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SC Court of Appeals

Robert J. Bonds, Circuit Court Judge
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Appellate Case No. 2026-000244
Case No. 2011-CP-10-07166

Otha M. Delaney, Octavia D. Watson, Alicia S. Alston and Paul McGuiggan, Jr., individually and on behalf of all others similarly situated as Co-Class Representatives .....Respondents/Appellants,

v.

First Financial of Charleston, Inc.....Appellant/Respondent.

AND

Otha M. Delaney, Octavia D. Watson, Alicia S. Alston and Paul McGuiggan, Jr., individually and on behalf of all others similarly situated as Co-Class Representatives ..... Appellants,

v.

First Financial of Charleston, Inc.....Appellant/Respondent.

APPELLANTS' INITIAL BRIEF

J. Ashley Twombley, Esquire (S.C. Bar #72916)
Thomas Blase Iandoli, Esquire (S.C. Bar #105294)
Twenge + Twombley Law Firm
311 Carteret Street, Beaufort, SC 29902
(843) 982-0100
twombley@twlawfirm.com
iandoli@twlawfirm.com

and

C. Mitchell Brown, Esquire (S.C. Bar #12872)
Nelson Mullins Riley & Scarborough, LLP
P.O. Box 110770
Columbia, SC 29211
(803) 255-9595
mitch.brown@nelsonmullins.com

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STATEMENT OF ISSUE ON APPEAL

Whether the circuit court abused its discretion by denying any sanction for the spoliation of evidence where (1) First Financial of Charleston, Inc. had a clear duty to preserve the files of other potential class members upon service of the October 4, 2011 putative class-action complaint, (2) First Financial of Charleston, Inc. destroyed all of its files for those putative class members, (3) the destruction of those files—which First Financial of Charleston, Inc. testified is the only means of identifying, notifying, and facilitating the participation of those class members—caused severe, irreparable, and case-determinative prejudice to those class members, and (4) the circuit court provided no explanation for its refusal to impose any sanction, not even a remedial one.

STATEMENT OF THE CASE

This appeal arises from the circuit court's denial of a motion for sanctions for the spoliation of case critical evidence. The underlying action is a certified class action, initially filed by Plaintiff-Appellant Otha Delaney against First Financial of Charleston, Inc. ("FFC"), arising from violations of Article 9 of South Carolina's Uniform Commercial Code ("SCUCC").[1] Article 9 of the Uniform Commercial Code governs the rights and duties of a secured creditor (here, FFC) after a consumer (here, the members of the class) defaults on a secured obligation (here, the class members' auto-loans). In the automobile-finance context, Article 9 gives a secured creditor extraordinary self-help remedies: without first obtaining a court order, the creditor may repossess a consumer's vehicle, sell or otherwise dispose of that vehicle, take the proceeds of the sale, and then seek to collect any claimed deficiency. *See* National Consumer Law Center, Repossessions § 13.2.4.6 (9th ed. 2017) ("Article 9 [of the UCC] provides creditors with an extraordinary remedy: without the intervention of a court or supervision of a regulatory agency, creditors can declare a note in default,

[1] The Uniform Commercial Code is applicable in all fifty states. https://guides.ll.georgetown.edu/commerciallaw/ucc

seize the consumer's property, sell it without supervision, and recover the deficiency.") (cited in Pl.'s Nov. 4, 2024 Mem. in Supp. p. 4; R. p. __).

Because those remedies are powerful, final, and harsh—particularly when consumers are involved—Article 9's statutory scheme imposes certain mandatory disclosure requirements on secured creditors before, and after, the sale of repossessed consumer collateral. The disclosure are designed to provide debtors with basic information about their legal rights during the process of their collateral being sold and the proceeds accounted for. This case concerns those required disclosures.

The disclosures required to be made are not discretionary, technical preferences, or matters of judgment. They are part of Article 9's uniform statutory framework, applicable in every state in the union, and they require secured creditors to send specified information to consumers in connection with the disposition of consumer collateral. In consumer-goods transactions, the statutory disclosure/notice requirements are enforced through strict liability: a notice that omits any of the required information is insufficient as a matter of law. Liability does not depend on proof of intent, bad faith, reliance, confusion, mistake, or actual injury. When the disclosures are not properly made, Article 9 provides the secured party is "liable for any loss caused by the failure to comply . . . ." S.C. Code 62-9-625. However, Article 9 also provides for the automatic recovery of minimum and sum certain statutory damages "in any event." Id. Those damages are calculated using two figures from the customer's loan documents, namely, "the credit service charge plus ten percent of the principal amount of the obligation . . . ." Id.

In sum, the role of the Court in these cases is typically straightforward and clear: compare the notices to requirement of the law. If the notices are defective in any way, strict liability applies, and customer is entitled to an award of no less than "the credit service charge plus ten percent of the principal amount of the obligation . . . ."

On October 4, 2011, Plaintiff Otha M. Delaney (individually and on behalf of others similarly situated) filed this action against FFC challenging FFC's notice practice. The original complaint alleged that, upon FFC's repossession of Delaney's vehicle and the vehicles of situated customers, FFC violated Article 9 of the SCUCC by sending defective and non-compliant notices/disclosures, i.e., notices that do not comply with Article 9.

Significantly, the putative class action complaint also alleged that FFC used "form" notices in an effort to comply with Article 9's disclosure/notice requirements. Specifically, the complaint alleged that each time FFC sent notices, it changed only the consumer's name and relevant account information. The complaint is clear that it seeks class status and was brought by Mr. Delaney "on his own behalf and that of all others similarly situated." (Compl. p. 1; R. p. __.) The complaint was also clear that names of similarly situated FFC customers, as well as the number of customers, was known only to FFC. (Compl. pp. 2-3; R. pp. __ (alleging that the form notices/disclosures change "only the names, the dates[], and the particulars of the vehicles involved . . . with **identities** and **number** of consumers being known only to First Financial." (emphasis added)).) The complaint alleged that the members of the proposed class "are so numerous that joinder of all members is impractical." (*Id.* at p. 4; R. p. __.) Critically, the complaint alleged that FFC was "**uniquely situated** to address" these issues, and that "discovery on these issues ought to be permitted." (*Id.* at p. 4 n.1; R. p. __ n.1 (emphasis added).)

On November 30, 2011, FFC moved to dismiss Mr. Delaney's claims. Significantly, in recognition of the fact that Delaney was also asserting claims on behalf of a putative, FFC also moved to dismiss the claims of the "putative class." (Mot. to Dismiss p. 1; R. p. __.)

