STATE OF SOUTH CAROLINA
COUNTY OF SPARTANBURG

Jo Ann Blackwell, Michelene Brooks, and Samuel H. Owens, Jr., individually and on behalf of all others similarly-situated,

Plaintiffs,

v.

Mary Black Health System, LLC, d/b/a Mary Black Memorial Hospital; CHSPSC, LLC; and Professional Account Services, Inc.,

Defendants.

IN THE COURT OF COMMON PLEAS
SEVENTH JUDICIAL CIRCUIT

C.A. No. 2017-CP-42-00219

ORDER GRANTING RENEWED MOTION FOR SANCTIONS

This matter came before the Court on Plaintiffs' Renewed Motion for Sanctions against Defendant Mary Black Health System, LLC, filed January 17, 2023. A hearing was held, via Webex, on March 16, 2023. Appearing for the Plaintiffs were Marghretta H. Shisko of John B. White, Jr., PA and Rachel G. Peavy of Simmons Law Firm, LLC. Attorneys James L. Werner and Katon E. Dawson, Jr. of Parker Poe LLP appeared on behalf of the Defendants.

According to Plaintiffs, Mary Black has continued to engage in a pattern of conduct during discovery designed to frustrate the purpose and intention of South Carolina's discovery rules and in contravention of the Court's repeated rulings and directives in this case. The Court, as previously noted in its Form 4 Order filed June 23, 2023, agrees, and finds that sanctions are appropriate for the reasons that follow.[1]

[1] Given the Court's long-standing involvement in this litigation, it does not wish to reiterate the entire case history and therefore incorporates its prior orders of July 6, 2021 (granting motion to compel, in part), November 23, 2021 (granting motion to compel), August 2, 2022 (granting motion for sanctions), and November 1, 2022 (granting motion for class certification and directing the Hospital to supplement and amend its discovery responses to include both Spartanburg and Gaffney facilities).

RELEVANT FACTUAL BACKGROUND

This is a class action lawsuit that arises from allegations that the defendants, a hospital and related billing/collection entities (at times collectively referred to as "the Hospital" or "Mary Black"), engaged in "unlawful, unfair, and predatory and billing practices." (Am. Compl. ¶ 1.) On November 1, 2022, the Court certified the following class:

> All individuals who, since January 1, 2014, received any type of healthcare treatment from any entity located in South Carolina that is owned or affiliated with Defendants, while being covered by valid health insurance other than Cigna, and whose medical bills resulting from that treatment were not submitted to their health insurance carrier for potential payment.

(Order Certifying Class, at 7, Nov. 1, 2022.)

Put another way, this case is about patients who were covered by health insurance policies when they sustained injuries implicating third party liability and presented at Mary Black for treatment. Instead of submitting claims to the patients' health insurance, Mary Black elected to seek payment directly from the patients, sometimes by contacting the patients directly or by asserting a lien against their potential third-party tort recoveries.

According to the Hospital's discovery responses, it collected an estimated $1,816,454.85 for treatment and services rendered to approximately 1,538 patients at Mary Black Hospital during the relevant period.[2] This amount is for medical bills that the Hospital did not submit to the patient's insurance carrier, which totaled approximately $7,199,837.54.[3] The amount that the Hospital estimated it would have received if it had properly billed those patients' insurance carriers

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[2] This "approximate" number of 1,538 was provided by Mary Black in its supplemental responses to Plaintiffs' second set of interrogatories. However, as more fully explained below, this number (and the related calculations) are inaccurate because the Hospital failed to include patients treated at the Hospital's Gaffney location.

[3] The Hospital has identified in discovery at least 14 insurance carriers (plus related affiliates and/or subsidiaries) with whom it had agreements to promptly submit claims for payment.

was $990,349.66. Accordingly, these figures reflect almost a 100% profit for the Hospital as a result of this business practice.

