id*. at 59:1-5. He testified that Plaintiff informed him that her daughter had found the shoes while "clearing out things from her house," and Mr. Hayashi requested that Plaintiff send the shoes to the Aronfeld Firm. *See id*. at 59:6-18. Mr. Hayashi confirmed that the Aronfeld Firm disclosed Plaintiff's possession of the shoes to Defendant's counsel on March 21, 2025. *See id*. at 60:24-61:3, 62:4-20. He stated that Defendant's counsel did not respond to the email informing them that the shoes had been discovered, nor did they

request to inspect the shoes, re-depose Plaintiff, or to extend the expert disclosure deadline. *See id*. at 63:4-22. The Aronfeld Firm received the shoes on March 26, 2025. *See id*. at 55:18-23. Mr. Hayashi testified that Plaintiff's testimony at the Hearing was mistaken and that Plaintiff had actually discovered the shoes in March 2025, not late 2024. *See id*. at 41:4-23.

As to the photos, Mr. Hayashi testified that Plaintiff sent the pictures to the Aronfeld Firm around March 7 or 8, 2024, shortly after Plaintiff spoke with her expert, Dr. De Caso. *See id*. at 18:7-19:19, 48:12-15. The pictures were added to the firm's case management system and may have been forwarded to Dr. De Caso, but Mr. Hayashi was not copied on that communication. *See id*. at 15:25-16:20, 50:25-51:16. Plaintiff re-sent the photos to Mr. Hayashi on October 29, 2024 via text message. *See id*. at 48:9-49:1. Although he acknowledged that the photos should have been disclosed as part of Plaintiff's discovery obligations, he assumed they had already been produced earlier and did not personally verify this. *See id*. at 48:19-49:1. Mr. Hayashi conceded that the photos were not disclosed to Defendant until March 17, 2025, more than one year after the firm received them. *See id*. Mr. Hayashi stated the failure to disclose the photos was inadvertent and not Plaintiff's fault, but her counsel's. *See id*. at 26:15-27:2, 52:1-12. He only realized the oversight during Dr. De Caso's deposition when defense counsel stated they had never seen the photographs. *See id*. at 52:13-23. That same day, Mr. Hayashi supplemented the discovery responses to include the photos. *See id*. at 52:24-53:7.

F. Spencer Aronfeld

Mr. Aronfeld, founder of the Aronfeld Firm, testified that although he is not involved in day-to-day pretrial matters, he supervises his staff and takes responsibility for everything that happens at the firm. *See id*. at 87:19-24, 91:18-92:2. Mr. Aronfeld testified that on March 21, 2025, he personally notified defense counsel upon learning that the shoes were located. *See id*. at

79:5-13, 92:9-18; ECF No. [152-3]. Regarding the photographs of the shoes, Mr. Aronfeld testified that the Aronfeld Firm received them no later than March 8, 2024. *See id*. at 87:5-16. Outside of this, Mr. Aronfeld testified that he has no personal knowledge of the discovery responses or communications with Plaintiff relating to the shoes or the photos. *See id*. at 87:19-24, 88:2-9.

He acknowledged that Plaintiff's testimony at the Hearing was inconsistent with what she told the Aronfeld Firm. *See id*. at 79:17-80:8. Mr. Aronfeld acknowledged that Plaintiff's testimony during her deposition was also inconsistent and, in some instances, inaccurate compared to what she had previously told him. *See id*. at 80:3-8, 83:23-84:14. He characterized her as confused rather than dishonest, emphasizing that while her story varied, he believed she was trying to be truthful. *See id*.

G. Dr. Francisco De Caso (Plaintiff's Expert)

In February 2024, Plaintiff's counsel retained, Dr. De Caso, who is a principal scientist at the University of Miami and founder of the Ibis Group. Day 1 Hr'g Tr. at 25:8-19. He conducted a gangway inspection on March 10, 2024, and in preparation for the inspection, he spoke with Plaintiff by phone on March 7, 2024. *See id*. at 25:20-22. Dr. De Caso asked Plaintiff about the footwear she was wearing during the Incident and requested to inspect the shoes. *See id*. at 26:12-27:15. Plaintiff informed Dr. De Caso that she no longer had the shoes but had photos of them, which she agreed to send to Dr. De Caso. *See id*. at 30:11-21. Dr. De Caso initially misstated that Plaintiff texted him the photos, correcting himself and testifying that paralegal Adrian Baez of the Aronfeld Firm sent them via email on March 8, 2024, after his call with Plaintiff. *See id*. at 32:16-25. Metadata shows the photos were taken in Philadelphia, Mississippi, on March 7 and 8, 2024, just before the inspection. *See id*. at 44:22-45:19. Although Dr. De Caso requested to inspect

Plaintiff's shoes, he testified that the slip resistance of the gangway surface is independent of footwear, and that inspecting Plaintiff's shoes at the time of the fall would not have changed his opinion. *See id*. at 51:8-52:11.

H. David J. Martyn (Defendant's Expert)

Defendant retained Mr. Martyn, a forensic engineer specializing in naval architecture, to conduct a site inspection, perform slip resistance testing, and provide an opinion on the cause of Plaintiff's fall. *See id*. at 146:24-147:21. He conducted his inspection on March 10, 2024, and reviewed Plaintiff's deposition as part of his investigation. *See id*. at 147:24-149:8, 154:10-12. At the time of his report in 2024, he understood that Plaintiff's shoes were unavailable, which he stated prevented him from evaluating whether her footwear was a contributing factor to the slip and fall. *See id*. at 161:6-8. While he emphasized that footwear is a critical component in any slip-and-fall investigation, he acknowledged that the type of shoe worn does not impact the slip resistance coefficient of the gangway surface itself and that his firm does not test shoes. *See id*. at 148:24-149:8, 160:5-161:8. Ultimately, Mr. Martyn stated that the absence of the plaintiff's shoes limited his ability to assess their role in the Incident, but his slip resistance testing of the gangway did not depend on the type of footwear. *See id*. at 160:5-19, 161:20-23.

II. LEGAL STANDARDS

A. Sanctions Under Inherent Judicial Authority

The Eleventh Circuit has "long acknowledged the broad discretion of the district court to impose sanctions." *Flury v. Daimler Chrysler Corp.*, 427 F.3d 939, 944 (11th Cir. 2005) (superseded on other grounds). "This power derives from the court's inherent power to manage its own affairs and to achieve the orderly and expeditious disposition of cases." *Id*. (citing *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43 (1991)). "Accordingly, sanctions for discovery abuses

are intended to prevent unfair prejudice to litigants and to insure the integrity of the discovery process." *Id*. (citing *Gratton v. Great Am. Comm'ns*, 178 F.3d 1373, 1374 (11th Cir. 1999)). "Spoliation sanctions are often imposed under the broad discretion of the district court, which has inherent power to 'manage its own affairs and to achieve the orderly and expeditious disposition of cases.'" *Skanska USA Civil Se. Inc. v. Bagelheads, Inc.*, 75 F.4th 1290, 1311 (11th Cir. 2023) (quoting *Flury*, 427 F.3d at 944). "But sometimes other sources of federal law provide more specific authority," for example, Rule 37 and Rule 26. *See id*. "As a general matter, the imposition of sanctions for failure to provide discovery rests with the sound discretion of the district court." *Stansell v. Revolutionary Armed Forces of Colombia*, 120 F.4th 754, 763 (11th Cir. 2024) (quotation marks omitted).