On February 22, 2012, while the case remained pending in the circuit court, Mr. Delaney served an initial set of interrogatories, requests for production, and requests for admission. (*See generally* Plaintiff's First Request for Production, Plaintiff's First Set of Interrogs., and Plaintiff's

First Set of Requests for Admissions; R. p. __.) Plaintiff's initial discovery was targeted at determining whether "form" documents were used, and if so, how many of FFC's customers were sent the form documents. In other words, the initial discovery was targeted at the Rule 23, SCRCP, prerequisites for certification as a class action, namely, numerosity, typicality, and commonality. For example, Plaintiff requested the following:

- "Admit or deny that Exhibit C is a form notice sent by FFC to consumers other than Otha Delaney at addresses in South Carolina."
- "[H]ow many transactions from January 1, 2006 until the present . . . has [the allegedly defective from notice] . . . been sent to a debtor residing in the State of South Carolina";
- "Admit or deny that [the allegedly defective form notice was] sent by FFC between January 1, 2006 and the present date to more than forty (40) [South Carolina consumers]";
- "Admit or deny that [the allegedly defective form notice was] sent by FFC between January 1, 2006 and the present date to more than one hundred (100) [South Carolina consumers]"; and
- "Admit or deny that [the allegedly defective form notice was] sent by FFC between January 1, 2006 and the present date to more than five hundred (100) [South Carolina consumers]."
- "State [FFC's] policy . . . regarding retention and destruction of documents and records reflecting accounts of consumer debtors from whom collateral has been repossessed and disposed of by FFC (e.g., how long records are maintained by FFC and where they are kept."

(*Id.*; R. pp. __.)

In sum, the original complaint made it clear that Plaintiff asserted claims on behalf of himself and others similarly situated who were sent the defective notice; that FFC was "uniquely situated" to determine the "identity" and "number" of "similarly situated" individuals who were sent the defective notice; and finally, that Plaintiff believed the notice had been sent to so many people that it was impractical to join them in this proceeding. (*Id.*; R. p. __.) The discovery was precisely the type of class discovery one would expect in a class action of this nature and was specifically tailored to initial threshold questions that underpinned the class allegations. *See* § 7:16. Scope of certification-related discovery—Generally, 3 Newberg and Rubenstein on Class Actions § 7:16 (6th ed.) ("The Fourth Circuit has long noted that 'it is essential that a plaintiff be afforded a full opportunity to develop a record containing all the facts pertaining to the suggested class and its representatives. . . . Discovery concerning the certification requirements is therefore permitted, indeed often required." (quoting *International Woodworkers of America, AFL-CIO, CLC v. Chesapeake Bay Plywood Corp.*, 659 F.2d 1259, 1268 (4th Cir. 1981)). If the, the discovery at issue even asked questions about FFC's document and record retention policy.

On March 22, 2012, FFC filed a motion to extend time to respond to the discovery. On March 29, 2012, the circuit court entered a consent order regarding FFC's deadline to respond. The order effectively recognized FFC's obligation to respond within the deadline proscribed by the rules but extended FFC's time to do so until after FFC's Motion to Dismiss was resolved. (Mar. 29, 2012 Order; R. p. __.)

On April 30, 2013, the circuit court granted FFC's Motion to Dismiss. The court later denied reconsideration, and Mr. Delaney appealed. On September 28, 2016, the Court of Appeals affirmed the dismissal in a split decision. A remittitur was issued on October 19, 2016, but the Court of Appeals recalled the remittitur on November 2, 2016. Mr. Delaney sought rehearing,

which was denied. Mr. Delaney petitioned the Supreme Court of South Carolina for a writ of certiorari. (Mar. 22, 2017 Pet. for Writ. of Cert.; R. p. __.) FFC moved to dismiss the Petition, arguing that the Court of Appeals had improperly recalled the remittitur, and that the Petition was due to be dismissed. The Supreme Court granted certiorari and dismissed FFC's Motion to Dismiss as moot. (March 28, 2018 Order; R. p. __ ("Based on the vote of the Court, the petition for a writ of certiorari is granted and the motion to dismiss is denied as moot.").)

On May 8, 2019, the Supreme Court reversed the dismissal in *Delaney v. First Financial of Charleston, Inc.*, 426 S.C. 607, 829 S.E.2d 249 (2019), and remitted the case to the circuit court on July 15, 2019. (July 15, 2019 Remittitur; R. p. __.)

With the motion to dismiss resolved, FFC responded to the initial discovery requests. FFC's responses showed that the notice sent to Delaney was in fact a form notice, and also showed that "[d]uring the three-year period from October 4, 2008, to October 4, 2011, FFC did not use any other forms" to satisfy its Article 9 disclosure obligations. (Def.'s Oct. 23, 2019 Resps. p. 7; R. p. __.) However, as to the number of individuals sent the defective notice from October 4, 2008, through October 4, 2011 (i.e., numerosity), FFC stated that it was "not able to provide the requested information." (*Id.* at p. 5; R. p. __.)

Ultimately, discovery revealed that the reason FFC was "unable" to provide the number of customers who had been sent the form notice was because FFC failed to preserve any files, records, or other data that would enable it to identify and or determine the number of other customers similarly situated. (*Id.*) Specifically, FFC's 30(b)(6) designee testified that FFC destroyed all those records after being served with this lawsuit in October of 2011. (April 14, 2021 Dep. Tr. p. 26; R. p. __.) When asked to confirm that FFC took "no steps" to institute a litigation hold or to otherwise

"hold the documents that might be related to the class action allegations in Mr. Delaney's October 2011 complaint," FFC confirmed it took no such action: "Yes." (*Id.* at pp. 25-28; R. p. __.)[2]

On July 27, 2021, the circuit court certified the case as a class action and appointed Mr. Delaney as class representative. (Jul. 27, 2021 Order p. 2; R. p. __.) The class included victims of FFC's challenged notice practice from October 4, 2008, through July 27, 2021, the date class certification was granted.

Thereafter, the parties engaged in additional discovery. As a result, class members whose vehicles were disposed of from 2012 to 2021 were identified by FFC. However, because FFC destroyed its records for class members 2008 through 2011, FFC was never able to provide the number or identity of class members from October 4, 2008, through October 4, 2011.

On September 18, 2025, the circuit court granted summary judgment in favor of the entire class on the merits of each of the class's notice claims. (Sept. 18, 2025 Order; R. p. __.) The circuit court later granted Octavia D. Watson, Alicia S. Alston, and Paul D. McGuiggan, Jr. leave to intervene individually and as Co-Class Representatives alongside Delaney. (Jan. 22, 2026 Order; R. p. __.)

On August 6, 2024, Plaintiff Delaney moved for sanctions based on, *inter alia*, FFC's destruction of class members' files whose vehicles were disposed of between 2008 and 2011. Plaintiff sought sanctions for spoliation on the grounds that, upon service of the October 2011 complaint, FFC knew putative class members files were relevant to these proceedings and further knew that FFC was "uniquely situated" to determine the identity and number of those FFC

[2] On March 30, 2021, Mr. Delaney filed an amended complaint. (Am. Compl.; R. p. __.) The Amended Complaint continued to assert claims based on FFC's original pre-sale notice and added claims concerning FFC's revised pre-sale notice and revised post-sale notice, which also failed to comply with Article 9. The amended complaint sought a variety of relief, including "actual damages not less than the minimum damages provided by" statute.

customers. Yet, FFC destroyed their files after the 2011 suit was filed. (Aug. 6, 2024 Mot. for Sanctions pp. 1-2; R. p. __.)

The circuit court heard argument on sanctions and, by order dated January 22, 2026, denied Plaintiff's motion for sanctions in a Form 4 order. (Jan. 22, 2026 Order; R. p. __.) Plaintiff moved for reconsideration on February 2, 2026. (Feb. 2, 2026 Mot. to Recons.; R. p. __.) On March 10, 2026, the circuit court denied reconsideration, concluding that its prior denial of sanctions was a proper exercise of discretion. (Mar. 10, 2026 Order p. 4; R. p. __.)