After reviewing the records produced by the Hospital in support of the above-referenced "patient count" and related calculations, Plaintiffs' counsel discovered that Defendants only included patients who treated at the Hospital's Spartanburg location in their discovery responses, and that Defendants had not produced any Gaffney patient records. As a result, the purported amended and supplemental discovery responses and calculations (which the Court had ordered Defendants to perform) were incomplete and inaccurate.[4]

Plaintiffs' counsel notified the Hospital of the missing records by letter dated October 24, 2022, and requested that the Hospital advise if Plaintiffs had somehow overlooked the Gaffney records. In response, defense counsel sent a letter, dated October 26, confirming that "the patient and collection totals that were identified in response to the Plaintiffs' discovery requests related only to the Mary Black Spartanburg facility." The response letter further represented that the Hospital was "investigating the availability of those patients' records and have requested a list of the patients responsive to Plaintiffs' Interrogatory #8 from the Mary Black Gaffney facility." At the same time, the Hospital also advised that records were destroyed from two employees who had been previously identified as records custodians—Christine Poplawski, the former Mary Black Gaffney CFO, and Tammie Culbreth, the director of reimbursed contracts—when they were terminated on December 31, 2018 (the date that Mary Black was sold to Spartanburg Regional).

A few weeks later, in correspondence dated November 14, 2022, the Hospital subsequently changed course and refused to produce any discovery related to the Gaffney facility, asserting that Plaintiffs' discovery was only addressed to Mary Black Health System, LLC, and that the Gaffney

[4] *See* n.1 *supra*.

facility was owned and operated by Gaffney H.M.A. LLC and was "neither owned, nor operated by Mary Black Health System, LLC and it is not a corporate affiliate of any Defendant." The Hospital's correspondence also contended that the Gaffney facility is not an "affiliate" of Mary Black Health System, LLC, such that "the patients treated at the facility owned and operated by Gaffney H.M.A, LLC are not subject to the Plaintiffs' claims and those patients records and information are not responsive to any discovery request in this case."

In their rejection of the Hospital's contentions, the Plaintiffs relied, in part, on the Hospital's prior representations to both the Court and Plaintiffs' counsel that it was searching for Gaffney records and related custodian accounts (presumably undertaking such exercise because such materials are indeed relevant and responsive).[5] Plaintiffs also relied on the following:

1. In its answer filed on March 31, 2017, Defendant CHSPSC, LLC asserted that the defendants named in this lawsuit are "affiliated companies," and that Community Health Systems, Inc. was an "indirect parent" of the defendants.
2. Certain of Mary Black's confidential provider agreements, which Plaintiffs submitted to the Court under seal for *in camera* review, specifically state that Gaffney HMA, LLC is an "affiliated" hospital/provider and list that entity on a schedule as Gaffney HMA, LLC d/b/a Mary Black Health System – Gaffney.

[5] For instance, there was significant discussion of missing Gaffney records at the June 27, 2022 hearing on Plaintiffs' first motion for sanctions. Defense counsel had previously agreed that a search of Gaffney employees' email records was required in this case. *See* Tr. 9, 19, 24 (searching for emails for Brett English, former CFO of Mary Black in Gaffney); *id.* at 27 (acknowledging that Christine Poplawski, CFO of Mary Black's Gaffney location, was a records custodian that they had searched and returned no records for); *id.* at 33, 37 (Plaintiffs' counsel expressing concern related to missing data at Gaffney); *id.* at 34 (discussion by defense counsel regarding missing Gaffney records).

3. The compensation schedule contained in this same confidential provider agreement submitted for *in camera* review also reflects that Mary Black Health System operated locations in both Gaffney and Spartanburg.[6]

4. Publicly-available documents and news reports reflect that the Mary Black hospital system consisted of both the Gaffney and the Spartanburg locations. For instance, Plaintiffs directed the Court's attention to news reports, with one example excerpted below:

Gaffney hospital joined with Spartanburg's Mary Black

April 22, 2015

Gaffney Medical Center and Mary Black Memorial Hospital have united to form a combined health system to be known as Mary Black Health System – Gaffney and Mary Black Health System – Spartanburg. Affiliated physician practices will be identified as Mary Black Physicians Group.

