STATE OF SOUTH CAROLINA
COUNTY OF SPARTANBURG

IN THE COURT OF COMMON PLEAS
SEVENTH JUDICIAL CIRCUIT

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.

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

AMENDED
ORDER STRIKING DEFENDANTS' ANSWERS AND HOLDING DEFENDANTS IN DEFAULT

This case comes before the Court as a result of Defendants' prolonged refusal to engage in discovery in good faith and abide by the Court's multiple orders. That this Court is intimately familiar with the discovery process in this case is undeniable and unfortunate; similarly unfortunate is the Court's conclusion that it must impose additional sanctions on these Defendants yet again. Although the Court imposes such sanctions cautiously and reluctantly, the Court finds that, based on its historical view of Defendants' conduct and its review of the current motion and related submissions, the sanctions of striking Defendants' answers and holding Defendants in default are justified and supported by South Carolina law. Further, the Court finds that any less severe sanctions would neither achieve justice nor be sufficient under the circumstances.

Although the Court has given Defendants numerous opportunities to comply with their discovery obligations and the Court's numerous orders, the Court's patience is not without limits. Defendants are well aware of the Court's repeated admonitions that the Court and Plaintiffs' counsel have a duty to protect absent class members and that any further delays in this case are unwarranted. Thus, after careful and detailed review, and mindful of its duties to the class members

and its obligations to maintain and protect the integrity of the judicial process, the Court hereby GRANTS the Motion for Immediate Relief and ORDERS the answers stricken from the record as a sanction and further ORDERS that the Defendants are to be held in default.

Factual and Procedural Background

Because of the serious nature of this ruling and the unprecedented nature of Defendants' discovery misconduct, the Court includes a detailed recitation of the litigation and the discovery process, while also incorporating by reference all prior orders and directives. As outlined herein and as shown by the record in this case, Defendants have materially and substantially failed to respond to discovery, failed to preserve relevant information and documents, failed to conduct adequate searches, failed to disclose material information and documents, interfered with notice to the absent class members, and failed to comply with this Court's orders and directives on multiple occasions.

1. The Class Action and the Claims at Issue.

This case has been pending since January 20, 2017, when Plaintiff Jo Ann Blackwell filed a Summons and a putative Class Action Complaint seeking to represent a class of individuals who had valid health insurance and who received medical treatment at any facility in South Carolina owned or affiliated with Community Health Systems, but whose medical bills were not properly submitted to the patients' health insurance carriers for payment. (Compl. ¶ 41.) Although the complaint was later amended to add two other named Plaintiffs, Michelene Brooks and Samuel Owens, and to include some additional allegations, the plaintiffs have always sought to maintain a class action against the defendants based on allegations that they engaged in "unlawful, unfair, and predatory service and billing practices." (Am. Compl. ¶ 1.)

On November 1, 2022, this Court entered an order certifying the following class under Rule 23, SCRCP:

> 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 7.)[1] As with the proposed class definitions in Plaintiffs' original and amended pleadings, the class that the Court ultimately certified was not limited to patients who had a particular health insurer carrier or who received treatment at a particular location. Instead, this case has always encompassed anyone who treated at any South Carolina entity "owned or affiliated with Defendant," and who was impacted by Defendants' "refusal to bill policy"—i.e., "Defendants' routine refusal to submit medical bills to certain patients' insurance carriers if the Hospital's screening identified the patients as ones for whom third-party recovery might be available to pay for such treatment—usually, a patient who was treated following a motor vehicle collision." (Order Certifying Class 1–2.) Plaintiffs allege that this was an unlawful, predatory billing practice giving rise to claims for tortious interference with contractual relationship, unjust enrichment, and injunctive relief. (*See* Am. Compl. ¶¶ 63–83.)

2. Plaintiff's Initial Discovery Requests.

Plaintiff served interrogatories, requests, for production, and requests to admit on or about September 8, 2017, and Defendants responded on or about November 13, 2017. In their responses, Defendants raised numerous boilerplate objections—e.g., that the discovery sought was overly

[1] Because Defendants have appealed this Court's denial of their motion to compel Mr. Owens to arbitrate his claims against them, the Court found "it appropriate to carve out the claims of Mr. Owens until such time as a final decision has been rendered by the appellate courts." (Order Certifying Class 7 n.4.)

broad, unduly burdensome, or not relevant—and identified certain documents that would be made available "subject to the execution of an appropriate Confidentiality Order."[2] That same day, Defendants also filed a Motion for Protective Order and/or to Stay Discovery, in which Defendants characterized the discovery at issue as an "expensive fishing expedition" and objected to providing "discovery regarding persons and/or circumstances not applicable to Plaintiff's personal claims" because a class had not yet been certified. (Defs.' Mot. for Protective Order and/or to Stay Discovery 1–2.) Recognizing that Plaintiff's 2017 discovery requests sought to discover information and documents regarding the prevalence and impact of the challenged refusal to bill policy, Defendants sought to limit discovery "to the facts and circumstances of Plaintiff's personal claim." (*Id.* at 4–5.) After a hearing on the motion, the circuit court (the Honorable Grace G. Knie presiding) entered an Order granting Defendants' motion in part and ordering as follows:

> Defendants shall not be required to otherwise respond to Plaintiff's outstanding Interrogatories or Requests for Production of Documents until after the Motion for Complex Case Designation is resolved and a Judge is designated to assume jurisdiction over this case. Therefore, the issue of additional discovery can be addressed as part of such scheduling and/or case management order as may be issued, or otherwise addressed by the parties and the designated judge.

(Knie Order ¶ 1, Dec. 21, 2017.) Judge Knie's Order also stated that nothing in her order prevented the parties from agreeing to a Consent Protective Order and moving forward to "complete the production of documents as already proposed in Defendants' Responses." (*Id.* ¶ 2.)

3. Defendants' Early Resistance to Discovery.

Although the parties had jointly moved for complex case designation in October 2017, the undersigned was not assigned to the case until February 2019. Thereafter, a Consent Protective Order was entered on April 11, 2019. Despite the case having been assigned to this Court and the

[2] Defendants' responses to Plaintiff's 2017 discovery requests are in the record as Exhibits 1–6 to Defendants' Motion for Protective Order and/or to Stay Discovery, filed on November 13, 2017.

entry of a protective order, Defendants did not produce any of the confidential documents referenced in their 2017 discovery responses. *But see* Rule 26(e), SCRCP (requiring supplementation of discovery). Additionally, Plaintiffs served another set of interrogatories and requests for production on Defendants on July 2, 2019. The July 2019 discovery requests essentially sought the same information and documents that Plaintiffs sought to discover in the 2017 discovery requests. After not receiving any responses from Defendants, Plaintiffs filed an initial motion to compel on November 27, 2019.[3] Defendants filed a response in opposition to the motion to compel on January 6, 2020, in which they continued to assert that discovery should be limited to the personal claims of Plaintiff Blackwell.

During this same period, Plaintiff Blackwell sought to amend the complaint and add Ms. Brooks and Mr. Owens as named plaintiffs. (*See* Pls.' Mot. for Leave to Am. Compl., Oct. 18, 2019.) In addition to opposing Plaintiff's efforts at class-wide discovery, Defendants opposed the addition of other named plaintiffs on various grounds, attempting to limit the case to the Ms. Blackwell's claims and arguing that the Court should conclude that none of the plaintiffs' claims were viable. (*See* Defs.' Mot. to Strike, Aug. 19, 2019; Defs.' Mem. in Opp'n to Pls.' Mot. to Am. Compl., Oct. 24, 2019.) On January 6, 2020, this Court held a hearing on the motions related to Plaintiff's proposed amendment of the complaint and Plaintiff's initial motion to compel. Thereafter, the Court entered a Form 4 Order granting the motion to amend the complaint and advising the parties as follows:

> With the ruling above related to the motion to amend, the parties should consult on outstanding discovery. The Court's understanding is that responding further to discovery was dependent on the ruling related to amending the complaint. My law clerk will reach out to the parties to schedule a status conference. The status conference will be set just beyond 30 days from this ruling to allow the parties time to

[3] Plaintiffs' July 2, 2019 discovery requests are in the record as Exhibit A to Plaintiffs' November 27, 2019, Motion to Compel.