B. Sanctions Under Federal Rules of Civil Procedure 26 and 37[3]

Rules 26 and 37(c) govern situations in which a party fails to timely disclose evidence. Rule 26(e)(1) requires parties to timely supplement or correct prior disclosures or discovery responses if they learn that the original information was materially incomplete or inaccurate and the new information has not otherwise been shared. *See* Fed. R. Civ. P. 26(e)(1). Additionally, Rule 26(g)(1) mandates that all discovery disclosures and responses be signed by an attorney or unrepresented party, certifying that, after reasonable inquiry, the information is complete and accurate, legally justified, not submitted for improper purposes, and proportionate to the needs of the case. *See* Fed. R. Civ. P. 26(g)(1). Subsection (g)(3) states that "[i]f a certification violates this rule without substantial justification, the court, on motion or on its own, must impose an

[3] The Court recognizes that the alleged spoliation could, at first glance, be characterized as a matter outside the scope of discovery, as Plaintiff's efforts to sell and donate the shoes occurred prior to the commencement of litigation. Nevertheless, because the discovery exchanged between the Parties clearly established that the alleged spoliation at issue arose pursuant to the discovery procedures, the Court finds that the issue constitutes a "dispute[ ] related to discovery" and therefore falls within the purview of Local Rule 26.1(g).

appropriate sanction on the signer, the party on whose behalf the signer was acting, or both. The sanction may include an order to pay the reasonable expenses, including attorney's fees, caused by the violation."

C. Standard for Spoliation Sanctions

The Eleventh Circuit's standard for spoliation sanctions is bad faith, but "even if bad faith were shown, the court's decision not to impose sanctions would be appropriate if 'the practical importance of the evidence'" was minimal. *Tesoriero v. Carnival Corp.*, 965 F.3d 1170, 1183–84 (11th Cir. 2020) (quoting *Flury*, 427 F.3d at 945). "When deciding whether to impose sanctions, a number of factors are relevant: '(1) whether the party seeking sanctions was prejudiced as a result of the destruction of evidence and whether any prejudice could be cured, (2) the practical importance of the evidence, (3) whether the spoliating party acted in bad faith, and (4) the potential for abuse if sanctions are not imposed.'" *Tesoriero*, 965 F.3d at 1184 (quoting *ML Healthcare Servs., LLC v. Publix Super Mkts., Inc.*, 881 F.3d 1293, 1307 (11th Cir. 2018) (quoting *Flury*, 427 F.3d at 945)).

"Spoliation sanctions — and in particular adverse inferences — cannot be imposed for negligently losing or destroying evidence." *Tesoriero*, 965 F.3d at 1184. "Indeed, 'an adverse inference is drawn from a party's failure to preserve evidence only when the absence of that evidence is predicated on bad faith.'" *Id*. (quoting *Bashir v. Amtrak*, 119 F.3d 929, 931 (11th Cir. 1997)). "And bad faith 'in the context of spoliation, generally means destruction for the purpose of hiding adverse evidence.'" *Id*. (quoting *Guzman v. Jones*, 804 F.3d 707, 713 (5th Cir. 2015)). "This consideration is key in evaluating bad faith because the party's reason for destroying evidence is what justifies sanctions (or a lack thereof)." *Id*. "Mere negligence is not enough, for

it does not sustain an inference of consciousness of a weak case." *Id*. (quoting *Vick v. Tex. Emp't Comm'n*, 514 F.2d 734, 737 (5th Cir. 1975) (internal quotations omitted)).

D. Sanctions Under Federal Rule of Civil Procedure 41

Under Rule 41(b), a district court may dismiss a complaint with prejudice "*only* when: (1) a party engages in a clear pattern of delay or willful contempt (contumacious conduct); and (2) the district court specifically finds that lesser sanctions would not suffice." *Betty K Agencies, Ltd. v. M/V MONADA*, 432 F.3d 1333, 1338 (11th Cir. 2005) (quotation marks omitted) (emphasis in original). The Eleventh Circuit has cautioned lower courts, stating:

> the severe sanction of dismissal—with prejudice or the equivalent thereof—should be imposed "only in the face of a clear record of delay or contumacious conduct by the plaintiff." Moreover, such dismissal is a sanction of last resort, applicable only in extreme circumstances, and generally proper only where less drastic sanctions are unavailable. A finding of such extreme circumstances necessary to support the sanction of dismissal must, at a minimum be based on evidence of willful delay; simple negligence does not warrant dismissal.

McKelvey v. AT & T Technologies, Inc., 789 F.2d 1518 (11th Cir.1986); *see Beavers v. Am. Cast Iron Pipe Co.*, 852 F.2d 527, 530–31 (11th Cir. 1988). Additionally, "sanctions of last resort — such as dismissals or default judgments — are appropriate only when less drastic sanctions would not ensure compliance with the court's orders." *Hornady v. Outokumpu Stainless USA, LLC*, 118 F.4th 1367, 1378 (11th Cir. 2024) (quotation marks omitted).

III. DISCUSSION

As explained above, Defendant contends that Plaintiff and her counsel's misconduct has significantly prejudiced its defense, particularly by depriving its liability expert of the opportunity to inspect the footwear central to evaluating the proximate cause of Plaintiff's fall. As a result, Defendant maintains that dismissal of Plaintiff's claims with prejudice is the only appropriate remedy. In the alternative, Defendant requests a non-rebuttable adverse inference jury instruction

based on Plaintiff's willful destruction of the shoes, preclusion of any reference to or use of the allegedly "found" shoes and associated photographs at trial, and an award of attorney's fees and costs incurred in preparing the Motion for Spoliation Sanctions.

Additionally, Defendant seeks sanctions against Plaintiff's counsel for their repeated discovery violations throughout the case relating to the shoes and the photos. In addition to fees and costs in bringing the Motion for Spoliation Sanctions, Defendant requests the Court award its attorney's fees and costs incurred in bringing its Motion for Sanctions Against Plaintiff's Counsel and in preparing for and attending the Hearing. Defendant argues that the Aronfeld Firm should be held jointly and severally liable for any monetary sanctions imposed on Plaintiff and the sanctions against the Aronfeld Firm do not preclude or substitute the sanctions warranted against Plaintiff for spoliation.

Although the Court believes Plaintiff and her counsel's misconduct has prejudiced Defendant, the Court does not find bad faith or an inability to cure sufficient to warrant dismissal. The Court does find, however, other sanctions necessary to remedy Defendant's prejudice and deter future misconduct by Plaintiff and her counsel.

A. Motion for Spoliation Sanctions (ECF No. [91])

As previously stated, the Eleventh Circuit's standard for imposing spoliation sanctions requires the weighing of several factors: "(1) whether the party seeking sanctions was prejudiced as a result of the destruction of evidence and whether any prejudice could be cured, (2) the practical importance of the evidence, (3) whether the spoliating party acted in bad faith, and (4) the potential for abuse if sanctions are not imposed." *Tesoriero*, 965 F.3d at 1184; *ML Healthcare*, 881 F.3d at 1307; *Flury*, 427 F.3d at 945. The Court finds this is the appropriate standard for analyzing the imposition of spoliation sanctions in this matter.

The Court does not find that involuntary dismissal under Rule 41(b) is warranted here.[4] As the Eleventh Circuit has consistently held, dismissal with prejudice is a "sanction of last resort," appropriate "only in the face of a clear record of delay or contumacious conduct by the plaintiff." *McKelvey*, 789 F.2d at 1520; *Betty K Agencies*, 432 F.3d at 1338. Moreover, the Court must specifically find that "lesser sanctions would not suffice." *Betty K Agencies*, 432 F.3d at 1338. As further explained below, there is no evidence of a clear pattern of delay or willful disobedience rising to the level of contumacious conduct. Rather, Plaintiff's conduct at issue constitutes a narrow and curable discovery violation, which — while requiring correction — does not reflect the type of extreme or willful disregard of the Court's authority necessary to support dismissal. *See Beavers*, 852 F.2d at 530–31 ("simple negligence does not warrant dismissal"). The Court finds that lesser sanctions would be adequate to address the issue and ensure compliance moving forward. *See Hornady*, 118 F.4th at 1378. Accordingly, Rule 41(b) dismissal is not appropriate under these circumstances and finds the applicable standard is the Eleventh Circuit's standard for spoliation sanctions.