On April 9, 2026, Plaintiffs filed a timely Notice of Appeal of the circuit court orders denying Plaintiffs' motion for sanctions and motion to reconsider.[3]

STATEMENT OF THE FACTS

A. The Class Action

In October 2007, Otha Delaney financed the purchase of a pick-up truck through FFC. After Mr. Delaney defaulted, FFC repossessed the truck in May 2008 and sold it in December 2008, sending Mr. Delaney a pre-sale notice of disposition before the truck was sold. The notice was sent by FFC in an effort to comply with its mandatory Article 9 disclosure requirements. (*See, e.g.*, April 14, 2021 Dep. Tr. p. 61; R. p. __.)

On October 4, 2011, Mr. Delaney filed this action on behalf of himself, and all similarly situated consumers, challenging FFC's failure to send a legally compliant pre-sale notice required under Article 9 before disposing of the putative class's vehicles. As previously stated, the complaint was clear that it was being brought on behalf of not only Delaney, but also "others

[3] The orders on appeal affect a substantial right because FFC's 30(b)(6) designee has testified they are necessary for a significant portion of the class to be identified, notified pursuant to Rule 23, and given the ability to participate in this certified class action. (April 9, 2026 Notice of Appeal pp. 1-2; R. p. __.); (Sept. 25, 2024 Dep. Tr. pp. 88-89; R. pp. __.); (*Id.* at pp. 88, l. 22 – p. 89, l. 10; R. p. __ - p. __.)

similarly situated," and that those individuals were believed to have been sent the same or substantially defective disclosure form. (Compl. pp. 2-3; R. pp. __ .) The complaint was also clear that FFC was in the "unique" position to provide the identity and number of FFC customers impacted. (*Id.* at p. 4; R. p. __.)

FFC immediately retained counsel, and its CEO and corporate designee, William Van Hook, testified that he discussed the case with FFC's attorneys "throughout the entire process" and "every step of the way." (April 14, 2021 Dep. Tr. p. 19; R. p. __.) Van Hook also admitted that he received the complaint, read it, and specifically saw the language alleging a putative class of "all others similarly situated." (*Id.* at p. 14; R. p. __.)

The claims in this case arise from specific consumer-protection requirements imposed by Article 9 of the SCUCC. Before disposing of repossessed consumer collateral, a secured party must send the debtor a "reasonably authenticated notification of disposition" that contains specific information required by sections 36-9-613 and 36-9-614 of the SCUCC. After disposition, the secured party must also provide an explanation of the calculation of any surplus or deficiency containing the information required by section 36-9-616. These provisions are not optional or technical formalities. They prescribe the information a consumer must be sent before and after collateral is sold so the consumer can try to understand the intended disposition and further is aware of his or her rights related to the process. These provisions are clear, unequivocal, mandatory, and must be strictly followed. *See Delaney v. First Financial of Charleston, Inc.*, 426 S.C. 607, 613 n.2, 829 S.E.2d 249, 251 n.2 (2019) ("We note that comment four to section 36-9-625(c)(2) states this provision 'is designed to ensure that every noncompliance with the requirements of Part 6 [sections 36-9-601 to -635] in a consumer-goods transaction results in liability, regardless of any injury that may have resulted.'"). The failure to include the required information results in the notice being insufficient as a matter of law. S.C. Code Ann. § 36-9-614

cmt. ("A notification that lacks any of the information set forth in paragraph (1) is **insufficient as a matter of law**.") (emphasis added)); Joseph S. Murray, IV, *South Carolina's Public Sale Procedures Under the Uniform Commercial Code Revised Article 9-Secured Transactions*, 55 S.C. L. Rev. 501, 510 (2004) ("[A] court should require a notice to conform to South Carolina Code section 36-9-614 without any error, regardless of how small the error is or if the error causes any harm." (emphasis added)). Finally, "[a]ny doubt as to compliance should be resolved in the debtor's favor. Any doubt about what constitutes strict compliance is resolved in the debtor's favor." Default and enforcement—Contents and form of notification before disposition of collateral: Consumer goods transaction, § 10:96, 20A1 Minn. Prac., Business Law Deskbook § 10:96.

The drafters of the UCC and the South Carolina General Assembly have made compliance with the pre-sale notice requirements literally as easy as cutting and pasting. Specifically, a "safe-harbor" form is provided with language that secured creditors like FFC can copy and paste verbatim into a pre-sale notice to ensure they are complying with the law. When a creditor uses the safe harbor language, its pre-sale notice is sufficient as a matter of law. S.C. Code Ann. § 36-9-614(3) ("The following form of notification, when copied, provides sufficient information."). Courts have found that creditors who choose not to use the safe-harbor language do so at their own peril. *See, e.g.*, *First Community Credit Union v. Levison*, 395 S.W.3d 571, 587 (Mo. App. E.D. 2013) ("[P]arties who fail to use the Safe Harbor Form do so at their peril.").[4]

While the SCUCC provides any damages caused by the failure to send a proper notice is recoverable, in a consumer-goods transaction, it also provides that minimum and sum certain "statutory damages" can be awarded "in any event." S.C. Code Ann. § 36-9-625(c)(2). For a

[4] 4 James J. White & Robert S. Summers, Uniform Commercial Code § 34-10 (4th ed. 1995 and Supp. 2001) ("The notice requirement **is easy to understand and to apply**.") (emphasis added)

defective pre-sale notice, section 36-9-625(c)(2) provides minimum damages in an amount not less than the credit service charge plus ten percent of the principal amount of the obligation. For a defective post-sale explanation, section 36-9-625(e) provides damages of $500. Thus, if liability is established, the information contained in each class member's file—including the consumer's identity, account information, credit service charge, and principal amount of the obligation—is necessary not only to identify the class member, but also to calculate and administer the *minimum* relief provided by the SCUCC.

On summary judgment, the trial court ruled in favor of the class on liability, finding that FFC's challenged pre-sale and post-sale notices failed to comply with Article 9 as a matter of law.[5] While that liability ruling is not the subject of this sanctions appeal, it is important to the prejudice analysis addressing sanctions here. First, it establishes that, in the view of the lower court, FFC violated the rights of all class members, including those from 2008 to 2011, because the notices they were sent were defective. Those claims do not depend on any individualized dispute over whether a particular consumer defaulted, whether FFC had the right to repossess collateral, or whether the collateral was sold in a commercially unreasonable manner. The circuit court found that liability turns on the content of FFC's standardized notice documents and that those documents failed to include the information required by the SCUCC. Second, the summary judgment finding by the lower court also entitles each class member from 2008 to 2011 to, at a minimum, sum

[5] The circuit court concluded FFC's notices did not comply with Article 9 in numerous different ways. In its original and revised (or modified) presale notices, FFC failed to state the intended method of disposition, the date after which disposition would occur, and the debtor's entitlement to an accounting. (Sept. 18, 2025 Order pp. 23-26; R. pp. __.) In its original and revised (or modified) post-sale notices, FFC had numerous failures or improper statements and failed to list the information in the statutorily mandated order. (*See id.* at pp. 31-32; R. pp. __.) Plaintiff need only prove one to succeed on summary judgment. *See* 68A Am. Jur. 2d Secured Transactions § 536; *Delaney* 426 S.C. at 613 n.2, 829 S.E.2d at 251 n.2 (cited in Sept. 18, 2025 Order p. 26; R. p. __.)

certain statutory damages. The significance of the destroyed records is therefore not that they establish FFC violated the law; that has already been decided by the lower court. Rather, the significance is that the destroyed records are needed to identify the 2008 to 2011 class members, provide them Rule 23 notice, and calculate—at least—the minimum damages to which each class member is entitled.