> discuss, and hopefully resolve, discovery issues. If not, the Court will be available for assistance.

(Form 4 Order 2, Feb. 11, 2020.) In other words, this Court instructed the parties that its ruling on the amendment of the pleadings affected the scope of discovery, such that discovery should not be limited to Ms. Blackwell's personal claims going forward. (*See also* Order Granting Pls.' Mot. for Leave to Am. the Compl. 2, Apr. 23, 2020 (ordering the parties to consult as to the plaintiffs' outstanding discovery requests).)

After Plaintiffs filed the amended complaint on April 24, 2020, Defendants again sought to delay discovery, filing motions to dismiss or, in the alternative, stay the case and compel arbitration. Although this Court had previously ordered Defendants to consult with Plaintiffs about the outstanding discovery requests, Plaintiffs filed their second motion to compel on October 23, 2020, because Defendants refused to produce the confidential documents referenced in Judge Knie's 2017 Order. (*See* Pls.' Mot. to Compel 2, Oct. 23, 2020.) Further, having received no responses to the discovery requests served in July 2019, Plaintiffs re-served those requests in October 2020, to which Defendants again refused to respond. (*See* Pls.' Mem. in Opp'n 5, Nov. 24, 2020.) Again, rather than consulting with Plaintiffs as the Court instructed, Defendants continued to maintain their position that they should not be required to respond to any discovery requests, filing a motion to stay discovery in its entirety because Defendants intended to appeal the Court's denial of their Motion to Dismiss or in the Alternative to Compel Arbitration and Defendants' Motion to Alter or Amend. (*See* Defs.' Mot. for Protective Order 2, 3.)

This Court denied Defendants' Motion to Alter or Amend on December 8, 2020, and Defendants filed a notice of appeal the same day.[4] Although Defendants had sought to compel only Plaintiff Owens to arbitrate his claims, Defendants maintained that their appeal stayed the entire case, and they continued to refuse to participate in discovery. As a result, Plaintiffs filed a third motion to compel on December 9, 2020, in which they again had to seek the Court's assistance in obtaining responses to discovery requests that were originally served in 2017. (*See* Pls.' Mot. to Compel 3, Dec. 9, 2020.) In their motion, Plaintiffs noted that "[t]o date, Defendants have not produced a single document in discovery or identified the billing practices and procedures (and related financial implications that are at the heart of this lawsuit." (*Id.*)

Thereafter, in response to Defendants' assertions that the entire case was stayed during the pendency of the appeal and that the Court now lacked jurisdiction over the case, the Court requested that the parties submit briefing on whether Defendants' notice of appeal affected the Court's ability to proceed with discovery and Plaintiffs' pending motions to compel. After receiving the parties' submissions and conducting a hearing, the Court entered an Order on July 6, 2021, in which the Court determined that only the claims of Mr. Owens and the absent class members with Cigna insurance were stayed by Defendants' appeal. (*See* Order 4, July 6, 2021.) With respect to Plaintiffs' pending discovery motions, the Court's Order was clear that "Judge Knie's prior rulings and orders have not changed," and that "[a]ll of her decisions must be complied with by the parties." (*Id.* at 7.) Additionally, this Court's July 2021 Order required the parties to meet and confer as to any other outstanding discovery issues, reminded the parties that discovery requires

[4] Following the denial of their motions to dismiss in December 2020, Defendants never filed answers to the amended complaint. After Plaintiffs requested that they do so, Defendants ultimately filed untimely answers on May 2, 2022.

"full and fair disclosure," and urged Defendants "to reconsider, at least in part, any stated objections and to try to resolve the outstanding motions without the Court's intervention." (*Id.* at 8–9.)

4. Defendants Disregard the Orders of the Court.

On July 23, 2021, Defendants produced the confidential documents that they had identified in their November 2017 discovery responses, but they refused to supplement or amend their responses any further. (*See* Pls.' Supp. Mem., Ex. B, Nov. 2, 2021.) As a result of Defendants' refusal to provide any other discovery, the Court was required to review additional briefing (and related exhibits) and to conduct another hearing, which was held on November 3, 2021. Following the hearing, the Court entered an order granting Plaintiffs' pending motions to compel and "find[ing] that Mary Black's objections are unfounded and there exists no good faith basis for the hospital to continue to decline to provide information relevant to the claims asserted in this lawsuit." (Order Granting Pls.' Mots. to Compel 4, Nov. 23, 2021.) Expressing concern with the age of the case and the need to protect the interests of putative class members, this Court instructed that discovery should proceed without further delay and reminded Defendants that this Court "espouses a liberal and broad definition of what is discoverable in this case." (*Id.* at 6–8 & 6 n.11.)[5]

This Court's November 23, 2021 Order specifically ordered Mary Black to respond to the following discovery requests:

- Interrogatory No. 8. From January 2014 through present, has Defendant ever intentionally failed to submit medical bills to a patient's insurance carrier where the patient was covered by valid commercial health insurance? If the answer to this interrogatory is yes, please identify (a) the number of occurrence wherein Defendant failed to submit the medical bills and (b) the number of patients for

[5]For instance, the Court noted at the time that the possibility that class members could die while the case was pending was not just a mere abstraction, a fact subsequently borne out by the Court's *in camera* review in January 2023 of certain patient records that were provided in support of Plaintiff's Renewed Motion for Sanctions. These records reflected that certain putative class members had, in fact, passed away. *See* Renewed Mot. for Sanctions Ex. G.

whom Defendant has failed to submit the medical bills; and (c) the name of the carriers Defendant refused to bill.

- Interrogatory No. 9. For the medical bills not submitted to a patient's insurance carrier identified in Interrogatory No. 6 above, please identify the total dollar amount of bills Defendant failed to submit.

- Interrogatory No. 10. For the medical bills not submitted to a patient's insurance carrier identified in Interrogatory No. 6, please identify the total dollar amount of collections on those medical bills.

- Interrogatory No. 11. For the medical bills not submitted to a patient's insurance carrier identified in Interrogatory No. 6, please identify the total dollar amount Defendant would have received had the patient's insurance carrier been billed directly.

- Interrogatory No. 20. From January 2014 through present, has Defendant ever entered into or been a party to an agreement with a health insurance carrier which requires that health insurance claims be promptly submitted to the carrier for payment? If the answer to this interrogatory is yes, please identify (a) each contract or agreement; (b) the name of the insurance carrier with whom this contract or agreement has been made; and (c) describe the terms of each contract or agreement.

- Request for Production No. 13. Copies [of] any and all agreements from January 2014 to present wherein Defendant agrees to promptly submit claims to health insurance carriers for payment.

- Request for Production No. 14. Any and all documents and communications from January 2014 to present, to include internal communication and communications between Defendant and any health insurance carrier, which refers to, or discusses, the failure to submit medical bills to a patient's insurance carrier.

- Request for Production No. 19. All documents, materials, procedures manuals, directives, interoffice memos, or other papers or items of Defendants from January 2014 through present relating to when and how to submit medical bills to a patient's insurance carrier.

(*Id.* at 6; Pls.' Supp. Mem., Ex. A, Nov. 2, 2021.) As explained in the Order, these discovery requests collectively sought "'institutional information' from Mary Black that should be available for collection and analysis, including "number of occurrences when Mary Black failed to submit medical bills," the total number of patients affected by the refusal to bill policy, identification of insurance carriers and contracts, "total dollar amounts related to this business practice, and

comparisons between amounts received from the carriers versus amounts received from collections from patients," as well as any documents and communications related to the challenged policy. (Order Granting Pls.' Mots. to Compel 7, Nov. 23, 2021.)