1. No Evidence that Plaintiff Acted in Bad Faith

Given that the Eleventh Circuit regards bad faith as the dominant consideration in determining the propriety of spoliation sanctions, the Court begins its inquiry with this factor. *Tesoriero*, 965 F.3d at 1183 (stating that the standard for spoliation sanctions is bad faith). Absent evidence of bad faith, a district court should not impose sanctions for spoliation. *See id*. at 1184.

[4] Defendant makes passing reference to Rule 41(b) in its Motion for Spoliation Sanctions but fails to adequately develop this argument. Additionally, Defendant failed to raise its argument under Rule 41(b) at the Hearing. Accordingly, the Court finds that this argument was not properly preserved, but even if Defendant preserved it, the Court has addressed why Rule 41(b) does not apply. *See Sapuppo v. Allstate Floridian Ins. Co.*, 739 F.3d 678, 681 (11th Cir. 2014) ("We have long held that an appellant abandons a claim when he either makes only passing references to it or raises it in a perfunctory manner without supporting arguments and authority.")

"[B]ad faith in the context of spoliation, generally means destruction for the purpose of hiding adverse evidence." *Id*. (quoting *Guzman v. Jones*, 804 F.3d 707, 713 (5th Cir. 2015) (internal quotations omitted)). "This consideration is key in evaluating bad faith because the party's reason for destroying evidence is what justifies sanctions (or a lack thereof)." *Id*. "Mere negligence is not enough, for it does not sustain an inference of consciousness of a weak case." *Id*. (quoting *Vick*, 514 F.2d at 737) (internal quotations omitted).

In this case, the record does not support a finding that bad faith motivated Plaintiff's failure to preserve the shoes. Defendant contends that Plaintiff knowingly made misrepresentations about her possession of the shoes, failed to preserve the shoes, and deliberately hid the shoes from it. The record, however, indicates that Plaintiff's delayed disclosure stemmed from her misunderstanding and lack of appreciation for the legal significance of the shoes at the relevant time. This is evidenced by the eventual disclosure of the shoes as they were not truly destroyed but rather belatedly located and produced. Upon realizing she had possession of the shoes, Plaintiff promptly informed her counsel, who in turn immediately informed Defendant's counsel. Plaintiff's prompt disclosure upon discovering that her daughter still had the shoes underscores a lack of intent to conceal adverse evidence, weighing against a finding of bad faith.

Additionally, the record reflects that, while Plaintiff may be an inaccurate historian, this does not equate to deliberate falsehood or an effort to conceal evidence. While there are no specific criteria for assessing credibility, factfinders often look to a witness's demeanor, tone, body language, candor, and responsiveness; the inherent plausibility or implausibility of the witness's testimony; the consistency of the witness's testimony with other record evidence; any inaccuracies in the witness's testimony; and the context and atmosphere within which the witness testifies. *See League of Women Voters of Fla. Inc. v. Fla. Sec'y of State*, 66 F.4th 905, 938 (11th Cir. 2023)

(crediting a trial court's determination, based on a witness's "'face and body language,' over Zoom, that the witness was lying"); *Reiterman v. Abid*, 26 F.4th 1226, 1234–35 (11th Cir. 2022) (noting that "variations in demeanor and tone of voice . . . bear so heavily on the listener's understanding of and belief in what is said" (quoting *Anderson v. City of Bessemer City*, 470 U.S. 564, 575 (1985)); *Amlong & Amlong, P.A. v. Denny's, Inc.*, 500 F.3d 1230, 1245–46 (11th Cir. 2007); *Chen v. U.S. Att'y Gen.*, 463 F.3d 1228, 1231 (11th Cir. 2006); *Rice v. Collins*, 546 U.S. 333, 343 (2006) (Breyer, J., concurring) (noting "the factors that underlie credibility: demeanor, context, and atmosphere"). Having observed Plaintiff's testimony and demeanor, the Court finds Plaintiff to be inconsistent and imprecise about details and in her recollections as to when things occurred, but ultimately sincere in her testimony as to whether certain events took place. *See, e.g.*, *United States v. Ramirez-Chilel*, 289 F.3d 744, 749 (11th Cir. 2002) (valuing the ability to "personally" observe testimony); *Viehman v. Schweiker*, 679 F.2d 223, 227–28 (11th Cir. 1982) (valuing the "ability to view first-hand the demeanor of the witness").

Ms. Barrier, who the Court found credible, provided context for Plaintiff's inconsistent statements and corroborated Plaintiff's general version of events as it relates to the whereabouts of the shoes. Ms. Barrier's testimony demonstrated that the considerable lapse of time, along with the large quantity of items offered for sale at the yard sale and stored in the shed, reasonably contributed to both her and Plaintiff's confusion as to whether the box containing the shoes involved in the Incident (along with other shoes not sold during the yard sale) were donated or stored. *See* Day 2 Hr'g Tr. at 106:17-18; *id*. at 110:2-10; *id*. at 111:12-13; Day 1 Hr'g Tr. at 127:1-5-10. Ms. Barrier's testimony further underscores that much of the confusion arose from her and Plaintiff's failure to appreciate the significance of the shoes or the necessity of preserving them at the time of the yard sale. *See* Day 2 Hr'g Tr. at 109:4-8; *id*. at 115:5-8; *id*. at 115:23-116:25; *id*.

at 117:8-12; *id*. at 120:2-14; Day 1 Hr'g Tr. at 126:21-127:5. This supports the inference that Plaintiff and Ms. Barrier paid little attention to the shoes' whereabouts immediately after the yard sale. The shoes' lack of legal significance to Ms. Barrier plausibly explains why she could not specify the exact date of the yard sale involving the shoes, when she learned about her mother's legal claim, or when she was first made aware that the shoes should have been preserved. Moreover, Ms. Barrier was open about these limits of her recollection. This kind of candor shows she is not attempting to tailor her testimony to fit a legal narrative. Ms. Barrier's testimony demonstrates that Plaintiff's failure to disclose the shoes earlier was not due to bad faith or intentional misconduct, but a failure to recognize the shoes' legal relevance.

Additionally, the Court credits Ms. Barrier's testimony for a more accurate timeline in the shoes' chain of custody. Ms. Barrier corroborated some of Plaintiff's muddled testimony and provided a detailed and consistent account of the shoes' location. Her testimony indicates that her family has held yard sales for at least the past ten years, *see* Day 2 Hr'g Tr. at 108:10-14, and they often took place more than once a year, *id*. at 102:15-17; *id*. at 102:25-103:6; *id*. at 104:5-6. She testified that her family has consistent procedures for yard sales whereby her family members, including Plaintiff, bring various household goods to her shed to store them for future yard sales. *See id*. at 102:9-10; *id*. at 103:12-20; *id*. at 106:25-107:23; *id*. at 108:10-17; *id*. at 114:12-20; *id*. at 118:25-119:3. If items do not sell at a yard sale, the family boxes the leftover items, which are either donated or stored in the shed for future yard sales. *See id*. at 108:7-9; *id*. at 121:9-16. The family does not organize the unsold items by family member but places an entire category of items into one box, including shoes. *See id*. at 118:23-119:3. Ms. Barrier testified that the same occurred here. *See id*.

She testified that the first yard sale after the Incident in October 2022 likely occurred in the first quarter of 2023 but could have also been in November or December 2022. *See id*. at 102:15-103:6. At some point after the Incident but before the yard sale, Plaintiff brought various items, including the shoes, to Ms. Barrier's house for a future yard sale, as is standard procedure for the family. *See id*. at 102:8-15; *id*. at 107:24-108:9. Ms. Barrier testified that all of the unsold shoes from this particular yard sale were intended to be donated,[5] but she did not remember any decision made directly as to the subject shoes. *See id*. at 107:24-108:9; *id*. at 119:12-17. Ms. Barrier's testimony demonstrates a logical and routine sequence of events that is consistent with the way Plaintiff's family handles retired household goods. Moreover, her timeline explains why Plaintiff was unaware of the shoes' significance because the yard sale likely happened before Defendant sent the preservation letter to Plaintiff's initial counsel.