Leadership and operations at the Gaffney hospital will not be changed, a spokeswoman told reporters. The current owner of Mary Black Memorial Hospital, the Franklin, Tenn.-based Community Health Systems Inc., acquired Gaffney Medical Center in November 2014.

"We are excited about our future as a new health system," said Joshua Self, chief executive officer at Gaffney Medical Center. "Working together we can better serve the health care needs of the broader region, increasing access to services, improving coordination of patient care and leveraging our investments in recruiting new physicians to the market."

While the hospitals will continue to operate as two individual facilities, they will "share best clinical practices for quality care, achieve operational efficiencies, enable the expansion of important services and expand access to primary and specialty care," according to a statement. The combined system has 332 licensed beds, more than 1400 employees and more than 400 physicians on medical staff.

"Aligning the names of our facilities and physician groups into a single identity makes it easier for the community to recognize our strengths and shared commitment to the communities we serve," said Sean Dardeau, chief executive officer for Mary Black Memorial Hospital.

https://upstatebusinessjournal.com/healthcare/gaffney-hospital-joined-spartanburgs-mary-black/

Plaintiffs further directed the Court to Spartanburg Regional's own website:

[6] This agreement appears to be the same Participating Provider Agreement that Mary Black relies on its motion to compel arbitration as to three Absolute Total Care class members. (*See* Mot. to Compel Arbitration, 2–3, Nov. 14, 2022 (quoting ¶ 7.2 of Absolute Total Care Agreement).)

> In 2019, Mary Black Health System became part of Spartanburg Regional Healthcare System. Both the Spartanburg and Gaffney Mary Black hospitals became part of the system, including 20 physician practices and 1,400 associates. The purchase from Community Health Systems allowed Spartanburg Regional Healthcare System to serve even more patients in Spartanburg and Cherokee counties.

https://www.spartanburgregional.com/spartanburg-regional-healthcare-system-history

LEGAL CONCLUSIONS AND FACTUAL FINDINGS

The South Carolina Rules of Civil Procedure specifically provide that:

> Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter.

Rule 26(b)(1), SCRCP. It is well-established that "[t]he scope of discovery in South Carolina is generally broad. As a result, parties may obtain discovery regarding any matter that is not privileged so long as it is relevant to the subject matter involved in the pending claim." *In re Mt. Hawley Ins. Co.*, 427 S.C. 159, 166–67, 829 S.E.2d 707, 712 (2019) (internal citations omitted).

"Pursuant to Rule 37(b)(2)(C), SCRCP, when a party fails to obey an order to provide or permit discovery, the court may 'make such orders in regard to the failure as are just,' including an order dismissing the action or proceeding, or any part thereof." *Temple v. Tec-Fab, Inc.*, 370 S.C. 383, 390, 635 S.E.2d 541, 544 (Ct. App. 2006), *rev'd on other grounds*, 381 S.C. 597, 675 S.E.2d 414 (2009). "The rights of discovery provided by the Rules give the trial lawyer the means to be prepared for trial. Where these rights are not accorded, prejudice must be presumed and, unless the party who has failed to submit to discovery can show a lack of prejudice," sanctions must be imposed or a resulting verdict must be reversed. *Richardson v. Twenty-One Thousand & no/100 Dollars ($21,000.00) U.S. Currency & Various Jewelry*, 430 S.C. 594, 600, 846 S.E.2d 14,

17 (Ct. App. 2020) (quoting *Downey v. Dixon*, 294 S.C. 42, 46, 362 S.E.2d 318, 319 (Ct. App. 1987)).