Additionally, the Order required Mary Black to withdraw its objections and prepare supplemental and amended responses to the following discovery requests:

- Interrogatory No. 17. Please identify the individuals or entities responsible for creating or implementing Defendant's billing practices from January 2014 through present.
- Interrogatory No. 18. Please identify all written rules, policies, or procedures governing when and how Defendant should submit medical bills to a patient's insurance carrier from January 2014 through present.
- Interrogatory No. 19. Identify all training offered by Defendant to its employees and from January 2014 through present on when and how to submit medical bills to a patient's insurance carrier, including a list of which employees or staff members received which training.
- Request for Production No. 1. Any and all documents identified in response to Plaintiffs' Interrogatories.
- Request for Production No. 11. Copies of any and all documents presented to incoming patients relating to billing from January 2014 to present, including any documents which assign or authorize payment to Defendant by a patient's health insurance carrier.
- Request for Production No. 20. Records of all in-service training held from January 2014 through present relating to when and how to submit medical bills to a patient's carrier.
- Request for Production No. 21. Copies of any rules, guidelines, statements and/or policies and procedures from January 2014 through present relating to when and how to submit medical bills to a patient's insurance carrier.

(*Id.* at 7–8; Pls.' Supp. Mem., Ex. A, Nov. 2, 2021.) As with the discovery requests identified above, these discovery requests sought information and documents related to the creation and implementation of the challenged refusal to bill policy and the individuals involved. (*See* Order Granting Pls.' Mots. to Compel 7–8, Nov. 23, 2021.) Finally, the Order required Mary Black to

"[p]repare supplemental and/or amended responses to any other discovery its counsel, after review, deems necessary in accordance with Rule 26(e), SCRCP." (*Id.* at 8.) Yet again, the Court reminded the parties of "the grave consequences of any further delay of this action." (*Id.*)

The Court held another hearing on discovery issues on December 17, 2021.[6] Because Defendants still had not provided information and documents responsive to Plaintiffs' discovery requests, the Court once again ordered Defendants "to get the information." (Dec. 17, 2021 Hr'g Tr. 32, Ex. B. to Pls.' Mot. for Sanctions, Feb. 22, 2022.)[7] Although Defendants acknowledged that they had the necessary information to perform the analysis ordered by the Court, Defendants again raised their prior arguments that Plaintiffs' discovery requests amounted to "improper class discovery prior to certification." (*Id.* at 20–21.) Once again, the Court rejected Defendants' arguments and reminded Defendants that the case needed to move forward. (*See id.* at 34.) The Court also warned Defendants that sanctions could be available in future,[8] and specifically ordered Defendants to perform the calculation required by Interrogatory No. 11, produce documents responses to

[6] The Court had originally scheduled a hearing to follow-up on discovery issues on December 9, 2021, but shortly before the hearing, Defendants forwarded "Defendants' Discovery Report to the Court." The parties agreed to reschedule the hearing to the following week to allow Plaintiffs time to review the report and confer with Defendants.

[7] The transcript from the December 17, 2021 hearing is in the record in its entirety as Exhibit B to Plaintiffs' Motion for Sanctions, filed February 22, 2022.

[8] This Court explained that it viewed sanctions "as a continuum," which could include dismissal, striking of answers, or something "very dramatic." (Dec. 17, 2021 Hr'g Tr. 34–35.) Although this Court said, "I don't think we're at that stage yet," and reserved the issue of potential sanctions, the Court repeatedly expressed its desire for Defendants to obtain the requested information. (*See id.* at 35–36, 40–41; *see also id.* at 63 (warning Defendants that the failure to conduct a reasonable search could be viewed "as sanctionable conduct").)

Request for Production No. 14, and perform an adequate search. (*Id.* at 47, 61–63.) Defense counsel indicated that he understood the Court's directives and would document his efforts to comply. (*See id.* at 63–64.)

Sixty days later (and four years into the litigation), Mary Black served supplemental responses to Plaintiffs' discovery requests in which Mary Black continued to disobey the Court's prior orders and directives.[9] Plaintiffs filed a Motion for Sanctions on February 22, 2022, alerting the Court to "the wholly deficient supplemental discovery responses" and requesting that the Court order sanctions pursuant to Rule 37(b)(2), SCRCP. (Pls.' Mot. for Sanctions 1, Feb. 22, 2022.) In their motion, Plaintiffs pointed to specific examples where Mary Black had not complied with the Court's rulings so as to support the imposition of sanctions. (*See id.* at 2–5.) For example, Mary Black improperly objected to Interrogatory No. 11, declined to produce any documents responsive to Request for Production No. 14, and failed to provide any information about its search for discoverable information and documents. (*See id.*; *see also* Pls.' Mem. in Supp. of Mot. for Sanctions 1–3, 5–25 (outlining numerous deficiencies with the supplemental discovery responses).) Additionally, in responding to Interrogatory No. 17, Mary Black asserted it could not fully identify the individuals and entities responsible for creating or implementing the challenged policy because of a never-disclosed "three year document retention policy," and the supplemental responses did not adequately identify those insurance carriers with whom Mary Black had contracted and who required Mary Black to submit claims promptly. (*See* Pls.' Mot. for Sanctions, Ex. A.)

5. The Court Imposes Sanctions for Defendants' Failure to Obey its Prior Orders.

[9] Mary Black's Supplemental Responses to Plaintiffs' Second Set of Continuing Interrogatories and Plaintiffs' First Set of Requests for Production were served on February 15, 2022, and are in the record as Exhibit A to Plaintiffs' Motion for Sanctions, filed February 22, 2022.

The Court held a hearing on Plaintiffs' Motion for Sanctions on March 30, 2022, at which time the Court heard and considered extensive arguments from counsel. In opposing the motion, Mary Black argued, among other things, that: (1) there was no prejudice or bad faith warranting the imposition of sanctions; (2) it could not perform the calculations required by Interrogatory No. 11; and (3) the only existing communications about the refusal to bill policy were the billing notes for affected patients. (*See* Mary Black's Mem. of Law in Opp'n to Mot. for Sanctions, Mar. 30, 2022.) The fact that Mary Black had just recently (and belatedly) disclosed its document retention policy in February 2022 bolstered this Court's previously noted concerns about the age of the case and the preservation of evidence, especially since non-party Spartanburg Regional Healthcare System had purchased Mary Black's assets in a transaction that closed about two years after this lawsuit commenced. Indeed, two days before the hearing, Defendants filed the affidavit of an employee of never-before disclosed third party vendor, in which the affiant offered opinions as to why Mary Black could not fully respond to discovery (to include certain calculations related to the collection of amounts from patients versus what the hospital would have expected to receive if the patient's health insurance had been billed) and noted that "Mary Black Memorial Hospital ('Mary Black') was sold to Spartanburg Regional . . . pursuant to an asset purchase agreement." (Sinkhorn Aff. ¶ 4, Mar. 28, 2022.) Defendants presented this testimony despite having previously represented to the Court that Mary Black was the "best entity" to perform the calculations. Additionally, defense counsel had previously suggested that the sale impacted Mary Black's ability to respond to discovery. (*See* Dec. 17, 2021 Hr'g Tr. 23, Ex. B to Pls.'s Mot. for Sanctions, Feb. 22, 2022.)

After careful consideration of all the arguments and materials presented, the Court found that the claimed inability to produce the information that the Court had previously directed Defendants to provide was not credible and was instead indicative of bad faith and a lack of respect

for the judicial process, thereby justifying the imposition of sanctions. At the hearing, there was significant discussion of the available sanctions arising from Mary Black's discovery abuse, including the option of striking the answer, but the Court ultimately decided to exercise its discretion to impose sanctions in the form of attorney's fees and costs and requested that Plaintiffs' counsel submit affidavits. Additionally, the Court directed Mary Black to produce the communications it claimed it was in the process of gathering and to explain why it could not calculate the financial impact of its refusal to bill policy.

