FILED
2020 Jan-03 PM 02:21
U.S. DISTRICT COURT
N.D. OF ALABAMA

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

ROCHE DIAGNOSTICS CORPORATION and ROCHE DIABETES CARE, INC., Plaintiffs, v. PRIORITY HEALTHCARE CORPORATION D/B/A PRIORITY CARE, ET AL.; Defendants.	Case No. 2:18-cv-01479-KOB-HJN

PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION FOR SANCTIONS AGAINST PHILLIP MINGA, KONIE MINGA, AND THE CORPORATE DEFENDANTS

TABLE OF CONTENTS

TABLE OF CONTENTS
(continued)

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

Other Authorities

Plaintiffs Roche Diagnostics Corporation and Roche Diabetes Care, Inc. (together, "Roche") respectfully submit this memorandum of law in support of their motion for case-ending sanctions against Phillip Minga, Konie Minga, and the Corporate Defendants[1] ("Defendants"), pursuant to the Court's inherent powers and Federal Rule of Civil Procedure 37, on the grounds of their repeated and deliberate spoliation of evidence and other egregious discovery violations.

INTRODUCTION

Defendants have recently changed their lead counsel for the fourth time since this action was filed, and their new counsel have indicated to Roche that they will seek, in effect, a reset of discovery. But further proceedings in this matter would be futile. Defendants have demonstrated beyond reasonable dispute that they stand ready to defraud the Court and Roche at every turn, including by intentionally (and repeatedly) doctoring highly material documents, knowingly

[1] The Corporate Defendants are those represented by Bainbridge Mims Rogers & Smith LLP, namely Priority Healthcare Corporation d/b/a Priority Care; Priority Care Pharmacy, LLC; Amory Priority Care Pharmacy, LLC; Priority Care Pharmacy Services, LLC; Priority Express Care Pharmacy, LLC; Priority Care Pharmacy Solutions, LLC; Amory Discount Pharmacy, LLC; Priority Care Pharmacy at Cotton Gin Point, LLC; Priority Care Pharmacy 2, LLC; Jasper Express Care Pharmacy, LLC; Vincent Priority Care Pharmacy, LLC d/b/a The Medicine Chest; Vincent Express Care Pharmacy, LLC; Vickers Priority Care Pharmacy, LLC; Carbon Hill Express Care Pharmacy, LLC; Bowie's Priority Care Pharmacy, LLC d/b/a Bowie's Discount Pharmacy; Bowie's Express Care Pharmacy, LLC; B&K Priority Care Pharmacy, LLC; B&K Express Care Pharmacy, LLC; Monroe Pharmacy Corporation; Tombigbee Pharmacy, LLC; Main Street Drugs, LLC; Yellowhammer Pharmacy Services Corporation; Medical Park Discount Pharmacy, LLC; Razorback Pharmacy Services, Inc.; Burns Discount Drug Store LLC; Ozark Family Pharmacy LLC; Priority Care Professional Staffing, LLC; Medpoint, Inc.; Medpoint, LLC; Medpoint Advantage, LLC; Medpoint Pharmacy Benefit Managers, LLC; and Professional Healthcare Staffing, LLC.

concealing evidence from Roche, and failing to investigate, much less correct, these violations when directly confronted with them. To this day, Defendants' document production contains numerous demonstrable forgeries that have never been corrected, explained, or even acknowledged.

To be absolutely clear: Roche does not contend that Defendants' prior counsel had any involvement in their fraud on the Court and it does not expect Defendants' newest counsel to do so either. Defendants themselves, not their counsel, are solely responsible for their litigation misconduct. It is for precisely this reason that this case cannot proceed in the ordinary course. The Federal Rules of Civil Procedure rest on the assumption that the parties will participate in discovery with a basic level of good faith and honesty. Defendants have shattered that assumption, repeatedly, in connection with this action. As set forth below, Defendants have ignored subpoenas, orders to compel, and even orders holding them in contempt; they have lied under oath; they have repeatedly made blatantly deficient productions they falsely represented to be complete; they have repeatedly doctored and fabricated business records; they have actively concealed material facts; and they have repeatedly persuaded their attorneys to bring groundless motions in an effort to delay and obstruct the truth-seeking process.