"The imposition of sanctions is generally entrusted to the sound discretion of the Circuit Court." *Downey*, 294 S.C. at 45, 362 S.E.2d at 318. However, "[w]hatever sanction is imposed should serve to protect the rights of discovery provided by the rules." *Orlando v. Boyd*, 320 S.C. 509, 511, 466 S.E.2d 353, 355 (1996). Without adequate sanctions, discovery procedures would be ineffectual. *Downey*, 294 S.C. at 45, 362 S.E.2d at 318 (quoting C. Wright, *The Law of Federal Courts* § 90, at 596 (4th ed. 1983)). As a result, "[o]verleniency" should be avoided. *Id.* (quoting *Diaz v. S. Drilling Corp.*, 427 F.2d 1118, 1126 (5th Cir. 1970)). "If a party fails to obey an order to provide or permit discovery, the trial court may impose sanctions such as striking pleadings, dismissing the action, or rendering a default judgment." *Griffin Grading & Clearing, Inc. v. Tire Serv. Equip. Mfg. Co.*, 334 S.C. 193, 198–99, 511 S.E.2d 716, 718 (Ct. App. 1999) (finding no abuse of discretion in the trial court's striking of defendant's answer as a discovery sanction and noting the trial court's finding of a "pattern of non-compliance and discovery abuse [that] constitutes further evidence of bad faith and wi[l]lful, intentional disobedience").

"In determining the appropriateness of a sanction, the court should consider such factors as the precise nature of the discovery and the discovery posture of the case, willfulness, and degree of prejudice." *Id.* at 199, 511 S.E.2d at 719. For example, in *Samples v. Mitchell*, a party in a personal injury case failed to disclose the existence of a videotape that was relevant to the issue of damages. 329 S.C. 105, 109–10, 495 S.E.2d 213, 215 (Ct. App. 1997). Observing that the tape's existence should have been disclosed, the Court of Appeals stated that "[t]he entire thrust of the discovery rules involves full and fair disclosure, 'to prevent a trial from becoming a guessing game

or one of surprise for either party.'" *Id.* at 113, 495 S.E.2d at 217 (quoting *S.C. State Highway Dep't v. Booker*, 260 S.C. 245, 252, 195 S.E.2d 615, 619 (1973)).

The sanction should be aimed at the specific conduct of the party sanctioned. *See id.* at 112, 495 S.E.2d at 216. Rule 37(b), SCRCP, provides that a court may award reasonable expenses, including attorney's fees, for a party's failure to make or cooperate in discovery, and courts in this State routinely award fees and costs as a sanction for discovery misconduct. *See, e.g.*, *Arnal v. Arnal*, 363 S.C. 268, 297, 609 S.E.2d 821, 836 (Ct. App. 2005) (noting that the family court had imposed sanctions awarding attorney's fees for discovery abuse); *Scott v. Greenville Hous. Auth.*, 353 S.C. 639, 644, 579 S.E.2d 151, 154 (Ct. App. 2003) (observing that the trial court awarded the plaintiff his attorney's fees and costs for the defendant's failure to participate in discovery); *Hundley ex rel. Hundley v. Rite Aid of S.C., Inc.*, 339 S.C. 285, 305, 529 S.E.2d 45, 56 (Ct. App. 2000) ("In total, the circuit court assessed more than $40,000 in sanctions against Rite Aid in fines, attorneys' fees, and costs for discovery abuses."). Moreover, in *Davis v. Parkview Apartments*, the South Carolina Supreme Court affirmed the more severe sanction of dismissal of the plaintiffs' lawsuit, as well as the award of the defendants' costs and attorney's fees as a result of plaintiffs' noncompliance with the trial court's discovery rulings. 409 S.C. 266, 270, 762 S.E.2d 535, 537 (2014). The *Davis* court noted that the plaintiffs had continuously attempted "to divert the implementation of the court's rulings by providing incomplete responses and causing delay through other tactics." *Id.* at 281, 762 S.E.2d at 543. This was despite the circuit court having provided the plaintiffs with "ample opportunity" to comply with the various orders of the court. *Id.* at 283, 762 S.E.2d at 544. On appeal, the Supreme Court rejected the plaintiffs' assertion that the sanction was unduly harsh, noting that the movant met the required showing of "'bad faith, willful disobedience or gross indifference to its rights' to justify the sanction." *Id.* at 282, 762

S.E.2d at 544 (quoting *Griffin Grading & Clearing, Inc.*, 334 S.C. at 198–99, 511 S.E.2d at 718–19).