B. FFC's Failure to Preserve Critical Class Records

While service of the complaint was sufficient notice, on February 22, 2012, Delaney also served an initial set of interrogatories, requests for production, and requests for admission. (Pl.'s First Requests for Production, Pl.'s First Set of Interrogs., & Pl.'s First Set of Requests for Admissions; R. pp. __.) Those requests sought information about the scope of the putative class, including the number of repossession accounts in South Carolina, whether FFC used the challenged notice as a form letter for other debtors, the period during which FFC did so, and the total number of transactions in which FFC sent notices in that form to South Carolina consumers each year. (*Id.*; R. p. __.)

These discovery requests confirmed what was already clear from the class action complaint: Delaney alleged that FFC used form documents to attempt to comply with the SCUCC, that the form documents were non-compliant, that FFC was "uniquely" situated to identify and disclose how may South Carolinians were subjected to this practice, and, further, that FFC was uniquely situated to provide the information needed to identify other "absent" class members, "with the identities and number of such consumers being known only to [FFC]."

Despite (a) actual notice of a class action challenging a standardized form notice, (b) FFC retaining counsel to defend the action, (c) FFC moving to dismiss not only Delaney's claim but also the claims of the putative class, (d) discovery requests being served seeking information about the putative class, and (e) FFC moving the court to extend it's deadline to respond to that discovery,

FFC did not make any effort to hold or otherwise preserve the documents and information needed to identify other members of the class from 2008 to 2011. FFC testified it made no effort to determine what "all others similarly situated" meant and continued to operate under its ordinary 9non-litigation) document retention schedule, which provided for applicable class members' files to be destroyed twenty-six months after their account was paid off. (April 14, 2025 Dep. Tr. pp. 21, 25-28; R. p. __.) FFC preserved only Mr. Delaney's file. (*Id.* p. 22; R. p. __.) Of course, the members of the class never paid their accounts off, calling into question whether their files should have ever been destroyed in the ordinary course. In any event, their files were later destroyed after suit was filed. (*Id.* p. 26; R. p. __.)

When asked whether FFC made any effort to hold documents related to the class-action allegations, Van Hook testified that it had not. (*Id.*; R. p. __.) His explanation was: "I was never told to hold them." (*Id.*; R. p. __.) And when asked whether common sense suggested that the class plaintiffs and the court might want to see those documents, Van Hook testified: "That's never crossed my mind. I just followed the normal rules of keeping records and they were no longer kept." (*Id.* at p. 27; R. p. __.)

FFC's later electronic records from 2012 to 2021 illustrate the prejudice from FFC's destruction of the 2008 to 2011 records. Plaintiff has been able to require FFC to produce the name, address, account number, finance charges, and principal obligation of all class members from 2012 to 2021. (April 14, 2021 Dep. Tr. p. 38; R. p. __.) However, for class members falling in the 2008 through 2011 period, FFC destroyed these files after the 2011 suit was filed.

C. The Sanctions Motion and the Circuit Court's Denial

On August 6, 2024, Plaintiffs moved for sanctions based on, *inter alia*, FFC's destruction of class records relating to the identity and number of class members and the documents concerning each class member's disposition transaction from 2008 through 2012. (Aug. 6, 2024

Mot.; R. p. __.) The sanctions issues were ultimately narrowed to whether FFC should be sanctioned for failing to preserve putative class members' files and data from 2008 through 2011. (Dec. 12, 2024 Order p. 2; R. p. __.)

In response to Plaintiff Delaney's Motion for Sanctions, FFC did not dispute that it destroyed class records from 2008 to 2011 in the normal course after receiving the class action lawsuit. (Nov. 4, 2024 Def.'s Mem. in Opp. to Pl.'s Mots. to Compel and for Sanctions (Spoliation) pp. 17-18; R. p. __.) FFC also testified that there was no other way to obtain the information in the records that were lost. (Sept. 25, 2024 Dep. Tr. pp. 88, l. 22 – p. 89, l. 10; R. p. __ - p. __.)

In its memorandum opposing Plaintiff Delaney's motion for sanctions, FFC briefly argued that it had no duty to preserve the subject records because Plaintiffs did not send a preservation letter, and because Plaintiff's initial set of Requests for Production did not request every putative class member's records. (Def.'s Oct. 21, 2025 Mem. in Opp. to Pl.'s Mot. for Sanctions (Spoliation) pp. 7-8; R. p. __.) Of course, when the complaint was filed and discovery served, Delaney was not sure FFC used form documents, Delaney was not sure if form documents had been used throughout 2008 to 2011. It would not have been efficient for Delaney to request every potential class members file before establishing that form documents were used. Of course, FFC was aware that form documents were used and that they were used throughout 2008 to 2011.

FFC further argued that the destroyed records were unnecessary because it admitted that form documents were used and the content of the notice is not in dispute. (*Id.* at p. 9; R. p. __.) This argument is based on the false premise that the only relevant evidence in this class action is the wording of the notice. While that is true for establishing that the form notices do not comply with the law, it ignores the need to identify these class members who received the form notices, establish when they received them, provide them notice, determine their finance charges and principal loan obligations, or otherwise establish their damages and entitlement to other relief.

The circuit court heard argument and denied Plaintiff's Motion for Sanctions in a Form 4 Order dated January 22, 2026. The Form 4 Order provides no explanation for the Court's ruling and further did not address any of the elements applicable to sanctions under South Carolina law. (Jan. 22, 2026 Order; R. p. __.)

On February 26, 2026, the circuit court issued a Form 4 Order denying Plaintiffs' Motion to Reconsider. The Form 4 Order, again, provides no explanation for the Court's ruling but directs FFC to prepare a proposed order denying the motion. (Feb. 26, 2026 Order; R. p. __.) In the order ultimately entered by the circuit court denying Plaintiffs' Motion to Reconsider, the court once again does not address any of the factors applicable to sanctions and did not otherwise explain the basis for its ruling. (March 10, 2026 Order; R. p. __.) Instead, the court provides only the procedural background for the motion and then states, without explanation, that it "adheres to its decision to deny the Underlying Motion, which it finds to be a just and proper exercise of its judicial discretion under the circumstances that is duly supported legally and factually." (*Id.* at p. 4; R. p. __.) Thus, the court's ruling neither addresses FFC's duty to preserve in light of the complaint's allegations or FFC's admission that it made no effort to preserve this evidence. Most significantly, the order fails to address the prejudice caused by the destruction of these materials, nor even a remedial sanction to remedy the same. This appeal followed.