Defendants' discovery misconduct has been so egregious and so persistent that neither the Court, nor Roche, nor indeed Defendants' new counsel, can have

any confidence that any future representations made by Defendants in the course of discovery will be truthful and accurate. The Court is not required to countenance this untenable situation any longer. As the Eleventh Circuit has held, courts have the inherent power to refuse to accept the defendant's answer and enter default judgment where, as here, the defendant has knowingly acted in "bad faith" during litigation and the conduct is so "egregious" that any lesser sanction "would be an open invitation to others to abuse the judicial process." *Eagle Hosp. Physicians, LLC v. SRG Consulting, Inc.*, 561 F.3d 1298, 1306 (11th Cir. 2009); *see infra* at 27–28. Here, Defendants' litigation misconduct is considerably more egregious than in other cases where courts have issued case-ending sanctions. Rather than allowing Defendants to continue to disrespect the judicial process, the Court should reject their answers and issue default judgment in Roche's favor.

FACTS

A. Defendants' Business Ran on Lies and Forgeries

This case arises from Defendants' extensive history of fraud and deceit. As Roche's records, discovery from pharmacy benefit managers ("PBMs"), and Defendants' own admissions show, Defendants relied on a continuous campaign of deception, evasion, and fraud to perpetuate the Priority Care scheme and conceal the true nature of their business. *See* Declaration of Geoffrey Potter ("Potter

Decl.")[2] Ex. 1 (Transcript of July 22, 2019 Dep. of Geneva Oswalt ("Oswalt Tr.")) at 91:21–92:24, 152:2–20, 154:9–13, 167:4–168:15, 164:24–165:25, 184:7–14, 185:18–186:25; Exs. 2–8. Relevant to the present motion, Defendants' scheme regularly involved falsifying business records to take advantage of the common tendency to accept written representations at face value. *See, e.g.*, Exs. 2–8. For example, to become eligible for claim reimbursements, Defendants submitted applications to PBMs falsely stating that they were not mail-order suppliers, that they were not commonly owned, and that they were unaffiliated with any other pharmacies. *See, e.g.*, Exs. 2, 3. To avoid disclosing to auditors that they purchased all their test strips from unauthorized gray-market suppliers, they created fake invoices and spreadsheets from nonexistent wholesalers, which were actually sent from Priority Care affiliates, such as "DirecTest Corporation" and "MedWise, LLC," owned and controlled by the Mingas. *See* Exs. 4–8.

Defendants also provided fabricated documents *directly to Roche* to falsely certify compliance with their 2016 contract. Roche's mail-order contract with Corporate Defendant Priority Healthcare Corporation required it to submit monthly "utilization reports" documenting that each box of mail-order test strips sold to PHC was being dispensed directly to patients with durable medical equipment ("DME") insurance plans. *See* Ex. 9 § 5.1. Defendants did, in fact, submit such

[2] Unless otherwise noted, all exhibit citations herein refer to exhibits to the attached Declaration of Geoffrey Potter.

reports to Roche—massive spreadsheets of patient and sales data documenting what purported to be tens of thousands of DME insurance transactions. *See, e.g.*, Ex. 10. As Defendants later admitted, however, they dispensed every box they purchased from Roche to patients with pharmacy benefits and never submitted DME insurance claims for them. *See* Oswalt Tr. at 230:8–231:7. The utilization reports sent to Roche were completely fabricated, created and sent by Defendants to deceive Roche into believing that PHC was abiding in good faith by the terms of the contract. *See id.* at 226:13–229:7; Ex. 10.

B. Defendants Refused to Comply with Subpoenas and Defied Court Orders

When Roche turned to the judicial process to protect its rights, Defendants brought their fraudulent *modus operandi* from the warehouse to the courthouse. As Roche has previously recounted, Corporate Defendants refused for nearly a year to provide substantive responses to two lawful subpoenas issued in a separate action. *See, e.g.*, Doc. 10 at 7–8; Doc. 42 at 6–7; Doc. 51 at 3–6. Roche ultimately moved to compel production of the requested materials in this District and the United States District Court for the Northern District of Mississippi.[3] Both courts