After the March 30 hearing, the Court held yet another hearing on June 27, 2022.[10] In the interim, counsel met and conferred and exchanged correspondence about Defendants' proposed search terms and records custodians, but Defendants did not begin producing documents responsive to Plaintiffs' Requests for Production until June 15, 2022, when they began a rolling production. Mary Black served Second Supplemental Responses to Plaintiff's Second Set of Continuing Interrogatories on June 17, 2022.[11] At the hearing on June 27, the parties and the Court discussed Defendants' discovery progress, including that they were able to calculate the estimated financial impact of the challenged practice (despite previously saying it could not perform this calculation) and that Mary Black had produced certain relevant emails, even though it had previously represented that no responsive communications about its refusal to bill policy existed outside of the

[10] Excerpts from the transcript of the June 27, 2022 hearing are in the record as Exhibit D to Plaintiffs' Renewed Motion for Sanctions, filed January 17, 2023.

[11] The second supplemental discovery responses that were served on June 17, 2022, are in the record as Exhibit A to Plaintiffs' Renewed Motion for Sanctions, filed January 17, 2023. In these discovery responses, Mary Black performed the requested calculations (as estimated), which reflected that the total amount Defendants collected from patients was $1,816,454.85, as opposed to the $990,349.66 they would have expected to receive if they had submitted the charges to the patients' insurance carriers.

patient billing records. Mary Black also admitted that it had not attempted to identify any corporate-level custodians besides those suggested by Plaintiffs' counsel.

Additionally, there was a lengthy discussion at the hearing about records and witnesses from Mary Black's hospital facility in Gaffney, South Carolina. While Defendants stated that they had not obtained communications from Gaffney records custodians, Defendants never asserted that information and documents related to the Gaffney location were not discoverable, nor did they disclose that Defendants' discovery responses and document productions to date did not include any information or records for individuals who treated at the Gaffney location. The Court informed the parties that it would be entering a sanctions order and again instructed Defendants that Plaintiffs were entitled to full and complete discovery on the refusal to bill policy, including, for example, the impetus for the policy, the individuals with knowledge about the policy and any issues, and any changes to the policy over time.

On August 2, 2022, the Court entered an Order Granting Plaintiffs' Motion for Sanctions (the "Sanctions Order"), in which the Court ordered Defendant Mary Black Health System, LLC to reimburse Plaintiffs' counsel their attorney's fees and related costs. (Sanctions Order 15.) Specifically, the Sanctions Order found that:

> Mary Black has shown gross indifference to the rights of these Plaintiffs and the putative class members—persons who this Court is charged with protecting under Rule 23, SCRCP. Mary Black has ignored the orders and directives of the trial court, despite having been given repeated opportunity to comply. Its continually changing positions, failure to disclose pertinent policies, documents, and witnesses, and refusal to answer discovery as propounded—and as ordered by the Court—are 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. Plaintiffs filed this lawsuit five years ago, but only now in 2022—and after the Court's prolonged involvement—has Mary Black really begun to respond to discovery served in 2017.

(*Id.* at 12.) The Court decided to award sanctions in the form of attorney's fees and costs, finding "that Mary Black's abusive discovery tactics cannot go unpunished" and that Mary Black had only

produced the requested discovery "after multiple rounds of briefing and hearings." (*Id.* at 12, 13.) Although the Court declined to wade into the merits at that time, the Court warned Defendants that more severe sanctions could be imposed for discovery abuse and/or spoliation of evidence, to include adverse inferences, jury instructions, striking pleadings, and dismissal. (*See id.* at 12, 12 n.7.)

6. Defendants Continue to Stonewall Discovery and Shift Positions.

Although the Court directed the parties to confer as to the remaining issues discussed at the June 27, 2022 hearing and directed Defendants to further supplement their discovery responses, Defendants did not supplement their document production until March 16, 2023, and they did not supplement or amend their interrogatory answers until July 24, 2023.[12] In the meantime, Plaintiffs' counsel continued their efforts to obtain discovery from Defendants, conducting multiple telephone conferences regarding Defendants' deficient email productions and failure to identify witnesses and records custodians, as well as exchanging correspondence about Defendants' discovery deficiencies.[13]

On October 24, 2022, Plaintiffs' counsel wrote to defense counsel because Defendants' discovery responses and document production appeared to include only patients who treated at the Mary Black hospital facility in Spartanburg, and they did not include any information or documents for patients who treated at the Mary Black facility in Gaffney. In response, defense counsel confirmed that "the patient and collection totals that were identified in response to the Plaintiffs'

[12] Mary Black's Third Supplemental Responses to Plaintiffs' Second Set of Continuing Interrogatories are in the record as Exhibit B to Plaintiffs' Motion for Emergency Hearing and Immediate Relief, filed July 27, 2023.

[13] The letters between counsel related to Plaintiffs' attempts to obtain discovery from Defendants during this time period are in the record as Exhibit B to Plaintiffs' Renewed Motion for Sanctions, filed January 17, 2023.

discovery requests related only to the Mary Black Spartanburg facility," but represented that defense counsel 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." In the same letter, defense counsel further advised that records had been destroyed from two potential custodians whose employment terminated on December 31, 2018, "when both Mary Black Spartanburg and Mary Black Gaffney were sold to Spartanburg Regional," because "[a]s of that date, no legal hold was in place with respect to those individuals and their emails were not retained."

The issue of the missing Gaffney discovery came to a head shortly after the Court entered its order certifying the class on November 1, 2022.[14] On November 14, defense counsel sent a letter to Plaintiffs' counsel in which Defendants changed course, refused to produce any Gaffney-related discovery, and asserted that patients who treated at the Gaffney location "are not subject to the Plaintiffs' claims and those patient records and information are not responsive to any discovery request in this case." (Nov. 14, 2022 Correspondence, Ex. B to Pls.' Renewed Mot. for Sanctions, Jan. 17, 2023.) Defendants took this position despite previously representing to Plaintiffs' counsel and the Court that they were searching for Gaffney records and custodians. (*See, e.g.*, June 27,

[14] When the Court certified the class in this case, it directed Defendants to provide, within seven days, contact information for *all* patients impacted by the challenged practice (to include email addresses and telephone numbers). (Order Certifying Class 16–17, Nov. 1, 2022.) The Court also reminded Defendants of their "ongoing discovery obligations" and their duty to supplement and amend any discovery responses to the extent Defendants identified any "additional patients treated during the relevant time period at [Mary Black] facilities (i.e., locations in both Spartanburg, South Carolina and Gaffney, South Carolina." (*Id.* at 2 n.1.) Defendants filed a partial motion for reconsideration of the Order Certifying Class on November 8, 2022, and a second partial motion for reconsideration of the Order on November 14, 2022. On June 21, 2023, the Court notified the parties by email that the motions for reconsideration were denied. The Court's email outlined its reasoning for denying the motions and requested that Plaintiffs submit a proposed order to that effect.

2022 Hr'g Tr. 9, 19, 27, 33, 34, 37, Ex. D to Pls.' Renewed Mot. for Sanctions, Jan. 17, 2023.) Because Defendants had not included patients who treated at "Mary Black Gaffney" in their calculations and written responses, the discovery that Plaintiffs had spent years fighting for—and that the Court had spent years refereeing—was incomplete and inaccurate.

7. The Court Imposes Sanctions a Second Time and Approves Notice to Class Members.

Plaintiffs filed a Renewed Motion for Sanctions on January 17, 2023, requesting that the Court impose additional, severe sanctions for the refusal to produce any Gaffney-related discovery and the failure to preserve evidence from the Gaffney facility. (*See* Pls.' Renewed Mot. for Sanctions 8–10, Jan. 17, 2023.) On March 16, this Court held a hearing on the motion,[15] during which the Court again heard Defendants' arguments and explanations for their failures to provide discovery and preserve evidence related to Plaintiffs' claims. In deciding to grant Plaintiffs' second request for sanctions, the Court rejected Defendants' arguments, finding their "position that the Mary Black Gaffney facility is not part of the present litigation" and that they "did not consider the Gaffney facility as part of the litigation" to be disingenuous, disrespectful, contrary to prior representations to the Court, and untrue. (Form 4 Order, June 23, 2023.)