Here, the Court finds that Mary Black has shown gross indifference to the rights of these Plaintiffs and the putative class members—persons whom this Court is charged with protecting under Rule 23, SCRCP. Mary Black has ignored the orders and directives of this Court, despite having been given repeated opportunity to comply. Defendants' current position that the Gaffney facility was not affiliated with the Spartanburg facility appears to be untrue, and the Court finds Defendants' contention that the Gaffney facility is not a part of the present litigation to be disingenuous and disrespectful to the Court, particularly in light of the Hospital's prior representations and the evidence presented to-date. Defendants' refusal to answer discovery as propounded and in good faith—and as previously ordered by the Court—is evidence of its willfulness, which warrants the imposition of sanctions under Rule 37, SCRCP. Further, the Court finds that the prejudice to Plaintiffs is severe.[7] Plaintiffs filed this lawsuit more than six years ago, and they still do not have full and complete responses to discovery.

Accordingly, the Court hereby GRANTS the renewed motion for sanctions and ORDERS that Defendants immediately respond to the discovery requests and produce amended calculations, along with related patient billing and related documentation from its Gaffney location, within twenty (20) days of this Order. This includes amending and supplementing Defendants' responses to Interrogatories No. 8, 9, 10, and 11 within twenty (20) days of this Order.[8] In addition, Defendants shall undertake a comprehensive and thorough review of their amended and

[7] Documents produced to date show that certain class members have died.

[8] The immediate nature of the relief ordered by the Court is intentional and designed to illustrate the grave concerns which the Court possesses regarding the Hospital's conduct in this case.

supplemental discovery responses to ensure that all responses (and related productions) include the Gaffney facility.[9] By way of example, to the extent that a policy related to the "refusal to bill" practice was promulgated at the Gaffney facility, but has not been produced, or a Gaffney employee handbook referencing the "refusal to bill" policy has not been provided, such discovery must be supplemented and produced within twenty (20) days of the filing of this Order. Further, the Court specifically finds that Plaintiffs may conduct any additional discovery into the relationship between the Gaffney facility and the Spartanburg facility, the identity and knowledge of persons affiliated with the Gaffney facility as it relates to this litigation, and Defendants' efforts to obtain responsive documents and information from the Gaffney facility and/or Gaffney custodians. Such additional discovery may encompass the relevant time period (as set forth in the amended complaint and the certification order), as well as the post-filing discovery period in this case.

Additionally, the Court further ORDERS that, within twenty (20) days of the filing of this Order, Defendants shall provide to Plaintiffs and the Court a verified statement of all documents known to have been destroyed as they relate to this litigation and the Gaffney facility. This statement shall include a description of the destroyed document, the author(s) and recipient(s) of same, the date of destruction, and any policy or procedure which directed such destruction. Additionally, Defendants shall produce to Plaintiffs and the Court copies of any litigation hold or legal hold letters that were sent to any facility or employees of Defendants as a result of this litigation, again within twenty (20) days of the filing of this Order.

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[9] This will necessarily include the identification of those additional employees identified as potential witnesses and/or custodians in defense counsel's October 26, 2022, letter. Last known contact information for all former employees should be provided.

Finally, the Court ORDERS that defense counsel is to expressly instruct Defendants that no records related to the Gaffney facility and the present litigation may be destroyed or otherwise concealed. For the avoidance of doubt, Defendants must immediately suspend any routine destruction policies with respect to any records related to this case, and the Court reminds Defendants of their continuing duty to preserve same.

In sum, the Court has serious concerns about spoliation of evidence and is mindful that Mary Black's discovery tactics should not go unpunished. While declining to wade into the merits of this case at this time, the Court, in its discretion, specifically reserves ruling on any further sanctions related to Defendants' discovery misconduct—to include, for example, potential jury instructions and the award of costs and fees—until a later date.

AND IT IS SO ORDERED.

J. Mark Hayes, II
Presiding Circuit Court Judge

Dated: Jul 3, 2023

At: Spartanburg, SC.