Additionally, Ms. Barrier's testimony concerning the circumstances and timing of the subsequent discovery of the shoes provides greater clarity to the timeline of events. She testified that she underwent a divorce in early 2024, remarried in February 2025, and only rediscovered the shoes while clearing out a shed in preparation for her new husband's move-in. Importantly, Ms. Barrier did not realize she still had the shoes until she rediscovered them during the non-routine clean-out in March 2025. *See id*. at 121:9-16. The timing and context of this discovery is consistent with other witness testimony and documentary evidence in the case, such as Plaintiff's communication with her counsel upon the discovery of the shoes and Plaintiff's counsel's disclosure to Defendant of the shoes' discovery.[6]

[5] Both Ms. Barrier and Plaintiff testified that they initially believed the box of shoes, including the subject shoes, had been donated. *See* Day 2 Hr'g Tr. at 119:12-17; Day 1 Hr'g Tr. at 105:21-107:5.

[6] The Court notes that the metadata associated with the photos of the shoes reflects a timestamp of March 7 and 8, 2024, but Defendant did not offer forensic testimony to authenticate or explain these timestamps.

In sum, Ms. Barrier's testimony supports the conclusion that Plaintiff's failure to produce the shoes to Defendant was not the product of bad faith or intentional misconduct but rather a series of misunderstandings about their relevance and whereabouts. Accordingly, the record does not support a finding that bad faith or an intent to conceal adverse evidence motivated Plaintiff's failure to produce the shoes during discovery. The Court concludes that these actions are more appropriately characterized as negligent rather than willful attempts to destroy or withhold unfavorable evidence.

2. Plaintiff's Failure to Preserve Resulted in Prejudice to Defendant, But the Harm is Curable

Defendant argues it has been prejudiced because it was unable to determine if Plaintiff's shoes were a causal factor in her slip and fall, preventing it from exploring and potentially developing a viable defense. While Defendant's frustration is not unwarranted given the timing of Plaintiff's belated disclosure, the Eleventh Circuit has made clear that a finding of prejudice must consider not only the loss of evidence but also whether such prejudice is curable. *See Flury*, 427 F.3d at 946. In this case, although Defendant's frustration is understandable, the imposition of the severe sanctions sought is not justified, as any alleged prejudice is both curable and, to some extent, self-inflicted.

First, Defendant claims Plaintiff's late disclosure of her shoes prejudiced it, asserting that the shoes may have provided a viable defense had its expert been able to inspect them earlier. But this is speculative. This is not the sort of case where the unpreserved evidence clearly would have resolved a crucial issue in the case. There is no evidence in the record that Defendant's expert would have concluded that Plaintiff's shoes actually caused or contributed to her fall. *See* Day 1

See Day 1 Hr'g Tr. at 44:22-45:19. Such metadata is susceptible to manipulation and, standing alone, does not reliably establish the date on which the photographs were originally taken, as opposed to the date on which they may have been transmitted, altered, resaved, or captured via screenshot.

Hr'g Tr. at 161:6–8 (Mr. Martyn stating he could not assess the role of the shoes due to their unavailability); *id*. at 160:5–161:8 (Mr. Martyn acknowledging footwear is important but explaining his firm does not test shoes); *id*. at 160:5–19, 161:20–23 (Mr. Martyn agreeing that slip resistance testing did not depend on shoes). Notably, both Parties' experts testified that the shoes were not material to their respective analyses of the gangway's slipperiness. *See id.* at 51:8–52:11 (Dr. De Caso stating inspection of shoes would not have changed his opinion); *id*. at 160:5–161:8 (Mr. Martyn noting surface slip resistance was tested independently of footwear). While both requested to see the shoes, it was for the limited purpose of analyzing whether the footwear played any contributing role. *See id*. at 26:12–27:15, 161:6–8.

Moreover, unlike in *Flury*, where the plaintiff permanently disposed of the sole piece of physical evidence essential to the defendant's ability to mount a defense, the evidence here was not destroyed. Plaintiff located the shoes and her counsel promptly offered to cure the situation by extending the expert disclosure deadline, offering a third deposition of Plaintiff, and facilitating any necessary inspection. *See* Day 2 Hr'g Tr. at 60:24–61:3 (shoes disclosed March 21, 2025); *see also* ECF No. [152-3] (March 21, 2025 disclosure of shoes by Aronfeld Firm). Defendant chose not to avail itself of any of these options, despite having more than three months before trial and three weeks before the summary judgment deadline to seek relief or update its expert's opinions. *See* Day 2 Hr'g Tr. at 63:4–22 (Mr. Hayashi testifying Defendant's counsel never requested inspection, re-deposition, or deadline extension after being informed of shoes). This inaction undermines any claim of incurable prejudice. Accordingly, even if the shoes were ultimately important to Defendant's defense in this case, which remains unknown at this time, any prejudice was readily curable and could have been addressed through simple procedural steps.

Here, the shoes exist, the defense was offered every opportunity to access them, and their failure to do so was a strategic decision — not the result of spoliation.

In support of this factor, Defendant cites to various cases for the proposition that late disclosure may constitute incurable prejudice. *See* Day 2 Hr'g Tr. at 145:9-12 (citing to *UMG Recordings, Inc. v. Vital Pharm., Inc.*, No. 21-60914-CIV, 2022 WL 18023239, at *1 (S.D. Fla. Aug. 11, 2022), *aff'd,* No. 21-CV-60914-CIV, 2022 WL 18023249 (S.D. Fla. Sept. 30, 2022)); ECF No. [91] at 5 (citing to *Anheuser-Busch, Inc. v. Nat. Beverage Distribs.*, 69 F.3d 337, 342 (9th Cir. 1995); *Laukus v. Rio Brands, Inc.*, 292 F.R.D. 485, 510-11 (N.D. Ohio 2013)). However, none of these cases are remotely similar to the factual scenario presented here. In *UMG Recordings*, a copyright infringement action, the plaintiffs successfully demonstrated ownership of the musical works used in 140 videos, resulting in partial summary judgment in their favor. *See* 2022 WL 18023239 at *1. The defendants withheld disclosure of an additional 100 allegedly infringing videos until after the summary judgment motion had been filed. *See id*. The court found that the untimely production denied plaintiffs the opportunity to seek adjudication of those claims prior to trial and concluded that the defendants acted in bad faith by failing to preserve and timely disclose critical evidence. *See id*. at *2. In *Anheuser-Busch,* the defendant only produced the undisclosed documents after trial, warranting dismissal of its counterclaims. 69 F.3d at 342. And in *Laukus*, the undisclosed evidence was finally disclosed after the court ruled on the motions for summary judgment, after the appeal of those motions, after the mediation deadline, and after pre-trial motions deadline. 292 F.R.D. at 510-11. Unlike in these cases, Plaintiff here disclosed the shoes three months before trial and three weeks prior to the summary judgment deadline. This timing is critical. In contrast to the cited cases, where critical evidence was withheld until after dispositive motions were filed or even after trial proceedings had begun, the timing of Plaintiff's

disclosure, while late, still provided Defendant the opportunity to seek relief from the Court to investigate, depose witnesses, or provide supplemental expert opinions if needed.

Ultimately, this factor weighs against the extreme sanction of dismissal because Defendant is not irreparably foreclosed from defending itself. The Court, however, finds that Defendant was sufficiently prejudiced to warrant a lesser sanction against Plaintiff — one that can deter future misconduct and that can cure Defendant's prejudice. Specifically, the Court can deter future misconduct by precluding Plaintiff from using the shoes in its expert's analysis and testimony at trial. And the Court can cure the prejudice by reopening discovery for the limited purpose of allowing Mr. Martyn, Defendant's expert, to inspect the shoes and amend his expert report, if necessary, to address the impact of the shoes on his opinions, and allow him to testify about any such supplemental opinion at trial.