The Court entered its formal Order Granting Plaintiffs' Renewed Motion for Sanctions against Defendant Mary Black Health System, LLC on July 3, 2023 (the "Renewed Sanctions Order"). Again, the Court found that Mary Black had shown gross indifference to the plaintiffs' rights, disobeyed the Court's prior orders and directives, willfully refused to answer discovery, and caused prejudice to the class members. (Renewed Sanctions Order 9.) With respect to discovery related to the Gaffney Hospital, the Court specifically noted:

[15] The Court heard other pending motions in the case on that date as well.

> 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.

(*Id.*) As with the prior Sanctions Order, the Court warned Defendants that the sanctions available for failure to preserve evidence and discovery misconduct could be more severe in the future. (*See id.* at 11.) At that time, however, the Court elected to order immediate relief, requiring Defendants to "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." (*Id.* at 9.) The Court further ordered Defendants to: conduct a comprehensive review of their discovery responses "to ensure that all responses (and related productions) include the Gaffney facility," provide "a verified statement of all documents known to have been destroyed as they relate to this litigation and the Gaffney facility," produce "copies of any litigation hold or legal hold letters," suspend any document destruction policies, and preserve any documents related to the case. (*Id.* at 10–11.) Additionally, the Renewed Sanctions Order specifically found that Plaintiffs were entitled to "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." (*Id.* at 10.)

After entering the Renewed Sanctions Order, the Court entered a separate order approving certain procedures for providing notice to the class members (the "Notice Order"). (*See* Am. Order Establishing Notice Procedures & HIPAA Qualified Order, July 10, 2023.) The Notice Order required Defendants to provide contact information (including email addresses) for class members "for the purpose of providing direct mail notice of the pendency of this case to the class members." (*Id.* at 1–2, 4.) Additionally, the Court approved methods for notice by publication, including the

posting of notices at the former Mary Black locations in Spartanburg and Gaffney. (*Id.* at 4–6.) Because of the Court's previously expressed concerns about the age of the case and the fact that some class members had died, the Court found that notice by publication and the posting of notice in conspicuous locations at these community hospitals were "reasonably likely to apprise absent class members (who otherwise might not receive actual notice) of the pendency of the action and the opportunity to opt out." (*Id.* at 6.)

8. Defendants' Continued Misconduct Requires this Court's Further Involvement and Further Sanctions.

Undeterred by being sanctioned for discovery misconduct and spoliation issues twice in less than twelve months, on July 24, 2023, Defendants again disobeyed this Court's directives by producing incomplete contact information for the class members (thereby interfering with the Court's notice directives) and failing to provide the amended and supplemental discovery responses required by the Renewed Sanctions Order. (*See* Pls.' Mot. for Emergency Hr'g & Immediate Relief 1–2, July 27, 2023.) Plaintiffs filed their Motion for Emergency Hearing and Immediate Relief, alerting the Court to these issues and to issues with Defendants' July 24, 2023 Verified Statement, which had been required by the Renewed Sanctions Order. (*See id.* at 1–3 & n. 1–6.) In their Motion, Plaintiffs sought "all such relief, to include extraordinary relief, that the Court deems just and proper in light of Defendant's conduct over the past several years." (*Id.* at 2.)

The Court scheduled a hearing on Plaintiffs' Motion for Emergency Hearing and Immediate Relief for August 28, 2023. Before the hearing, the Court instructed the parties to confer in attempt to narrow the issues. At a meet and confer on August 18, Plaintiffs' counsel learned that Defendants had been able to locate last-known addresses for "approximately 25–29" class mem-

bers after manually reviewing some documents, Defendants had possession of patient account billing notes from the Gaffney facility that had not yet been produced to Plaintiffs, and Defendants would be producing additional payor contracts for the Gaffney facility. (*See* Pls.' Mem. in Supp. 19–21, Aug. 24, 2023; Pls.' Reply 1 n.1, Sept. 13, 2023.) Additionally, defense counsel advised that they could not produce email addresses for the class members as ordered by the Court and that they had been unable to identify any witnesses from the Gaffney location. (*See* Pls.' Mem. in Supp. 20–21.)

During this same period, Plaintiffs filed a memorandum in support of their motion,[16] with additional exhibits, and Defendants filed a response in opposition, with exhibits, as well as the affidavit of Michael Lynch, an employee of Defendant Professional Account Services, Inc. ("PASI"). Plaintiffs' counsel also provided copies of the summary notices to Spartanburg Regional Health Services District, Inc. ("SRHS") for posting as required by the Notice Order. After receiving the notices, SRHS's counsel contacted the Court informally and requested an opportunity to be heard. The Court held an informal telephone conference with counsel for SRHS and the parties on August 18, 2023. As a result of SRHS's involvement, the Court and Plaintiffs' counsel learned that the Asset Purchase Agreement (the "APA") for the sale of the Mary Black hospitals in Spartanburg and Gaffney to SRHS contained provisions that specifically addressed Defendants' right to access documents and records following the closing of the transaction on December 31, 2018. Plaintiffs' counsel wrote to Defendants and SRHS on August 24 to request production of the APA's relevant provisions. While SRHS immediately consented, Defendants did not respond to the request.

[16] Plaintiffs' Memorandum in Support of their Motion for Emergency Hearing and Immediate Relief contains a detailed recitation of "Defendants' misconduct and bad faith in this case," which has occurred over several years and has "requir[ed] Plaintiffs' counsel and the Court to unnecessarily expend a significant amount of time and effort." (Pls.' Mem. in Supp. 2, Aug. 24, 2023; *see also* 3–21 (describing Defendants' misconduct and discovery abuses).)

On September 28, 2023, the Court heard argument from the parties on Plaintiffs' Motion for Emergency Hearing and Immediate Relief. The Court also heard from counsel for SRHS about the APA and its concerns related to the posting of notice, and the Court took notice of the information relayed by SRHS's counsel concerning the terms and conditions in the APA as they related to Defendants' right to access and review records. In their memorandum and at the hearing, Plaintiffs argued convincingly that Defendants' conduct amounted to bad faith, willful disobedience, and gross indifference so as to justify the most severe sanctions possible—striking Defendants' answers to the amended complaint and entering judgment by default. Because Plaintiffs were seeking such harsh relief, the Court did not make any determination on Plaintiffs' motion at the hearing and instead provided Defendants with the opportunity to submit any additional or supplemental information, arguments, and materials. Additionally, the Court instructed defense counsel that the APA's relevant portions should be provided to Plaintiffs as expeditiously as possible and pursuant to the Consent Protective Order in the case. The Court further decided to hold the posting of notice at SRHS's hospitals in abeyance.