STANDARD OF REVIEW

"A trial court's exercise of its discretionary powers with respect to sanctions imposed in discovery matters will be interfered with by the Court of Appeals only if an abuse of discretion has occurred." *Karppi v. Greenville Terrazzo Co.*, 327 S.C. 538, 542, 489 S.E.2d 679, 681 (Ct. App. 1997). "An 'abuse of discretion' may be found by this Court where the appellant shows that the conclusion reached by the lower court was without reasonable factual support, resulted in

prejudice to the right of appellant, and, therefore, amounted to an error of law." *Dunn v. Dunn,* 298 S.C. 499, 502, 381 S.E.2d 734, 735 (1989) (citation omitted).

"[A] court's failure to exercise its discretion is itself an abuse of discretion." *Patton v. Miller*, 420 S.C. 471, 490, 804 S.E.2d 252, 262 (2017); *see also Samples v. Mitchell*, 329 S.C. 105, 112, 495 S.E.2d 213, 216 (Ct. App. 1997) ("Although the trial judge in this case correctly framed the issue as discovery abuse, he did not weigh the required factors. A failure to exercise discretion amounts to an abuse of that discretion.").

ARGUMENT

A party bringing a motion for sanctions based on the destruction of evidence must generally show three elements: (1) the party having control over the evidence had a duty to preserve it at the time it was destroyed; (2) the evidence was destroyed with a culpable state of mind; and (3) the destroyed evidence was relevant to the party's claim or defense such that a reasonable trier of fact could find that it would support that claim or defense. *See Falls v. CBS Corp.*, No. 2015-CP-46-02155, 2020 WL 13369348, at *5 (S.C. Com. Pl. Jan. 08, 2020) (quoting *Hawkins v. College of Charleston,* 2013 WL 6050324, *2 (4th Cir. 2013)).[6]

This appeal presents a spoliation motion in which no reasonable dispute exists as to any of the three elements required for sanctions. First, FFC had a clear duty to preserve the evidence in question in 2011 relating to "similarly situated" putative class members. FFC was served with a putative class-action complaint in October of 2011, challenging its standardized Article 9 disclosure and expressly alleging that the identities and number of similarly situated consumers were uniquely within FFC's possession. That complaint, standing alone triggered FFC's

[6] While this circuit court order is not binding on this Court, it provides a thorough analysis and summary of the law on sanctions and is therefore instructive, particularly where South Carolina case law is sparse.

preservation obligation for all records necessary to determine the number of "similarly situated" putative class members, the identity of those putative class members, and preserve other relevant information in FFC's files necessary to administer the mandatory minimum relief requested in the 2011 complaint. Second, FFC breached that duty with, at minimum, a negligent state of mind, which is all that is required under South Carolina law. FFC's own president and CEO admitted that after reading the complaint, he did not institute a litigation hold, made no effort to determine the scope of the class allegations, and destroyed "similarly situated" customer files under FFC's normal business practices—even after retaining counsel and actually moving to dismiss the claims of the putative class members. Third, according to FFC, the prejudice to the 2008 to 2011 class members is severe, structural, and recovery determinative, not merely evidentiary.

FFC's CEO's testified that the records FFC destroyed were the only means by which FFC could identify absent class members, determine the number of absent class members, or otherwise provide the basic information needed to calculate the minimum damages each class member is entitled to "in any event." Without those records, this portion of the Class cannot be identified by FFC, cannot receive notice by mail or through other customary means, and will not be able to participate in any recovery. The result is undeniably prejudicial here because, according to the lower court, the class members' rights were violated as alleged in the complaint.

If allowed to stand, FFC has, in effect, reduced the size of the class by destroying relevant evidence. Moreover, as FFC testified, not only will these class members receive no financial recovery and otherwise be unable to participate in the class, FFC will have obtained a windfall from its own spoliation. The impact is that class members will bear the entire cost of FFC's destruction. If that result is permitted to stand, South Carolina class action defendants will be incentivized to destroy records relating to absent class members, knowing that they can shrink the

class and reduce exposure to the class by destroying relevant records. This would be a manifest injustice.

Despite the absence of any colorable argument that any of the three elements is missing, the circuit court denied sanctions without citing any facts to support its decision and without providing any explanation. The circuit court did not address the duty to preserve, the breach of that duty, the culpability of FFC, the relevance of the evidence destroyed, or the prejudice caused. Nor did the circuit court even try to fashion a remedial sanction to put the impacted class members in the position they would be in had this not occurred.[7] The circuit court also failed to consider a sanction that would ensure FFC does not benefit from the spoliation. In its orders denying the Motion for Sanctions and the Motion for Reconsideration, the court provided no analysis, no explanation, and no reasoning.

A discretionary ruling that ignores the applicable legal framework—and leaves unidentified absent class members with no remedy—is not a permissible exercise of discretion; it is an abuse of it. *See Samples*, 329 S.C. at 114, 495 S.E.2d at 218 ("In summary, in failing to exercise discretion, the trial judge abused that discretion. Furthermore, the sanction he imposed was not meaningful enough to protect the rights of discovery provided by the Rules."). This Court must reverse and correct this injustice.

[7] At the hearing on Plaintiffs' Motion to Reconsider the Denial of Sanctions, Plaintiffs' counsel requested the court (1) enter an order finding FFC had a duty to preserve the records, (2) enter an order acknowledging FFC itself states there is no way to identify those class members, (3) give Plaintiff the opportunity to submit to the court a proposal from a class-action notice professional, (4) give FFC the opportunity to object to that proposal, (5) provide the opportunity to submit an attorneys' fee affidavit, and (6) determine a way to calculate the class members' damages. (Jan. 9, 2026 Hr'g Tr. pp. 92-95; R. pp. __.)

I. FFC Had a Duty to Preserve the Class Records.

The first question in any spoliation analysis is whether the party controlling the evidence had a duty to preserve it when it was destroyed. A party has a duty to preserve evidence that is potentially relevant during litigation and at any time "before the litigation when a party reasonably should know that evidence may be relevant to anticipated litigation." *Silvestri v. Gen. Motors Corp.*, 271 F.3d 583, 590 (4th Cir. 2001)) (quoted in *Hawkins v. Coll. of Charleston*, No. 2:12-cv-384-DCN, 2013 WL 6050324, at *2 (D.S.C. Nov. 15, 2013)). A party's preservation obligation arises when litigation is pending (or reasonably anticipated) and the party knows (or reasonably should know) that evidence may be relevant to the claims or defenses. Evidence is relevant when it has "any tendency to make the existence of *any* fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 401, SCRE.

Here, the first element is plainly satisfied. FFC was served with a putative class-action complaint challenging—and making FFC aware of—a legal challenge to what Plaintiff believed was a standardized Article 9 notice practice. The complaint alleged that the proposed class members were numerous, that they were similarly situated to Delaney, and that their identities and number were known only to FFC. Plaintiff actually pled in his complaint that FFC was uniquely situated to address these issues during discovery. Once FFC was served with the complaint, it had a duty to preserve evidence and could not later continue to destroy records under its normal and non-litigation documentation policy.