[3] *See Roche Diagnostics Corporation v. Binson's Hospital Supplies*, Inc., Nos. 2:18-mc-00521, 522, 523 (N.D. Ala.) ("*Binson's*"); *In re: Subpoena Issued to Gathright Reed Medical Supply LLC, et al.*, No. 3:18-mc-00007-MPM (N.D. Miss.) ("*Gathright*").

granted Roche's motions to compel.[4] Although it received timely notice of these orders, Priority Care did not comply with them.[5] On May 11, 2018, Judge Kallon issued an Order holding Priority Care in contempt and imposing a fine of $1000 per day until it complied with Roche's subpoenas, in addition to Roche's fees and costs.[6] Defendants remained in contempt for nearly six weeks—accruing a fine of over $100,000—until, on June 27, 2018, they produced 296 invoices reflecting Priority Care's purchases of retail and not-for-retail Accu-Check test strips. *See* Potter Decl. ¶ 2; Doc. 10 at 8.

C. Defendants Withheld Nearly a Thousand Invoices from Their Production

Defendants then certified to the Alabama and Mississippi courts that the June invoices were a full and complete production in satisfaction of the subpoenas.[7] They knew that their certification was false. In fact, the June production was missing almost *three-quarters* of the invoices in Defendants' possession showing their purchases of Accu-Chek test strips. *See* Potter Decl. ¶¶ 2–3. Only after Roche brought this lawsuit on September 11, 2018, and this

[4] *See* Order, *Binson's* (N.D. Ala. Apr. 4, 2018), ECF Nos. 2, 5; Order, *Gathright* (N.D. Miss. June 11, 2018), ECF No. 41.

[5] *See* Order at 2, *Binson's* (N.D. Ala. May 11, 2018), ECF No. 11.

[6] *See generally id.*

[7] *See* Amended Notices of Production of Documents and Payment of Attorneys' Fees, *Binson's* (N.D. Ala. June 29, 2018), ECF No. 19; Notice of Production of Documents, *Gathright* (N.D. Miss. June 29, 2018), ECF No. 42.

Court ordered Defendants to account for all of their Accu-Chek adjudications did they produce, on October 2, 2018, nearly one thousand *additional* invoices they had previously withheld. *See id.* ¶ 3. Defendants continued to flout Judge Kallon's orders even after they were held in contempt.

The invoices produced in October 2018 showed that Defendants had strategically withheld *all* of the invoices corresponding to several of their largest suppliers—including their largest supplier, a Canadian company called Current Trade, Inc. *See id.* ¶ 3. But as discussed below, Roche subsequently learned that the October 2018 production was also fraudulent. Although Defendants produced new invoices, they doctored them to remove incriminating information about Phillip Minga's involvement in the Priority Care enterprise and about their extensive sale of international versions of Roche's test strips, which are illegal to distribute in the United States. *See infra* at 10–12.

D. Konie Minga Gave False and Misleading Testimony

Defendant Konie Minga contributed to Defendants' deception by giving false and misleading testimony under oath. Pursuant to a non-party subpoena in another case, Roche deposed Konie Minga on June 27, 2018. *See* Ex. 11. In response to basic questions about Priority Care's leadership, business operations, and corporate structure, Ms. Minga gave sworn testimony that was in many

cases—as discovery in this case would later show—deliberately false. For example:

- Ms. Minga testified that Phillip Minga, her husband, was not employed by Priority Care or Medpoint, and when asked what involvement he had with the business, she replied "I don't know." Ex. 11 at 39:11–20, 105:9–10. In fact, Phillip Minga was in charge of all of Priority Care's operations, and Konie materially assisted him in managing it. *See* Oswalt Tr. at 39:10–40:14; Ex. 12 at 91:18–92:3; Doc. 252-4 ("Knotts Declaration") ¶ 2.

- When asked whether Phillip Minga had an office at Priority Care, Ms. Minga initially responded "no" and then revised her answer to state that he had an office but only did "family business" there. Ex. 11 at 39:21–40:13, 105:11–17. This was a lie. Phillip Minga and Konie Minga had neighboring offices at Priority Care, and both of them did extensive Priority Care business there. *See, e.g.*, Oswalt Tr. at 68:24–69:6; Ex. 12 at 91:18–92:3, 309:22–310:4.