Thereafter, Defendants filed a Supplemental Memorandum in Opposition to Plaintiffs' Motion for Emergency Hearing and Immediate Relief, and Plaintiffs filed a Reply. Additionally, Plaintiffs' counsel advised the Court by letter that, as of September 21, 2023, nearly a month after the hearing, they still had not received the relevant portions of the APA. On September 27, the Court received further correspondence from Plaintiffs' counsel advising that some, but not all, relevant pages from the APA had been provided, but at that point the Court had already reached its decision to strike the answers. Although the Court did not consider Plaintiffs' analysis of the APA or the import thereof in reaching its decision (and makes no finding of fact regarding the contents of such

agreement), it nevertheless views Defendants' failure to timely provide the APA's relevant provisions (as directed by the Court) as further evidence of the Court's inability to secure Defendants' good faith participation in the discovery process. Additionally, given the manner in which the APA was described, it appears that the agreement might have provided clarity as to the Defendants' contention that certain records and/or information sought in discovery were unavailable to them as a result of the SRHS transaction.[17]

Findings and Conclusions of the Court

"Under Rule 37(b)(2)(C), SCRCP, when a party fails to comply with a discovery order, the trial court has discretion to impose a sanction it deems just, including an order dismissing the action." *McNair v. Fairfield Cnty.*, 379 S.C. 462, 465, 665 S.E.2d 830, 832 (Ct. App. 2008). "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." *Griffin Grading & Clearing, Inc. v. Tire Serv. Equip. Mfg. Co.*, 334 S.C. 193, 199, 511 S.E.2d 716, 719 (Ct. App. 1999). Even severe sanctions—such as striking an answer or dismissing an action—are appropriate "in cases involving bad faith, willful disobedience, or gross indifference to the opposing party's rights." *McNair*, 379 S.C. at 466, 665 S.E.2d at 832. Based on Defendants' unprecedented and longstanding discovery misconduct as outlined herein,[18] there can be no doubt that the Court is well within its discretion in striking Defendants' answers and holding them in

[17] Plaintiffs' counsel advised the Court in their September 27 correspondence that they intended to file the pages of the APA that had been produced under seal in support of Plaintiffs' Motion for Emergency Hearing and Immediate Relief.

[18] *See also* Pls.' Mem. in Supp. 3–21, Aug. 24, 2023 (providing a detailed account of the discovery challenges in this case).

default, as well as reserving the right to award additional sanctions such as attorney's fees for any future bad faith misconduct. *See* Rule 37(b)(2).

A. All Defendants have received sufficient notice and an opportunity to be heard, but Defendants have ignored the Court's repeated warnings

Initially, the Court notes that Defendants have argued that the Court cannot impose sanctions against all three Defendants because Plaintiffs' Motion for Emergency Relief (filed July 27, 2023) sought relief against Defendant Mary Black. However, Plaintiffs' supporting memorandum (filed August 24, 2023) expressly sought relief against all Defendants and Plaintiffs' counsel argued at the hearing on August 28 that the Court should sanction all Defendants for a pattern of willful, intentional discovery abuse. The Court also permitted Defendants to submit a Supplemental Memorandum in Opposition to Plaintiffs' Motion after the hearing, which Defendants filed on September 6, 2023. The Court considered all the submissions and arguments, and it reached a decision on or about September 27, 2023. As such, the Court finds that Defendants had sufficient notice that sanctions could be imposed against Defendants CHSPSC, LLC and Professional Account Services, Inc., as well as against Defendant Mary Black. *See generally Heins v. Heins*, 344 S.C. 146, 152, 543 S.E.2d 224, 227 (Ct. App. 2001) ("Due process requires that a litigant be placed on notice of the issues which the court is to consider.").[19]

Further, the Court's prior orders certifying the class and establishing notice procedures required compliance by all defendants, not just Mary Black, and the Court finds that Defendants have willfully refused to comply. As for discovery, Defendants themselves have represented to the Court and Plaintiffs' counsel that Defendants were collectively making efforts to comply with

[19] Additionally, this Court's prior orders and directives have repeatedly referenced the Defendants collectively and addressed their collective discovery practices and duties. *See, e.g.*, April 23, 2020, Order; July 6, 2021, Order; Nov. 23, 2021, Order; Nov. 1, 2022, Order; July 3, 2023, Order; July 11, 2023, Order.

discovery or were collectively unable to provide the requested information. For example, Defendants' Motion for Partial Reconsideration of the Class Certification Order discusses Defendants' collective "efforts to collect the information addressed in the Certification Order," and states, "Defendants are preparing the required supplemental discovery responses" and "Defendants are in the process of re-reviewing the individual patient files and will expeditiously supplement the responses." (Defs.' Partial Mot. for Reconsideration 4–5, Nov. 8, 2022.) Defendants also recently filed a "Verified Statement" on behalf of Defendants Mary Black, CHSPSC, PASI, and Community Health Systems, Inc., in which they discuss Defendants' knowledge and discovery efforts collectively, as well as Defendants' collective attempts to comply with the Court's Order of July 3, 2023. (*See* Verified Statement, July 24, 2023.) And Defendants submitted the affidavit of a PASI employee that purports to explain why Defendants could not comply with this Court's prior orders. (*See* Lynch Aff., Aug. 25, 2023; Defs.' Mem. of Law in Opp'n to Pls.' Mot. 3, Augs. 28, 2023.) Previously, Defendants submitted a Discovery Report to the Court, dated December 9, 2021, in which they purported to "address[] Defendants' compliance with the Court's Order, dated November 23, 2021, and the efforts taken to gather documents that may be potentially responsive to Plaintiffs' discovery requests in a secure location." (Defs.' Discovery Report to the Court 1, Dec. 9, 2021.) The 2021 Report also discussed Defendants' production of documents, Defendants' attempts to gather information and documents, Defendants' inability to identify witnesses, and Defendants' efforts to gather and compile information about affected patients. (*Id.* at 1–4.) The Court thus finds that all Defendants have engaged in the sanctionable misconduct described herein.

The Court's decision to impose severe sanctions against Defendants has not been made lightly and comes after substantial reflection and consideration of the ongoing challenges with the

discovery process in this case, as well as multiple warnings. These numerous and unprecedented challenges are reflected in the record and the fact that the Court has conducted six hearings addressing discovery issues over the past two years, has entered multiple orders addressing Defendants' discovery deficiencies, and has repeatedly warned that further misconduct could result in severe sanctions. In an effort to afford proper due process to all parties, the Court has repeatedly declined to wade into the merits of the case and has sought to achieve Defendants' compliance by imposing less severe sanctions. This Court's prior efforts of achieving Defendants' good faith compliance included a finding of sanctions accompanied with an award of attorney's fees on August 2, 2022, and a determination of sanctions not accompanied by an award of attorney's fees less than 12 months later, on July 3, 2023. Further, Plaintiffs have consistently requested that the Court consider striking answers, and Defendants have been on notice since at least the date of the first Sanctions Order that the Court would consider awarding such severe sanctions for spoliation of evidence and/or discovery misconduct. (*See* Sanctions Order 12–13; Pls.' Mot. for Sanctions 5, Feb. 22, 2022.) The Court reminded them of this when it entered the Renewed Sanctions Order, again warning Defendants of potential sanctions before reaching its present decision to strike the answers. (*See* Renewed Sanctions Order 11.)

The Court accordingly finds that an award of sanctions against all Defendants comports with due process and is permissible under Rule 37, SCRCP.

B. Defendants' misconduct has been severe, protracted, and willful, and it has caused prejudice to the class members.

In deciding to award severe sanctions, this Court has considered "the nature of the [discovery sought], the discovery posture of the case, willfulness, and the degree of prejudice." *Samples v. Mitchell*, 329 S.C. 105, 112, 495 S.E.2d 213, 216 (Ct. App. 1997). Although the Court has attempted to achieve Defendants' compliance with their discovery obligations and the Court's

prior orders and directives, the Court fears that its Rule 23, SCRCP, obligations have been challenged to the point of compromising or jeopardizing the due process obligations to the unnamed class members in this case. Plaintiffs contend, and the Court agrees, that Defendants have made repeated, duplicitous representations to the Court and Plaintiffs' counsel, have refused to obey the Court's orders and directives, and have taken shifting positions about their ability to provide discoverable information and documents.

With respect to the discovery sought, Plaintiffs have been seeking (and Defendants have been resisting) discovery into basic, material information about the challenged refusal to bill policy, the individuals involved, communications related to the policy, and its financial impact for years. As this Court previously concluded and communicated on numerous occasions, all this information was clearly relevant and discoverable under South Carolina law. The Court finds that Defendants' continued resistance to relevant, material discovery is unfounded and obstructionist. Plaintiffs needed to obtain this discovery to further their claims on the merits, and Defendants have delayed and prevented their ability to do so, causing prejudice to the plaintiff class members. *See 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).