3. The Shoes' Practical Importance Has Yet to Be Determined

"And even if bad faith were shown, the court's decision not to impose sanctions would be appropriate if 'the practical importance of the evidence' was minimal." *Tesoriero*, 965 F.3d at 1184 (quoting *Flury*, 427 F.3d at 945). Here, neither party's expert testified that Plaintiff's shoes were crucial to the analysis of the slipperiness of the gangway. *See* Day 1 Hr'g Tr. at 51:8–52:11 (Dr. De Caso stating that inspecting Plaintiff's shoes would not have changed his opinion); *id.* at 160:5–161:8 (Mr. Martyn stating his slip resistance testing did not depend on the type of footwear and that his firm does not test shoes). Both experts stated that the presence or condition of the shoes would not affect their evaluation of the gangway's slipperiness. *See id.* However, both experts specifically requested to examine the shoes to determine whether the shoes themselves could have contributed to Plaintiff's fall. *See id.* at 26:12–27:15, 161:6–8. Accordingly, the shoes hold potential relevance to Defendant's defense. But without the inspecting the shoes, Defendant

cannot adequately assess or test the theory that the shoes contributed to the Incident, thus impairing Defendant's ability to develop an additional defense.

That said, the importance of the shoes remains inconclusive because Defendant chose not to inspect them after they were made available. *See* Day 2 Hr'g Tr. at 63:4–22. The failure to inspect the shoes leaves open the question of whether they would have indeed provided a viable defense. Accordingly, the practical importance of the evidence cannot be definitively determined given Defendant's own inaction. Nevertheless, their relevance to the question of whether they contributed to the slip and fall suggests they carry practical importance, and Defendant should have the opportunity to explore this defense.

4. There Is Sufficient Potential for Abuse If Sanctions Are Not Imposed

The final *Flury* factor asks whether there is a significant potential for abuse if the Court declines to impose sanctions. The answer here is unequivocally yes. Plaintiff's failure to preserve the shoes, and their late disclosure, undermined the integrity of the discovery process and created monetary prejudice to Defendant. If left unsanctioned, such conduct would signal to litigants that the duty to preserve evidence carries no consequence. Plaintiff had a duty to preserve the shoes as early as November 2022 when she initially retained counsel for the Incident. Although no bad faith was found regarding the failure to preserve the shoes, this does not negate Plaintiff's duty. Plaintiff's failure to preserve the shoes, although curable, caused prejudice, and the risk of abuse is real. Allowing such behavior to go unaddressed could incentivize litigants to delay disclosure of key physical evidence until after expert deadlines pass, thereby strategically disadvantaging opposing parties. While dismissal is not appropriate here given the curability of the harm and the remedial offers made, deterrence demands a sanction.

Accordingly, the undersigned respectfully **RECOMMENDS** that Defendant's Motion for Spoliation Sanctions, **ECF No. [91]**, be **GRANTED in part and DENIED in part**. Specifically, the undersigned **RECOMMENDS** that the Court briefly reopen discovery for the limited purpose of allowing Defendant's expert, David Martyn, to examine the shoes and amend his expert report, if necessary, to address the impact of the shoes on his opinions and allow him to testify about any such supplemental opinion at trial. Additionally, the undersigned **RECOMMENDS** that Plaintiff be precluded from allowing Plaintiff's expert, Dr. Francisco De Caso, from testifying at trial about the impact of the shoes on his opinions. Finally, the undersigned **RECOMMENDS** that the Court award reasonable attorneys' fees and costs incurred in connection with briefing and arguing the Motion for Spoliation and the Hearing, as well as fees for Defendant's expert to prepare a supplemental report.

B. *Ore Tenus* Motion for Sanctions Against Plaintiff's Counsel (ECF No. [148])

Defendant argues that sanctions are warranted against the Aronfeld Firm for discovery violations under the Court's inherent authority, Rule 26(g), and Rule 37(d)(1). Specifically, Defendant asks the Court to find that the Aronfeld Firm is subject to sanctions under the Court's inherent authority because it waited to disclose Plaintiff's possession of the shoes until the last day of the discovery period. Next, Defendant seeks sanctions under Rule 37(d)(1) for the Aronfeld Firm's failure to timely produce the photographs of the shoes during discovery. Finally, Defendant seeks sanctions for the Aronfeld Firm's failure to make a reasonable inquiry as required by Rule 26(g)(1) when certifying Plaintiff's Responses to the First RFP and her Supplemental Responses. The Court analyzes whether sanctions are appropriate against the Aronfeld Firm under each of these standards.

1. Plaintiff's Counsel Did Not Act In Bad Faith or Vexatiously When It Disclosed the Shoes

Defendant first asks the Court to sanction the Aronfeld Firm under its inherent authority for the firm's belated disclosure of Plaintiff's possession of the shoes. There is no doubt that the Court has "an inherent power to regulate litigation and sanction the parties, as well as their counsel, for abusive practices." *See Brandt v. Magnificent Quality Florals Corp.*, No. 07-20129-CIV-HUCK, 2009 WL 899925, at *4 (S.D. Fla. Mar. 31, 2009), *aff'd,* 371 F. App'x 994 (11th Cir. 2010) (citations omitted). Indeed, the common law recognizes "the power of any court to manage its affairs which necessarily includes the authority to impose reasonable and appropriate sanctions upon errant lawyers practicing before it." *Id.* (citing *Malautea v. Suzuki Motor Company, Ltd.,* 987 F.2d 1536 (11th Cir. 1993)). But "[t]he key to unlocking a court's inherent power is a finding of bad faith." *Barnes v. Dalton*, 158 F.3d 1212, 1214 (11th Cir. 1998) (citing *In re Mroz,* 65 F.3d 1567, 1575 (11th Cir.1995)). "A finding of bad faith is warranted where an attorney knowingly or recklessly raises a frivolous argument, or argues a meritorious claim for the purpose of harassing an opponent. A party also demonstrates bad faith by delaying or disrupting the litigation or hampering enforcement of a court order." *Id.* (quoting *Primus Auto. Fin. Servs., Inc. v. Batarse,* 115 F.3d 644, 649 (9th Cir.1997)). But, given the potency of its powers, the court must exercise discretion and restraint when exercising its inherent authority. *See Brandt*, 2009 WL 899925 at *4. Within that discretion, a court can determine the appropriate sanction for abusive conduct, including the assessment of attorneys' fees and costs against a party, attorneys, or both when it finds that either has "acted in bad faith, vexatiously, wantonly, or for oppressive reasons." *Id.* (citing *Allapattah Servs., Inc. v. Exxon Corp.*, 372 F. Supp. 2d 1344, 1373 (S.D. Fla. 2005)).

Here, based upon a careful review of the testimony adduced during the Hearing, the Court concludes that sanctions are not warranted under its inherent authority. Defendant argues that

sanctions are appropriate because Plaintiff disclosed her shoes to her counsel in late 2024 and her lawyers failed to disclose this to Defendant for three months, which was after the expert disclosure deadline and on the evening of the discovery cutoff. Much for the same reasons the Court finds that Plaintiff did not intentionally delay the disclosure of the shoes, the Court also finds that the Aronfeld Firm did not act in bad faith when it disclosed the shoes on the last day of the discovery period. As previously stated, the evidence does not support Plaintiff's testimony that the shoes were located in late 2024. Based on the totality of the record and the credibility of witness testimony, the Court finds that Plaintiff did not, in fact, locate the shoes until March 2025 when her daughter discovered them in her shed. Upon learning of this development, Plaintiff's counsel promptly notified Defendant and immediately offered a variety of remedies, including: (1) making the shoes available for inspection; (2) offering a third deposition of Plaintiff; and (3) extending the expert disclosure deadline to allow Defendant's expert to amend his report. *See* Day 2 Hr'g Tr. at 60:24–61:3; *id*. at 62:4–20; *id*. at 63:4–22. There is no doubt that there was a frustrating comedy of errors here as it relates to the belated disclosure of the shoes by Plaintiff and that Defendant has been prejudiced as a result. For that reason, the Court is recommending measures to cure that prejudice. Those errors, however, do not rise to the level of bad faith by the Aronfeld Firm and, without such a finding of bad faith, the Court declines to unlock its power to sanction counsel under its inherent authority.