- Ms. Minga falsely testified that only she had signatory authority over Priority Care's business bank accounts. Ex. 11 at 42:10–14. In fact, Phillip Minga, Wesley Minga, and other individual defendants had such authority over numerous accounts, including that of the central entity, Priority Healthcare Corporation. *See, e.g.*, Ex. 13; Ex. 12 at 135:17–145:8.

- Ms. Minga testified that she had never heard that any of the Priority Care pharmacies were being audited. Ex. 11 at 72:5–13. In fact, audits of Priority Care pharmacies were commonplace and Ms. Minga personally received and signed audit documents. *See, e.g.*, Ex. 14.

- Ms. Minga testified that Phillip Minga did not review contracts that she signed on behalf of Priority Care. *See* Ex. 11 at 164:10–15. In fact, Phillip Minga was the primary contact for and lead negotiator of PHC's agreement with Roche, and he oversaw and reviewed pharmacies' agreements with PBMs. *See, e.g.*, Exs. 15–18.

This extensive false and misleading testimony served to conceal the true nature of Priority Care's business operations and the Mingas' involvement in them.

E. Defendants Hid Thousands of Boxes of International Test Strips Immediately After This Case Was Filed

Days after the complaint was filed in this action, Priority Care received a shipment of between 3,600 to 5,000 boxes of international test strips from Current Trade. *See* Doc. 284 at 85:24–86:19. Phillip Minga loaded this shipment into his SUV and took the international strips to an unknown location. *Id.* at 87:7–18. Mr. Minga knew that it was unlawful and fraudulent to dispense international test strips to patients while submitting claims for retail test strips, *see* Oswalt Tr. at 113:18–114:12, 121:7–122:1, which is precisely what Defendants had been doing for years. *See, e.g.*, Doc. 284 at 80:20–81:12. He hid these strips to prevent Roche from discovering the international dimension of Priority Care's fraud.

Defendants then doubled down on Mr. Minga's misconduct, falsely representing through counsel that Priority Care's *only* remaining inventory was a collection of approximately 4,400 retail and not-for-retail U.S. test strips, *see* Ex. 19, which were later transferred to Roche's custody. *See* Ex. 20. It was over a year later, on October 12, 2019, that Daniel Knotts first revealed in his Declaration that Mr. Minga had driven off with thousands of boxes of international strips. *See* Knotts Decl. ¶ 27. It has been more than two months since then, and Defendants

have yet to even acknowledge Mr. Minga's spoliation of this material evidence, let alone account for or produce the missing boxes.

F. Defendants Altered or Fabricated Countless Invoices to Hide Their Purchases of International Test Strips and Minimize Their Liability

Defendants' campaign of deception and fraud escalated as litigation proceeded. The Court's September 17, 2018 Order (the "September Order") required Defendants to explain each of their adjudications of Accu-Chek test strips. *See* Doc. 22. As discussed above, on October 2, 2018, Defendants produced in response nearly one thousand additional invoices from previously unknown suppliers, including "Par Nasa, LLC," "Surplus Diabetic, Inc.," and Current Trade. *See supra* at 6–7. Third-party discovery and the testimony of Daniel Knotts revealed that hundreds of these invoices were falsified and/or fabricated by the Defendants. *See* Exs. 21–28; Knotts Decl. ¶¶ 28–30. Like all of the records belonging to the Corporate Defendants, these invoices were ultimately maintained in the custody of, and produced by, Phillip and Konie Minga, who together direct and oversee the Corporate Defendants' operations. *See, e.g.*, Oswalt Tr. at 39:10–22, 49:3–50:15; Ex. 12 at 91:18–92:3, 199:6–22, 200:2–12; Knotts Decl. ¶ 2.

Roche still does not know the extent of the fraud because Defendants have made no attempt to produce corrected versions of their invoices, despite being notified months ago that Roche had discovered the invoices were doctored. As

with Mr. Minga's concealment of thousands of international test strips, Defendants have never acknowledged this mass spoliation, much less made any effort to remedy it.