Further, while the scope of FFC's duty to preserve is determined by the allegations in the complaint and could not somehow be narrowed by an initial set of discovery requests served by Plaintiff, Delaney promptly served FFC with discovery seeking to confirm that form notices were used and then determine the number of FFC customers impacted. On February 22, 2012, Delaney

served an initial set of interrogatories, requests for production, and requests for admission. (Plaintiff's First Request for Production, Plaintiff's First Set of Interrogs., and Plaintiff's First Set of Requests for Admissions; R. p. __.) Those discovery requests concerned not only the wording of Delaney's notice; they also sought information about FFC's notice practices and the universe of relevant consumer accounts, including the number of accounts in South Carolina in which FFC repossessed collateral, the forms used to provide notice of disposition, whether the challenged notice was a form letter used for other debtors, and the number of transactions in which a notice in that form was sent to South Carolina debtors. (*See, e.g.*, Interrog. 16 ("In how many transactions from January 1, 2006 until present, has a notice form of Exhibit C been sent to a debtor residing in the State of South Carolina?"); R. p. __.) Those requests reinforced what the complaint already made obvious: the identity, number, and account information of putative class members were directly relevant to the litigation.

Courts that have addressed preservation obligations in class actions and have recognized that a defendant served with a class-action complaint is on notice that its preservation duty extends beyond the named plaintiff's records. In *Pippins v. KPMG LLP*, No. 11 Civ. 0377, 2011 WL 4701849 (S.D.N.Y. Oct. 7, 2011), the court denied the defendant's motion to limit its preservation obligations in a putative class action and ordered continued preservation of potentially relevant evidence for all potential class members. The court rejected the argument that preservation should be limited before the scope of the class was determined with finality, each potential member of the class was a "key player" whose records had to be preserved. *Id.* at *7. While *Pippins* arose in the context of a preservation dispute rather than a sanctions motion, the underlying principle is the same: once a putative class action is filed, the defendant's preservation duty extends to records relating to absent putative class members, not merely the named plaintiff.

FFC's contrary position, that it had no duty because Plaintiffs did not send a separate preservation letter, is non-sensical. A putative class action lawsuit was filed and served, and it defies common sense and misstates the law to suggest Plaintiff had to also send a preservation letter. A preservation letter may provide notice of a duty, but it is not the source of the duty. The duty arises from pending or reasonably anticipated litigation, and the party's knowledge that evidence may be relevant. *Silvestri*, 271 F.3d at 590; *Hawkins*, 2013 WL 6050324, at *2. FFC had notice upon receipt of a filed complaint. FFC had been sued in a putative class action. It knew the case challenged standardized notice forms. It knew the complaint alleged the identities and number of class members were uniquely within FFC's possession. FFC was not only aware that it possessed this relevant information, but also FFC testified that there is no other means to identify these members of the class. And it received discovery directed to those precise matters. A litigation hold letter is not required once a lawsuit is commenced, and the absence of a preservation letter when litigation is pending did not authorize FFC to destroy the only files capable of identifying absent class members.

Nor is FFC excused because Plaintiff Delaney's first requests for production specifically sought Delaney's file. The 2011 complaint was clear that Plaintiff believed FFC used "form" notice documents, that the forms document has been used on so many of FFC's customers that they were too numerous to join in a single action, that FFC was "uniquely situated" to identify the number of impacted class members, and that plaintiff sought "class" discovery including discovery targeted at "numerosity" under Rule 23. Of course, while Plaintiff did not know if the disclosures he was sent by FFC was a form document, FFC knew that was in fact the case. This is precisely why traditional class discovery was sent to FFC to begin establishing the Rule 23 prerequisites.

Spoliation law would be hollow if a party could destroy plainly relevant evidence simply because the first document requests in a putative class action did not name every document that

might ultimately be relevant throughout the entire case. The duty to preserve reaches evidence FFC knows or should know may be relevant to pending (or anticipated) litigation. *Hawkins*, 2013 WL 6050324, at *2. Here, the detailed allegations in the class complaint, as well as the initial interrogatories and requests for admission, made clear that the class records were essential to responding to the same. The initial complaint's allegations related to who received the notices from FFC, how many class members received the notices, and what relief might be owed. Those questions could not be answered without the files and data FFC destroyed.

Finally, the Court should reject FFC's confusing argument that it had no duty to preserve these records because of the brief period at the end of 2016 between this Court's remittitur of this case to the circuit court after affirming the circuit court's dismissal of Plaintiff's claims and this Court's recall of the remittitur. (Nov. 2, 2016 Order; R. p. ___.) FFC has never taken the position that it destroyed the relevant records during the fourteen days in 2016 between when this Court issued the remittitur and then recalled it. The remittitur issue is therefore a red herring; FFC presented the circuit court with no case law or other authority in support of this argument.

II. FFC Destroyed the Class Records Willfully and, at Minimum, With a Negligent State of Mind.

Second, FFC had the requisite culpability to justify the imposition of sanctions. "Willful spoliation occurs when a party has clear notice of an obligation to preserve evidence and proceeds to intentionally destroy evidence in spite of its obligation not to." *Cytec Carbon Fibers LLC v. Hopkins*, No. CIV.A. 2:11-0217-RMG, 2012 WL 6044778, at *2 (D.S.C. Oct. 22, 2012), *report and recommendation adopted*, No. 2:11-CV-0217-RMG, 2012 WL 6050595 (D.S.C. Dec. 5, 2012). That is precisely what occurred here. In any event, and at a minimum, FFC's failure to preserve the class records after service of the complaint and initial discovery was *negligent*, which is all that is required to warrant imposition of a remedial sanction. *Falls*, No. 2015-CP-46-02155,

2020 WL 13369348, at *7 ("The culpable state of mind requirement does not require willful destruction. Rather, the moving party need only show that the evidence was destroyed knowingly, even without intent [to breach the duty to preserve it], or negligently. (internal quotations omitted)); *see also Turner*, 736 F.3d at 282; *Vodusek v. Bayliner Marine Corp.*, 71 F.3d 148, 156 (4th Cir. 1995). The level of culpability bears on the severity of the sanction; it does not eliminate the court's obligation to remedy prejudice caused by negligent loss of evidence, and to sanction the improper conduct. *Cytec Carbon Fibers LLC*, 2012 WL 6044778, at *2.

Of course, the fact that FFC destroyed the records pursuant to its routine document destruction policy does not mean FFC acted without a culpable state of mind. To the contrary, once litigation was pending and the relevance of the files was apparent, FFC was required to suspend ordinary destruction practices and preserve relevant documents. Courts applying the spoliation doctrine have repeatedly recognized that a party must alter normal retention practices when it reasonably anticipates litigation. *See Turner v. United States*, 736 F.3d 274, 282 (4th Cir. 2013) (explaining that once a party reasonably anticipates litigation, it must suspend routine document destruction and institute a litigation hold to preserve relevant materials); *see also Silvestri*, 271 F.3d at 591 ("The policy underlying this inherent power of the courts is the need to preserve the integrity of the judicial process in order to retain confidence that the process works to uncover the truth."). Here, litigation had commenced. It is beyond dispute that FFC's failure to take steps to ensure these records were preserved was at least negligent. Plaintiff need not prove more to justify sanctions.

III. The Destroyed Records Were Relevant.

Third, the relevance of the destroyed evidence is undeniable. For spoliation purposes, evidence is relevant when a reasonable trier of fact could find that the evidence would support the claim or defense. *Hawkins*, 2013 WL 6050324, at *2; *Cytec Carbon Fibers LLC*, 2012 WL

6044778, at *2 (D.S.C. Oct. 22, 2012); *see also* Rule 401, SCRE (defining relevant evidence as evidence that has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable"). The destroyed class files easily satisfy that standard.