Defendants' failure to produce patient information and other discoverable information from the Mary Black Hospital location in Gaffney, SC is particularly troubling. As revealed in the meet and confer on August 18, Defendants disclosed that they in fact possessed but had not produced patient billing notes for the Gaffney location, even though such documents were directly responsive to the discovery requests that were the subject of the Court's November 2021 Order, as reflected in the prior production of almost 5,000 pages of patient billing notes from the Spartanburg facility. After Defendants revealed the existence of these billing notes, they subsequently asserted

at the August 28 hearing that they were not probative, admissible, or relevant, but this Court had already ruled that such documents were discoverable almost two years before and Defendants previously produced the same types of documents for the Spartanburg location. Further, Defendants' Verified Statement, filed on July 24, 2023, and executed by their counsel, stated that "they have no knowledge of what has been done with regard to the remaining Gaffney Hospital records by Spartanburg Health Services District, Inc. since Spartanburg Health Services District, Inc.'s acquisition of the Gaffney Hospital assets." At the August 18 meet and confer, however, defense counsel revealed that they would be producing certain additional payor contracts for the Gaffney location that they had been able to locate (which, again, had been ordered produced by this Court in its November 2021 Order).[20]

Further, the Court notes that Defendants have offered shifting, conflicting explanations for their failure to provide Gaffney-related documents. Initially, defense counsel represented to the Court and Plaintiffs' counsel that Defendants were searching for Gaffney records. (*See* Renewed Sanctions Order 4 n.5 & 3.) Later, Defendants changed course, asserting that Gaffney-related discovery was not responsive and that the Gaffney facility was not affiliated with the Spartanburg facility.[21] (*Id.* at 3–4.) Then, after the Court ordered production of Gaffney documents in its Renewed Sanctions Order, Defendants filed a Verified Statement in which they admitted that certain Gaffney documents had been destroyed, but in which they also claimed, "Defendants have

[20] Defendants had previously served a subpoena on SRHS for records related to the Gaffney facility on July 25, 2023, after the deadline for compliance with the Court's July 3, 2023, Order had passed. *See* Pls.' Motion for Emer. Hr'g. Ex. C.

[21] This Court has previously rejected Defendants' arguments that the Gaffney facility is not part of this litigation. *See* Renewed Sanctions Order 4–6, 9–11 (outlining the evidence submitted by Plaintiffs and ordered Defendants to, among other things, respond to Gaffney-related discovery).

no knowledge of what has been done with regard to the remaining Gaffney Hospital records." (Verified Statement 2, July 24, 2023.) Despite claiming they did not have any Gaffney discovery materials, Defendants later disclosed that they were, in fact, able to gather patient billing records and contracts, when these materials should have been provided almost two years ago.

The record in the case, as outlined exhaustively herein and in this Court's prior orders, contains numerous other examples of bad faith misconduct, to include repeated misrepresentations regarding the ability to access documents and records and perform calculations (and the effect of the SRHS transaction on such abilities); the untimely and potentially unnecessary subpoena served upon SRHS; the failure to supplement and amend discovery responses to identify appropriate witnesses in non-billing capacities (i.e., management and executives employed at both the Gaffney and Spartanburg facilities with institutional knowledge, as opposed to collections agents) and produce documentation related to same (and the related failure to preserve evidence); the misrepresentations concerning the Gaffney facility and its relevance to this litigation (supported by the existence of numerous publicly available documents demonstrating that the Gaffney facility was considered part of Mary Black by these Defendants and, relatedly, the disclosure that the APA was a single document that transferred ownership of the Mary Black facilities in Gaffney and Spartanburg to SRHS).

Additionally, the Court is deeply concerned with Defendants' interference with the notice program approved by the Court on July 12, 2023. The Court has repeatedly stated that it is tasked with protecting the interests of the class members in this case, and the Court and class counsel have a responsibility to provide notice of the pending litigation to absent class members. *Eldridge v. City of Greenwood*, 308 S.C. 125, 127, 417 S.E.2d 523, 534 (1992); *see also Salmonsen v. CGD, Inc.*, 377 S.C. 442, 459, 661 S.E.2d 81, 91 (2008) (noting that Rule 23(d) requires the trial courts

to protect "the interests of putative class members" and "permit[s] the trial court to maintain continual control over class action proceedings, including the method of class notification"). Since at least November 1, 2022, when the Court certified the class, Defendants have been on notice that they would need to identify class members and provide appropriate contact information to facilitate actual notice. Defendants also should have had the patient records necessary for them to comply with any notice directives since at least February 2022, when they supplemented their discovery responses. (*See* Defs.' Partial Mot. for Reconsideration 4, Nov. 8, 2022.)

Even so, Defendants failed to provide any contact information for 103 class members and failed to provide any email addresses, asserting at the August 28 hearing that Defendants do not collect and do not have email addresses, even though their own intake form contained a box for patients to provide such information. (*See* Pl. Mem. Ex. B (submitted for in camera review).) Despite having had over eight months to gather the information, Defendants instead produced Excel spreadsheets that failed to provide The Notice Company and class counsel with any contact information for 103 class members and failed to provide email addresses for any class members. This reflects contempt of the Court's Notice Order, has required that notice be conducted in stages, and calls into question the opt-out deadline that has been publicized to the class members.[22]

[22] Defendants produced additional address information on August 18, 2023, along with a related affidavit of Michael Lynch. *See* Pl. Mem. in Support of Mot. for Emerg. Hr'g 17, Ex. C. Once again, the Court finds that Defendants' explanations of "we don't have it" and "we can't provide what we don't have" are, in fact, not true. As outlined herein, these same types of explanations have been proffered multiple times throughout discovery—from the refusal to provide Court-ordered calculations in response to Interrogatory No. 11, to the refusal to produce all relevant records and communications (including those from the Gaffney location), despite assuring the Court and Plaintiffs' counsel that they were searching for same. As for the failure to provide email addresses, despite the clear language of the Court's Notice Order (and the plain language contained in their own form), Defendants nevertheless contended at the August 28 hearing that the email addresses were actually not part of the Notice Order or the notice program, and that Plaintiffs' argument related to same was disingenuous. Regrettably, it is Defendants' argument that is entirely disingenuous.

That Defendants' belated additional "manual" review—which Defendants performed well after the Court-ordered deadline—yielded address information for 29 additional class members is further confirmation of Defendants' interference with the notice program, their refusal to participate in the discovery process in good faith, and their contempt for this Court and the class members. Such "additional review"—manual or otherwise—could have and should have been conducted immediately following the entry of the notice order, if not months before, and the Court finds that Defendants' belated effort in conducting this review reflects yet another instance of the disregard and contempt that the Defendants have both for the Court and the class members.[23]

In sum, in addition to engaging in egregious discovery misconduct, Defendants have also frustrated the duties of this Court and class counsel to protect the rights of class members and provide them with due process. *See* Rule 23(d)(2), SCRCP; *see also Salmonsen v. CGD, Inc.*, 377 S.C. 442, 459, 661 S.E.2d 81, 91 (2008) ("[A] court in managing a class action suit should issue orders that 'fairly and adequately protect the interest of the persons on whose behalf the action is brought or defended.'"). Defendants' conduct has been willful and intentional, requiring an unprecedented level of involvement by the Court. This has been a multi-year pattern of discovery abuse and obstruction, and it is far from incidental or "trivial," as Defendants contended at the last hearing. This Court finds that the various challenges to the discovery process over such an extended period, Defendants' shifting of positions, and their interference with the Court's Rule 23 responsibilities constitute "bad faith, willful disobedience, [and] gross indifference" to the rights

[23] The failure to provide basic address information pursuant to the Court's July 12, 2023, Order may regrettably necessitate the implementation of multiple and/or expanded notice programs and the Court's continued involvement in the notice program.

of the plaintiff class members and demonstrate a total lack of respect for the judicial process. *Davis v. Parkview Apartments*, 409 S.C. 266, 762 S.E.2d 535 (2014) (quoting *Griffin Grading*, 334 S.C. at 198–99, 511 S.E.2d at 718–19).