2. Plaintiff's Counsel Did Not Violate Rule 37(d)(1) By Failing to Timely Produce the Photographs

Defendant next asks the Court to sanction the Aronfeld Firm under Rule 37(d)(1) for its failure to timely produce the photographs of the shoes — photographs it had in its possession for more than one year before disclosing them and that the firm provided to its expert witness. Rule 37(d)(1) provides as follows: "[t]he court where the action is pending may, on motion, order

sanctions if: (i) a party or a party's officer, director, or managing agent—or a person designated under Rule 30(b)(6) or 31(a)(4)— *fails*, after being served with proper notice, *to appear for that person's deposition*; or (ii) a party, after being properly served with *interrogatories under Rule 33 or a request for inspection under Rule 34* , fails to serve its answers, objections, or written response." Fed. R. Civ. P. 37(d)(1) (emphasis added). If a party fails to act accordingly, then a court may impose any of the sanctions included in Rule 37(b)(2)(A)(i)-(vi). *See* Fed. R. Civ. P. 37(d)(3). In addition to or instead of such sanctions, a court "must require the party failing to act, the attorney advising the party, or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the failure was substantially justified." *Id.*

In its Supplemental Brief, ECF No. [148], Defendant attempts to fit a square peg into a round hole by asking this Court to sanction the Aronfeld firm under Rule 37(d)(1) for the failure to produce the photographs in discovery. To support its argument, Defendant states that "Plaintiff's failure to provide the photographs in Plaintiff's initial disclosures pursuant to Rule 26 despite sending same to its expert witness, or in Plaintiff's response to Carnival's request for production warrants sanctions under Rule 37(d)." Starting with the first argument — Plaintiff failed to provide the photographs in its Rule 26 initial disclosures or any supplements to such disclosures — Rule 37(d)(1) does not contemplate the imposition of sanctions for the failure to produce documents in Rule 26(a)(1) disclosures. The Rule applies to the failure to act in three scenarios, none of which include Rule 26(a)(1) initial disclosures. It specifies that sanctions may be awarded against the party failing to act or the attorney advising the party, or both, for (1) a party's failure to appear at a deposition, (2) a party's failure to respond to interrogatories served under Rule 33, or (3) a party's failure to respond to a request for inspection served under Rule 34. Although the Court agrees that the Aronfeld Firm failed to provide adequate and timely

supplements to its Rule 26(a)(1) disclosures, as further explained below, Rule 37(d)(1) does not empower the Court to sanction the firm for this specific failure.

Turning to Defendant's second argument — that Plaintiff's Response to Defendant's First RFP warrants sanctions under Rule 37(d)(1) — sanctions would only be appropriate if Defendant actually requested the photographs of the shoes in a request for production under Rule 34. In its Supplemental Brief, Defendant only identifies Request 26 as the specific request that would have triggered Plaintiff's production of the photographs. *See* ECF No. [148] at 13. Request 26, however, makes no mention of photographs. To be sure, it requests: "The shoes Plaintiff was wearing at the time of the incident alleged in Plaintiff's Complaint." ECF No. [145-4] at 4 (Request 26). If Defendant wanted photographs of the shoes — as opposed to the shoes themselves, Defendant could have said so, but this Request is not one that calls for the production of photographs; it calls for the production of shoes. Therefore, Plaintiff's failure to produce photographs in response to Request 26 is not a basis for sanctions under Rule 37(d)(1).

Although Defendant did not raise this issue in its Supplemental Brief, *see generally* ECF No. [148], at the Hearing, Defendant argued that the photographs were responsive to Request 6, which seeks: "Photographs . . . and videotape footage of the accident scene, accident premises, or instrumentalities involved in the incident alleged in the Complaint in its original native format with all metadata and all other embedded information," *see* ECF No. [145-4] at 3 (Request 6). However, photographs of the shoes are not responsive to this request either. To find them responsive, the shoes must be "instrumentalities involved in the incident." Yet, the term "instrumentalities" is not defined in the First RFP and the context of Request 6 suggests that an instrumentality would, perhaps, be the gangway or the ramp as this request relates to the "accident scene" and the "accident premises." There is nothing about Request 6 that suggests that articles

of Plaintiffs' clothing, such as her shoes, would be considered "instrumentalities involved in the incident" and perhaps this is why Defendant abandoned this argument in its Supplemental Brief. If Defendant intended to seek photographs of the shoes in Request 6, it should have clearly requested them, much like it requested the shoes in Request 26, or it should have defined the term "instrumentalities" to include the shoes. But the Court will not fault the Aronfeld Firm for failing to divine that Request 6 sought photographs of the shoes. Absent a request for production served under Rule 34 seeking photographs of the shoes, the Court finds that Rule 37(d)(1) does not provide Defendant an avenue to seek sanctions against the Aronfeld Firm for its failure to timely produce the photographs.

With that said, there is no doubt in the Court's mind that the Aronfeld Firm inexcusably delayed in producing the photographs to Defendant as required by Rule 26(a)(1) and Rule 26(e) and that failure lies squarely with Plaintiff's counsel. Plaintiff originally sent the photographs to counsel in March 2024. *See* Day 2 Hr'g Tr. at 18:7–19:19 (Mr. Hayashi testifying Plaintiff sent photos to counsel around March 7 or 8, 2024); Day 1 Hr'g Tr. at 32:16–25 (Dr. De Caso correcting earlier testimony and stating that paralegal Adrian Baez sent the photos via email on March 8, 2024). Plaintiff's counsel then sent the photos to Plaintiff's expert — a clear indication of intent to rely on the images to support their claims. *See id.* at 32:16–25 (photos emailed to Dr. De Caso via law firm paralegal); Day 2 Hr'g Tr. at 15:25–16:20; *id*. at 50:25–51:16 (Mr. Hayashi confirming photos were added to firm's case management system and likely forwarded to expert). Under Rule 26(a)(1) and Rule 26(e), this triggered an obligation to produce the photos to Defendant as either part of the initial disclosures or a supplement to initial disclosures. That did not happen.

Plaintiff compounded the error in October 2024, when Plaintiff re-sent the photos to her counsel. *See* Day 2 Hr'g Tr. at 48:9–49:1 (Mr. Hayashi testifying Plaintiff re-sent the photos on October 29, 2024). Counsel again failed to disclose the photos, even though this was now the second opportunity — and even though the photos were plainly relevant to Plaintiff's claims and had already been provided to Plaintiff's expert. Defendant only learned of the existence of the photographs after Plaintiff's expert disclosed them, after Defendant's expert had already completed his initial report, and only after defense counsel confronted Plaintiff's counsel, who then transmitted the photos that same evening. *See id.* at 52:13–23 (Mr. Hayashi learning during expert deposition that defense counsel had never seen the photos); *id*. at 52:24–53:7 (Mr. Hayashi supplementing discovery responses and disclosing the photos that same day). The Aronfeld Firm's lack of diligence in producing discovery on which Plaintiff relied in this case is troubling. Had Defendant not chosen to take Dr. De Caso's deposition, Defendant may have never discovered that Plaintiff had withheld the photographs.

Here, no substantial justification exists for the nondisclosure. Plaintiff's counsel had two clear opportunities — March and October 2024 — to disclose the photographs. Despite that, the photos were never produced to Defendant until after Defendant discovered their existence during Dr. De Caso's deposition. *See id*. That Mr. Hayashi only realized the omission when opposing counsel raised it during a deposition exemplifies the very harm the rules of discovery are designed to prevent: surprise, disruption, and prejudice to the opposing party. Moreover, the delay in disclosure impeded Defendant's ability to evaluate and respond to critical evidence prior to expert disclosures and depositions.