The destroyed files were relevant initially and primarily because Plaintiff, as alleged in the complaint, is entitled to conduct class certification discovery to prove the requirements under Rule 23, SCRCP. *See* § 7:16. Scope of certification-related discovery—Generally, 3 Newberg and Rubenstein on Class Actions § 7:16 (6th ed.) ("The Fourth Circuit has long noted that 'it is essential that a plaintiff be afforded a full opportunity to develop a record containing all the facts pertaining to the suggested class and its representatives. . . . Discovery concerning the certification requirements is therefore permitted, indeed often required."). Moreover, Plaintiff pleaded this information was known only to FFC and FFC was uniquely situated to address these issues.

The destroyed files are then equally relevant because they would show which absent class members received the defective notices from FFC, how many absent class members were affected, what transactions fell within the class period, whether those consumers could receive Rule 23 notice, and how to calculate the minimum relief to which each was entitled SCUCC. That is, the destroyed files of absent class members were relevant to both the identity and number of the absent class members and to minimum damages. Plaintiff's notice claims seek no less than the minimum damages under the SCUCC, which depends on account-specific financial information, including the credit service charge and principal amount of each class member's loan obligation. Without the files and data for the impacted consumers, FFC has said it cannot determine which consumers fall within the affected period, or the account-specific information necessary to calculate and distribute relief without sanctions relief from the Court.

FFC's own later-produced data confirms the point. For the period in which records were not destroyed, FFC can identify the class members, provide their account numbers, provide their addresses, loan information, finance charges, and principal obligations—the very information needed to determine the identity of FFC's customers, confirmed they are in class, and at least calculate the statutory minimum damages available under section 36-9-625(c)(2). The absence of those same categories of information for the 2008–2011 period is therefore not a minor gap in proof. According to FFC, it is the difference between a class member who can be identified, notified, and minimally compensated, and a class member whose claim is effectively erased because FFC failed to preserve the records capable of establishing those facts.

Puzzlingly, FFC argued in opposition to Plaintiff's Motion for Sanctions that the destroyed class records were unnecessary because the content of the challenged notices is not disputed. (Def.'s Oct. 21, 2025 Mem. in Opp. to Pl.'s Mot. for Sanctions (Spoliation) p. 9; R. p. ___.) But this is a non sequitur. While the content of the challenged notices is *one piece* of relevant evidence, it plainly is not the *only* piece of relevant evidence in this class action. Although FFC argued that the destroyed records are not relevant, FFC does not explain how, without the destroyed records, the absent class members from 2008 to 2011 can be identified or contacted, or how the damages for each of those absent class members can be calculated. (Sept. 25, 2024 Dep. Tr. pp. 88, l. 22 – p. 89, l. 10; R. p. __ - p. __.) FFC has testified there is no other means to do so. (*Id.*) If the files had been preserved, they would have allowed FFC and the Court to identify absent class members, send direct notice, determine the scope of the affected group, and administer statutory relief. Evidence with that effect cannot reasonably be characterized as irrelevant.

IV. The Destruction of Class Records, According to FFC, Caused Class-Wide, Structural Prejudice to Absent Class Members and Therefore Warrants the Imposition of *Some* Remedial Sanction.

Because the three elements required for the imposition of spoliation sanctions have been satisfied, the final question is what remedy the prejudice demands. Plaintiffs do not ask this Court to dictate the precise sanction. That determination may belong to the circuit court on remand. But this Court should direct the circuit court to fashion a sanction that squarely addresses the prejudice here—and that prejudice is severe.

The prejudice is not ordinary and evidentiary. FFC did not merely destroy documents bearing on a disputed merits issue. By its own testimony, it destroyed the only records that would permit it to identify absent class members, send them Rule 23 notice, and calculate, according to the statutorily prescribed method, the minimum financial relief owed to them. Without those records, and without a remedial sanction to address the same, in FFC's view, a significant portion of the class will not identified, will not receive notice, and will not be able to participate in any recovery.

Rule 23 exists to protect absent class members—persons who are not before the court, who do not know this litigation affects them, and who depend on the class representatives, class counsel, and the court to safeguard their rights. Rule 23(a), SCRCP, permits a class action only if, among other things, "the representative parties will fairly and adequately protect the interests of the class." Rule 23(d), SCRCP, further authorizes the court, in the conduct of the action, to make appropriate orders "determining the course of proceedings," "requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given," and "dealing with similar procedural matters." The official note to South Carolina Rule 23 explains that Rule 23(d) "requires those seeking to maintain an action on behalf of a class to notify the members of the class of the pendency of the action." Rule 23(d), SCRCP, Note.

Secondary authority is consistent. Newberg explains that absent class members are not ordinary nonparties: because a class judgment may bind them, class procedure requires safeguards to ensure adequate representation, notice, and a fair opportunity to participate or exclude themselves where required. *See* 3 William B. Rubenstein, Newberg and Rubenstein on Class Actions §§ 8:1, 8:17 (6th ed.) (discussing the due-process function of class notice and absent class-member protections); *see also* 7AA Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure § 1789.1 (3d ed.) (explaining that class notice serves to protect absent class members and the binding effect of class judgments).

These impacted class members are not merely losing an evidentiary advantage; they are, as a result of FFC's inability to identify them, being deprived of the practical ability to receive Rule 23 notice, decide whether to participate or opt out, and protect their own rights before a judgment or settlement purports to bind them. That result is incompatible with the basic due-process protections that justify binding absent class members in a representative action.

While the decision on the precise sanction may rest with the circuit court on remand, the lower court should be directed to consider remedial sanctions designed to restore, as nearly as practicable, the position the absent class members would have occupied had FFC preserved the files and data it was required to preserve. The lower court should also be directed to sanction the improper conduct. Cytec Carbon Fibers LLC v. Hopkins, 2012 WL 6044778, at *4 (D.S.C.,2012) ("Where the spoliation elements are met, then any sanctions imposed must suit the purpose of leveling the evidentiary playing field and the purpose of sanctioning the improper conduct.").

Those remedies may include, among others: allowing Plaintiffs to present statistical, expert, or other reasonable extrapolation evidence from the surviving FFC data, to estimate the number of affected 2008 to 2011 class members. For example, extrapolating from surviving FFC data shows FFC repossessed and disposed of approximately 75 vehicles per year. For the three

years preceding the date the original complaint was filed, there are likely 225 impacted class members. The same type of extrapolation can be made from available financial data related to the mandatory minimum damages. For example if you assume a $5,000 finance charge and a principal loan amount of $15,000 (10% of that amount being $150), an average minimum damages number (before interest) is $5,000 + $150 = $5,150. Multiplying $5,150 (finance charge plus 10% of principal loan obligation) x 225 (estimated impacted members) = $1,158,750.[8] FFC could easily be required to provide for a damages fund for these impacted class members. The court could also consider the appointment of a claims administrator to administer the fund and determine a claim approval process under court-approved procedures. Ordering this relief will do nothing more than attempt to place the impacted class members into the position they would be in if FFC did not destroy their files.