C. Defendants' egregious misconduct requires the most severe sanctions available under South Carolina law.

This Court has never witnessed such egregious misconduct by litigants in any prior case, and the Court's efforts (including the efforts of a prior judge) to achieve compliance are extraordinary in length and exhaustive; indeed, the number of hearings is unprecedented. Without sanctions with sufficient teeth to punish Defendants and to deter similar misconduct, the entire discovery process would be a farce. *See, e.g.*, *Downey v. Dixon*, 294 S.C. 42, 45, 362 S.E.2d 317, 318 (Ct. App. 1987) ("[W]hatever sanction is imposed should serve to protect the rights of discovery provided by the Rules."). The Court finds that ample precedent exists under South Carolina to support striking Defendants' answers as a sanction for their misconduct in this case. *See, e.g.*, *Griffin Grading*, 334 S.C. at 198, 511 S.E.2d at 718 (affirming the trial court's decision to strike the answer where Defendant had engaged in a "pattern of noncompliance and discovery abuse" and had "withheld material, relevant evidence"); *McNair v. Fairfield Cnty.*, 379 S.C. 462, 467, 665 S.E.2d 830, 832 (Ct. App. 2008) (upholding the trial court's order striking the answer where Defendant had not produced documents more than seven months after being compelled to do so, which delay prejudiced "plaintiff's right to have his claim heard" and which refusal was "a serious affront to the integrity of judicial system"); *QZO, Inc. v. Moyer*, 358 S.C. 246, 257–58, 594 S.E.2d 541, 547–48 (Ct. App. 2004) (affirming the trial court's decision to strike Appellant's answer and enter a default judgment as a sanction for discovery abuse where Appellant violated a TRO and failed to preserve evidence); *Davis v. Parkview Apartments*, 409 S.C. at 281–83, 762 S.E.2d at 543-44 (affirming dismissal of Appellants' lawsuit as a sanction where the court "issued

numerous discovery rulings," but "Appellants willfully and repeatedly failed to comply," and instead "attempt[ed] to divert the implementation of the court's rulings by providing incomplete responses and causing delay through other tactics").

Here, as in *Griffin Grading*, the Court concludes that it is justified in striking Defendants' answers because "the record is full of multiple, egregious discovery abuses that blocked [Plaintiffs'] attempts to conduct meaningful discovery." 334 S.C. at 199, 511 S.E.2d at 719. This Court has conducted multiple hearings and entered multiple orders in an effort to secure Defendants' compliance with their discovery obligations, but Defendants have been undeterred, continuing on a path of active resistance and willful disobedience. Defendants have not only frustrated Plaintiffs' attempts to discover their claims, but they have also interfered with the required notice to class members. The Court has repeatedly warned Defendants that it was reserving the right to impose additional sanctions for any continued discovery abuse. *See McNair v. Fairfield County*, 379 S.C. at. 467, 665 S.E.2d at 833.

D. Defendants' excuses and explanations are untrue.

Defendants have offered various excuses, explanations, and arguments for their discovery misconduct. While the Court has carefully considered those contentions, it finds that Defendants' reasons for failing to comply "strain credulity" and are simply untrue. In contrast, the Court concludes that the assertions made by Plaintiffs are, regrettably, true and makes this specific finding of truthfulness to address Defendants' incorrect contention that Plaintiffs' counsel somehow lied or tricked the Court into issuing its orders. *See QZO, Inc. v. Moyer*, 358 S.C. at 257, 594 S.E.2d at 547 ("When, as here, there is conflicting evidence on an issue, it is up to the court as trier of facts to judge credibility.").

The Court wholeheartedly disagrees with Defendants that "[a]t issue are only situations where Plaintiffs have received discovery responses and documents, but say they want more." (Defs.' Supplemental Mem. in Supp. 1, Sept. 6, 2023.) The Court further disagrees that Plaintiffs have "ma[d]e up false scenarios" or "confuse[d] the Court into issuing orders to compel." (*Id*. at 1–2.) Instead, Defendants have resisted discovery at every turn, changing their explanations, needlessly delaying the litigation, and requiring the Court to spend countless hours and expend considerable resources to address Defendants' bad faith and willful misconduct. *Cf. Davis*, 409 S.C. at 283, 762 S.E.2d at 544 (upholding sanctions where "Appellants refused to comply merely because [the trial court's] rulings had adverse implications on their cases," the trial court provided "ample opportunity" to comply, and "Appellants willfully and repeatedly failed to comply"). Even though Defendants contend they have participated in discovery, and the Court notes that they have participated to a degree, Defendants' pattern and conduct during discovery has resulted in unwarranted delays and overall prejudice to the plaintiffs, and Defendants have not complied in good faith with the Court's directives.

E. The Notice Order remains in effect in its entirety.

The Court has previously taken notice of SRHS's expressed concern and informal objection to this Court's prior directive that the notices be posted in its facilities in Spartanburg and Gaffney. While the Court previously held the directive in abeyance following SRHS's informal request, the Court now takes the opportunity to state that its prior directive remains in place pending any formal appearance and motion by SRHS to the contrary because the Court has not received any additional information about an alternative method for notification that would

eliminate the need for the posted notice.[24] Accordingly, the Court, while not excluding the possibility of receiving notice of a formal motion from SRHS to address this issue, reiterates that its Notice Order remains in effect (including all directives contained therein). If SRHS intends to challenge the internal posting requirement, the Court directs that such challenge must be done immediately and no later than ten days from the entry of this Order (at which time the informal abeyance granted by the Court to SRHS will expire), and Plaintiffs' counsel are hereby directed to provide a copy of this Order to SRHS's counsel via email upon its entry and to provide the Court and Defendants with confirmation of same. In the event that SRHS elects to file such motion, the Court may then consider other alternatives for notice, such as those referenced in Plaintiffs' September 21 letter to this Court.

Conclusion

Again, the Court cautiously and reluctantly enters this Order striking Defendants' answers and holding Defendants in default, but the Court finds such sanctions to be justified and well within this Court's discretion. The Court has previously imposed less severe sanctions and warned Defendants on numerous occasions, but to no avail.[25] To allow such conduct to go unpunished would be a serious affront to the judicial system and the rights of the class members, and sanctions of this magnitude are necessary to deter other litigants from similar misconduct in the future. Although the Court is striking the answers and Defendants are in default, there is much additional work to

[24] While the Court notes the concerns of SRHS as expressed through informal means, the Court finds that those concerns do not outweigh the Court's duties to the absentee class members under Rule 23, SCRCP. Regardless, should SRHS elect to formally appear in this action, as explained herein, the Court may then consider its arguments and any opposition thereto.

[25] The futility of including a further monetary component to the present sanction is obvious.

be done in this case, including, for example, compliance with prior orders related to class notification. The Court genuinely regrets that Defendants' acts and omissions have led to the result, even though justified, of striking the answers.

Therefore, the Court ORDERS that Defendants' Answers to the Amended Complaint shall be stricken from the record in this case and further ORDERS that Defendants are in default.

Judge's Signature Page Follows

AND IT SO ORDERED.

_____
J. Mark Hayes, II
Presiding Circuit Court Judge

Dated: _____

At: _____

Spartanburg Common Pleas

Case Caption: Jo Ann Blackwell , plaintiff, et al VS Mary Black Health System, Llc , defendant, et al

Case Number: 2017CP4200219

Type: Order/Sanctions

IT IS SO ORDERED

s/ J. Mark Hayes, II #2132