Mr. Hayashi admitted that the photographs should have been disclosed as part of the firm's Rule 26 obligations, and that their omission was entirely the responsibility of Plaintiff's counsel

— not the Plaintiff. *See id*. at 48:19–49:1 (Mr. Hayashi acknowledging the photos should have been disclosed but assuming they had already been produced); *id*. at 52:1–12 (Mr. Hayashi stating the failure to disclose was inadvertent and not Plaintiff's fault). He acknowledged the failure as inadvertent and due to an internal oversight, not intentional concealment. *See id.* at 26:15–27:2 (Mr. Hayashi testifying the non-disclosure was not the result of bad faith but rather a mistake within the firm).

Inadvertence or internal miscommunication, however, does not constitute substantial justification. A party's duty to make timely and complete disclosures under Rule 26 is ongoing and affirmative; passive reliance on assumptions or a failure to confirm whether required disclosures have been made falls far short of this standard. Mr. Aronfeld's testimony further supports this conclusion. Although he ultimately took responsibility as managing attorney, he conceded that he had no personal knowledge of the discovery communications or the handling of the photographs. *See id*. at 87:19–24, 88:2–9 (Mr. Aronfeld testifying that he was not involved in day-to-day pretrial matters and had no personal knowledge of discovery responses or communications with Plaintiff regarding the shoes or photos). While commendable in principle, his general supervisory role does not excuse the firm's systemic failure to ensure compliance with its discovery obligations, especially where the existence of responsive, material evidence had been known for over a year. The Aronfeld Firm's prolonged failure to disclose the photographs — despite multiple opportunities and actual possession of the materials — was neither reasonable nor supported by any substantial justification. With that said, the Court's power to sanction under Rule 37(d)(1) is limited to three specific scenarios, none of which apply here, so this is not the appropriate mechanism by which to sanction the Aronfeld Firm for its discovery failures as it relates to the photographs.

3. Plaintiff's Counsel Violated Rule 26(g)(1)

Finally, Defendant seeks sanctions against the Aronfeld Firm "for failing to conduct a reasonable inquiry prior to signing Plaintiff's Response to Carnival's Initial Request for Production and Plaintiff's Supplemental Response to Carnival's Initial Request for Production." *See* ECF No. [148] at 13. Rule 26(g)(1) mandates that all discovery disclosures and responses be signed by an attorney or unrepresented party, certifying that, after reasonable inquiry, the information is complete and accurate, legally justified, not submitted for improper purposes, and proportionate to the needs of the case. *See* Fed. R. Civ. P. 26(g)(1). Additionally, subsection (g)(3) states that "[i]f a certification violates this rule without substantial justification, the court, on motion or on its own, must impose an appropriate sanction on the signer, the party on whose behalf the signer was acting, or both. The sanction may include an order to pay the reasonable expenses, including attorney's fees, caused by the violation."

Defendant identifies two discovery responses that, in its view, violated Rule 26(g)(1). The first is Plaintiff's Response to the First RFP in which Plaintiff represented that she had possession of the shoes even though at the time she believed (mistakenly) she no longer had the shoes. A discrepancy exists between Ms. Ivey's testimony and Plaintiff's testimony as to whether Plaintiff was specifically consulted about her possession of the shoes prior to serving these responses. Ms. Ivey signed and served Plaintiff's Responses to the First RFP on April 18, 2024, including Request 26, which requested the shoes Plaintiff wore at the time of the Incident. *See* Day 1 Hr'g Tr. at 175:20-176:4, 178:7-20. According to Ms. Ivey, these Responses were accurate to the best of her knowledge at the time. *See id*. at 174:20-176:13. She explained that, based on her conversation with Plaintiff before the lawsuit was filed, she believed Plaintiff had the shoes in her possession, *see id*. at 187:9-188:23, 189:6-12, and she relied on this earlier conversation without expressly

confirming with Plaintiff that this remained true before signing and serving the Responses to the First RFP six months later, *see id*. at 174:20-176:13. Ms. Ivey testified that the requests from the First RFP were sent to Plaintiff for review, and Ms. Ivey received no indication from Plaintiff that she no longer had the shoes. *See id*. at 185:22-187:3, 190:20-191:13. Ms. Ivey did not dispute that Plaintiff could have contacted someone else at the Aronfeld Firm and told them that she did not have the shoes. *Id.* at 187:13-21; 188:6-12.

Plaintiff's testimony, on the other hand, was less than clear on this issue. When asked specifically whether attorneys from the Aronfeld Firm contacted her prior to April 18, 2024 to discuss Defendant's First RFP, she first testified that she could not recall whether they did so and then later testified that she "believe[s]" they asked her about the shoes prior to April 18, 2024. *See* Day 1 Hr'g Tr. at 115:1-5; 116:4-14. She generally recalled that she spoke with Ms. Ivey, Mr. Hayashi, Mr. Aronfeld, and a paralegal named Adrian and would have discussed her discovery responses with them, but the timing of those conversations was unclear from her testimony. *Id.* at 116:15-117:8. She also testified that she told the Aronfeld Firm that she did not possess the shoes prior to April 18, 2024 but, based on the questions asked at the Hearing, the identity of the individual at the Aronfeld Firm to whom she provided this information is unknown and the precise timing is unclear.

Based on the testimony presented at the Hearing, the Court finds that Ms. Ivey's inquiry itself was not a reasonable one in that she did not ask her client in April 2024 whether Plaintiff still had the shoes at the time Ms. Ivey signed and served Plaintiff's Response to the First RFP. Ms. Ivey relied on information she received six months earlier from Plaintiff during a preliminary conversation prior to filing suit. And although Ms. Ivey sent Plaintiff the actual requests, she does not know if anyone ever sent Plaintiff the draft Responses to the First RFP to confirm the

information therein prior to serving them on Defendant. *Id.* at 185:22-186:2. Ms. Ivey did not recall specifically asking Plaintiff whether she still had possession of the shoes prior to signing and certifying those responses. *Id.* at 190:11-191:13. Importantly, the Aronfeld Firm has not offered any substantial justification for Ms. Ivey's failure to confer with Plaintiff to verify the accuracy of the Responses to the First RFP served on April 18, 2024, and as a result, the Court finds that the Aronfeld Firm failed to satisfy the requirements of Rule 26(g)(1).

With that said, one week later during Plaintiff's deposition on April 25, 2024, Defendant learned that Plaintiff's Response to Request 26 was incorrect (based on information Plaintiff believed to be true at the time) as Plaintiff unequivocally testified that she no longer had the shoes following a yard sale. After that deposition, on May 13, 2024, defense counsel reached out to the Aronfeld Firm to confer about Plaintiff's discovery responses, explaining that they were seeking a better response to Request 26, among others. *See* ECF No. [145-6]. Ms. Ivey responded by providing a detailed account of those discovery requests that required supplementation and those that did not. *Id.* Regarding Request 26, Ms. Ivey stated "response remains the same," *id.*, meaning Ms. Ivey continued to represent that Plaintiff possessed the shoes even though she testified at her deposition weeks earlier that she did not have them. No further discovery took place at the time though because, on that same day, Plaintiff filed an Unopposed Motion to Stay, ECF No. [32] and ECF No. [33], which the Court granted, ECF No. [34], staying the case for 120 days. It was not until September 17, 2024 when the Court lifted the stay that discovery resumed. *See* ECF No. [38]. Thereafter, on October 29, 2024, the Parties conferred about several outstanding discovery matters, including the accuracy of Plaintiff's Response to Request 26, at which time Mr. Hayashi noted he would check with his client. *See* ECF No. [145-7] at 2. It was not until December 3,

2024 that Plaintiff finally supplemented her response to Request 26 to reflect that Plaintiff did not possess the shoes involved in the Incident. *See* ECF No. [145-5].