The lower court could also order a procedure for attempting to locate the impacted class members. This could include allowing Plaintiff to propose an expert class action administration firm with expertise in attempting to locate the unknown class members. The plan could include television advertisements, digital advertising, social media, and other targeted methods reasonably calculated to try and locate the affected class members. Regardless of how many impacted class members are located, the lower court could be ordered to consider using any unclaimed funds under the protocols established by the SCRCP. For example, because it is common for unclaimed funds to remain following the administration of a class action, Rule 23(e)(2), SCRCP, expressly provides how such funds may be used. That rule provides as follows:

> **(e) Disposition of Residual Funds.**
>
> **(1)** "Residual Funds" are funds that remain after the payment of all approved class member claims, expenses, litigation costs, attorneys' fees, and other court-approved disbursements to implement the relief granted. Nothing in

[8] The number does not consider interest.

> this rule is intended to limit the parties to a class action from suggesting, or the trial court from approving, a settlement that does not create residual funds.
>
> **(2)** Any order, judgment, or approved compromise in a class action under this rule that establishes a process for identifying and compensating members of the class may provide for the disbursement of residual funds. In matters where the claims process has been exhausted and residual funds remain, not less than fifty percent of residuals must be distributed to the South Carolina Bar Foundation to support activities and programs that promote access to the civil justice system for low income residents of South Carolina. The court may disburse the balance of any residual funds beyond the minimum percentage to the South Carolina Bar Foundation to any other entity or entities for purposes that have a direct or indirect relationship to the objectives of the underlying litigation or otherwise promote the substantive and procedural interests of members of the class.

Foundationally, such relief would not punish FFC or provide a windfall to the impacted class members, rather, it would simply provide for some method to try and put the impacted class members back in the position they would be in had their files not be destroyed. Just as important, it would prevent FFC from benefiting from its destruction of evidence.[9]

In addition to a remedial sanction, the circuit court should also be directed to consider a sanction that ensures FFC does not benefit from spoliation, deters future similar conduct, and protects the discovery process.

V. Absent Sanctions, Class Action Defendants Will Be Incentivized to Destroy Records Relating to Absent Class Members.

The practical stakes of this appeal extend beyond the parties. If FFC is permitted to benefit from its destruction of class records without consequence, this case will become a roadmap for class action defendants facing similar claims. The incentive structure is straightforward and

[9] On remand, too, FFC may be heard on the mechanics of any fund, notice program, or claims process, but it should not be permitted to defeat relief by pointing to evidentiary gaps that exist only because the relevant files were destroyed. In addition, FFC should not be permitted to argue or have reasonable doubts or reasonable option resolved in FFC's favor. Any reasonable doubts should be resolved against FFC who created this very situation through spoliation.

troubling: a defendant that destroys records identifying absent class members reduces the number of class members who can participate in any recovery and thereby reduces its total liability. As FFC's conduct demonstrates, this can be accomplished under the cover of ordinary document-retention practices. If courts decline to impose even a remedial sanctions in such circumstances, or impose an insignificant sanction, class action defendants will rationally conclude that routine destruction of absent class members' records is both legally permissible and economically advantageous.

This Court's decision in *Samples v. Mitchell* is instructive. 329 S.C. 105, 495 S.E.2d 213 (Ct. App. 1997). In that case, this Court found that the circuit court abused its discretion by imposing a sanction that was not harsh enough where the defendant produced a relevant piece of evidence—a video taken by a private investigator of the personal injury plaintiff performing certain tasks after an accident—after discovery was completed. Although the circuit court did sanction the defendant by prohibiting him from having his investigator testify about the video at trial, this Court held that "[p]recedent reveals a more meaningful sanction was required in this case." *Id.*, 329 S.C. at 112, 495 S.E.2d at 217. This Court ultimately held that the circuit court's failure to consider the relevant factors amounted to a failure to exercise discretion and therefore an abuse of that discretion:

> In deciding what sanction to impose for failure to disclose evidence during the discovery process, the trial court should weigh the nature of the interrogatories, the discovery posture of the case, willfulness, and the degree of prejudice. . . . . Although the trial judge in this case correctly framed the issue as discovery abuse, he did not weigh the required factors. A failure to exercise discretion amounts to an abuse of that discretion.
>
> . . . .
>
> Even though the imposition of sanctions is usually left to the sound discretion of the trial judge, whatever sanction the judge imposes "should serve to protect the rights of discovery provided by the

> Rules." *Downey v. Dixon,* 294 S.C. 42, 362 S.E.2d 317 (Ct. App. 1987). Overly lenient sanctions are to be avoided where they result in inadequate protection of discovery.

Id., 329 S.C. at 112-14, 495 S.E.2d at 216-17.

Here, the prejudice to Plaintiffs from FFC's destruction of critical evidence is much more severe than the prejudice to the plaintiff in *Samples* from the defendant's delayed production of a video. Unlike in *Samples*, FFC's destruction of evidence prevents FFC from determining even the minimum statutorily prescribed recovery for a significant portion of Plaintiffs' certified class. Further, while the circuit court in *Samples* imposed some sanction, the circuit court in this case imposed no sanction whatsoever, placing the severe consequences of FFC's document destruction only on Plaintiffs. As in *Samples*, this Court should reverse the decision of the circuit court and direct the circuit court to consider the relevant factors and impose an appropriate sanction.

CONCLUSION

FFC's destruction of the class records did not merely deprive Plaintiffs of helpful evidence; according to FFC, it eliminated the practical mechanism for identifying, notifying, and potentially compensating the absent class members whose rights are directly at stake. The circuit court's denial of sanctions, with no discussion or explanation of its ruling, gives FFC a windfall: it is relieved of liability to class members who cannot be identified precisely because FFC destroyed the records. That result cannot be reconciled with the purposes of Rule 23, the due-process rights of absent class members, or the spoliation doctrine's core function of preventing parties from benefiting from the destruction of evidence they were obligated to preserve. Allowing it to stand would signal to class action defendants across South Carolina that evidence destruction is a permissible litigation strategy, provided it is accomplished before a court orders otherwise. South Carolina courts should not send that signal.

The circuit court had discretion to select a sanction proportionate to the prejudice; it abused its discretion when it denied all relief and thereby placed the entire burden of FFC's destruction on absent class members. The orders should be reversed and the case remanded for a tailored remedial sanction. The circuit court should be directed to consider remedies specific to the class context that prevent FFC from benefiting from the absence of the records it destroyed and that restore the affected class members as nearly as possible to the position they would have occupied had the files been preserved.

TWENGE + TWOMBLEY LAW FIRM

BY: s/J. Ashley Twombley
J. ASHLEY TWOMBLEY
S.C. Bar #72916
THOMAS BLASE IANDOLI
S.C. Bar #105294
311 Carteret Street
Beaufort, SC 29902
Telephone: (843) 982-0100
Facsimile: (843) 982-0103
twombley@twlawfirm.com
iandoli@twlawfirm.com

and

C. Mitchell Brown, Esquire (S.C. Bar #12872)
Nelson Mullins Riley & Scarborough, LLP
P.O. Box 110770
Columbia, SC 29211
(803) 255-9595
mitch.brown@nelsonmullins.com

ATTORNEYS FOR APPELLANTS

Beaufort, South Carolina

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