Defendant had to jump through multiple hoops to force the Aronfeld Firm to respond to Request 26 based on the information then-known to Plaintiff. All of this could have been avoided had Ms. Ivey reasonably inquired with Plaintiff prior to signing and serving the Responses to the First RFP. For that reason, the Court finds that a limited attorneys' fees sanction is appropriate against the Aronfeld Firm. Specifically, the undersigned **RECOMMENDS** that Defendant be awarded (1) its reasonable attorneys' fees incurred between April 18, 2024 and December 3, 2024 relating to Plaintiff's supplementation of its Response to Request 26 and (2) its reasonable attorneys' fees and costs for preparing its Supplemental Brief in support of its Motion for Sanctions Against Plaintiff's Counsel, ECF No. [148]. However, an award against Plaintiff for this conduct would be unjust as she is not responsible for Ms. Ivey's failure to make a reasonable inquiry about the location of the shoes or Ms. Ivey's continued representation to defense counsel that the response to Request 26 remained accurate even after Plaintiff testified to the contrary at her deposition.

Next, Defendant takes issue with Plaintiff's Supplemental Responses to Defendant's First RFP, arguing that these supplemental responses likewise failed to comply with Rule 26(g)(1). *See* ECF No. [148] at 14. Specifically, Defendant argues that the Aronfeld Firm failed to make a reasonable inquiry when it served these responses, indicating that Plaintiff did not possess the shoes because Plaintiff testified that she found the shoes in late 2024. *Id.* The Court disagrees with Defendant that the Aronfeld Firm failed to make a reasonable inquiry here. Mr. Hayashi testified that following a meet-and-confer call with opposing counsel on October 29, 2024, he texted Plaintiff to inquire about the location of the shoes at which time she confirmed that she no longer

had the shoes following a yard sale. *See id*. at 38:1-9, 38:24-39:1; 42:15-23; 46:5-47:1. As explained above, the Court finds, based on the evidence, that it was not until March 2025 that Ms. Barrier located the shoes at which time she informed Plaintiff of the discovery and Plaintiff, in turn, informed the Aronfeld Firm. Thus, at the time that Mr. Hayashi signed the Supplemental Response to the First RFP on December 3, 2024, the information was based on the information that Plaintiff believed to be true at the time. Thus, the Court finds there was no discovery violation as it relates to the Supplemental Response.

Accordingly, the undersigned respectfully **RECOMMENDS** that Defendant's Motion for Sanctions Against Plaintiff's Counsel, **ECF No. [148]**, be **GRANTED in part and DENIED in part** as further set forth below.

IV. CONCLUSION

This case presents separate but related failures — (1) Plaintiff's late disclosure of the shoes, (2) the Aronfeld Firm's failure to timely disclose the photos of the shoes, and (3) the Aronfeld Firm's failure to accurately certify Plaintiff's discovery responses. Together, these failures undermined the integrity of the discovery process and created monetary prejudice to Defendant. If left unsanctioned, such conduct would signal to litigants and lawyers alike that strategic delay or carelessness in discovery will carry no consequence, even when it interferes with deadlines, expert work, and case preparation. Although the Court ultimately finds that neither Plaintiff nor her counsel acted in bad faith, the prior sworn representations — and her counsel's certifications — created a misleading discovery record to Defendant's detriment.

For the reasons explained above, the undersigned respectfully **RECOMMENDS** that**:**

1. Defendant's Motion for Spoliation Sanctions, **ECF No. [91]**, be **GRANTED in part and DENIED in part** as follows:

a. Discovery should be briefly reopened for seven (7) days for the limited purpose of allowing Defendant's expert, David Martyn, to examine the shoes and amend his expert report, if necessary, to address the impact of the shoes on his opinions and allow him to testify about any such supplemental opinion at trial.

b. Plaintiff should be precluded from allowing Plaintiff's expert, Dr. Francisco De Caso, from testifying at trial about the impact of the shoes on his opinions.

c. Plaintiff should be **ORDERED** to pay Defendant its reasonable attorneys' fees and costs incurred by Defendant in: (1) preparing and filing the Motion for Spoliation Sanctions; (2) attending and preparing for the Hearing; and (3) compensating Defendant's expert for the costs of supplementing his report due to the late disclosure.

2. Defendant's *Ore Tenus* Motion for Sanctions Against Plaintiff's Counsel, **ECF No. [148]**, be **GRANTED in part and DENIED in part** as follows: the Aronfeld Firm should be liable to pay (1) the reasonable attorneys' fees and costs incurred by Defendant between April 18, 2024 and December 3, 2024 for any meet-and-confer efforts to obtain an accurate response to Request 26; and (2) the reasonable attorneys' fees and costs incurred by Defendant for preparing its Supplemental Brief in support of its Motion for Sanctions Against Plaintiff's Counsel, ECF No. [148].

3. Should the Honorable K. Michael Moore adopt these recommendations, the undesigned will thereafter determine the amount of reasonable attorneys' fees and costs.

The Parties will have **seven (7) days**[7] from the date of being served with a copy of this

[7] Typically, "[a]ny party may object to a Magistrate Judge's proposed findings, recommendations or report . . . within fourteen (14) days after being served with a copy thereof." *See* S.D. Fla. L. Mag. J.R. 4(b); 28

Report and Recommendation within which to file written objections, if any, with the Honorable K. Michael Moore, United States District Judge. Failure to timely file objections shall bar the Parties from a *de novo* determination by the District Judge of an issue covered in the Report and shall bar the Parties from attacking on appeal unobjected-to factual and legal conclusions contained in this Report except upon grounds of plain error if necessary in the interest of justice. *See* 28 U.S.C. § 636(b)(1); *Thomas v. Arn*, 474 U.S. 140, 149 (1985); *Henley v. Johnson*, 885 F.2d 790, 794 (11th Cir. 1989); 11th Cir. R. 3-1.

RESPECTFULLY SUBMITTED in Chambers in Miami, Florida on June 4, 2025.

MARTY FULGUEIRA ELFENBEIN
UNITED STATES MAGISTRATE JUDGE

cc: All Counsel of Record

U.S.C. § 636(b)(1) ("Within fourteen days after being served with a copy, any party may serve and file written objections to such proposed findings and recommendations as provided by rules of court."). If "exigencies exist," however, "a court may shorten the time for filing objections." *See, e.g.*, *R Palace Surfside, LLC v. Anamar Ventures, Inc.*, No. 1:23-CV-22884, 2023 WL 8479417, at *5 n.2 (S.D. Fla. Nov. 29, 2023), *R.&R. adopted*, No. 23-CV-22884, 2023 WL 8470626 (S.D. Fla. Dec. 7, 2023); *United States v. Barney*, 568 F.2d 134, 136 (9th Cir. 1978) (rejecting "appellant's suggestion that the trial court erred in allowing appellant less than the full . . . period provided by 28 U.S.C. s 636(b)(1) to file objections to the magistrate [judge's] recommendation" because the period provided "is a maximum, not a minimum" and a "court may require a response within a shorter period if exigencies of the calendar require"). Indeed, this District's Local Rules acknowledge that a 14-day objection period is not mandated and that objections may be made "within such other time as may be allowed by the Magistrate Judge or District Judge." *See* S.D. Fla. L. Mag. J.R. 4(b). The Court finds that exigencies exist here because of the rapidly approaching trial date and related final pre-trial conference. *See Citimark Int'l Ltd. v. V10 Glob. Logistics & Trading Corp.*, No. 21-CV-24394, 2022 WL 17583642, at *1 (S.D. Fla. Aug. 22, 2022) (adopting a Report and Recommendation after the Magistrate Judge "shorten[ed] the usual fourteen-day objection period due to . . . pending discovery deadlines"); *United States v. Slowden*, No. 11-60288-CR, 2012 WL 696597, at *8 n.7 (S.D. Fla. Feb. 16, 2012) (shortening objection period to seven days in part because trial was due to begin in less than three weeks), *R.&R. adopted*, No. 11-60288-CR, 2012 WL 696399 (S.D. Fla. Mar. 1, 2012).