1. Defendants Produced Documents That Were Extensively Falsified and/or Fabricated

The invoices Defendants produced to Roche differ dramatically from the genuine invoices subsequently produced to Roche by Priority Care's suppliers and Daniel Knotts. Specifically:

- Invoices from Par Nasa, LLC were edited to delete Phillip Minga's name. *Compare, e.g.*, Ex. 21, *with* Ex. 22.
- Invoices from Surplus Diabetic, LLC were edited to delete references to "Medpoint Advantage, LLC." *Compare, e.g.*, Ex. 23, *with* Ex. 24.
- All of the Current Trade invoices were edited to delete Phillip Minga's name and replace the "To" and "From" addresses with less facially suspicious shipment information. *See, e.g.*, Exs. 25–28.
- Dozens of Current Trade invoices were edited to replace products explicitly identified as "international," "int'l," "blue," or "CAN[adian]" with products identified as U.S. strips. *Compare, e.g.*, Ex. 25, *with* Ex. 26.
- Dozens more Current Trade invoices were edited to replace NFR strips with retail strips. *Compare, e.g.*, Ex. 27, *with* Ex. 28.

There can be no doubt that the invoices the Corporate Defendants produced were falsified and/or fabricated. Daniel Knotts testified that, as warehouse manager, he maintained a comprehensive collection of authentic original copies of the invoices Priority Care received with its shipments of test strips. *See* Doc. 284

at 82:21–83:4; *see also* Knotts Decl. ¶¶ 28–30. Shortly after Roche filed suit, Phillip Minga asked that Mr. Knotts deliver to him the boxes of invoices he kept, after which Mr. Knotts never saw them again. *See* Doc. 284 at 82:21–84:3. And it was Phillip Minga who personally provided the copies of the invoices to be produced in October, *see* Oswalt Tr. at 49:3–50:15, which included an unknown number of falsifications and fabrications.

Defendants' motives were obvious: Obscuring Phillip Minga's and Medpoint Advantage's liability and erasing evidence of the extent of their fraud. Roche's allegations in this action hinge on the fact that Priority Care submitted well over 400,000 fraudulent insurance claims for retail test strips. The key documentary evidence for the fraud is that the Corporate Defendants' invoices show that they purchased from suppliers and dispensed to patients NFR test strips instead of retail test strips. By doctoring the Current Trade invoices to remove references to international and NFR test strips, Defendants sought to falsely understate the extent of their fraud and reduce the damages that Roche would be able to prove.

2. Defendants Have Made No Attempt to Investigate or Correct Their Falsified Document Production

Defendants' fraud on the Court is exacerbated by the fact that they have not made the slightest attempt to cure any of it. It has been over a year since Roche first alerted Defendants (and the Court) of the falsification of Par Nasa's invoices,

see Doc. 90 ¶¶ 187–189, and over two months since Mr. Knotts' testimony demonstrated that the Current Trade invoices produced by the Corporate Defendants are fabrications. *See* Doc. 284 84:22–85:23. Yet while Defendants have never disputed that they forged documents (a point which is conclusively established by the documents themselves), they have yet to take any steps to correct the record.

Defendants have also failed to respond to Roche's demands for further information about their falsified records. Roche's December 27, 2018 document requests specifically requested

> [a]ll documents and communications concerning Your alteration of invoices showing purchases from Par Nasa, LLC d/b/a Par Nasa Wholesale prior to production pursuant to the Order entered in this case on September 17, 2018, including documents and communications sufficient to identify the individual(s) responsible for causing those alterations to be made.

Ex. 29 at 9. Although Roche had provided clear evidence that those invoices were falsified, Defendants objected on facially improper grounds, *see* Ex. 30 at 23–24,[8] and produced nothing in response.

[8] Defendants asserted that this request was "disproportionate," "overly broad and unduly burdensome," "not reasonably calculated to lead to the discovery of admissible evidence," that it sought "documents and communications that are not relevant to the claims and defenses in this case," and that it was "argumentative and unproven." Ex. 30 at 23–24.

Defendants also ignored Roche's request for testimony on this issue. As with its document requests, Roche included in its Federal Rule of Civil Procedure 30(b)(6) notice a topic squarely addressing this issue:

> TOPIC NO. 11: The alteration, manipulation, or fabrication of documents or files pertaining to the purchase and dispensing of Accu-Chek Test Strips, ... including: Invoices, including deletion of names of individuals and entities and/or deletion of references to international products; . . . Documents produced to Roche during this litigation, including the Par Nasa, LLC invoice attached as Exhibit 4; and [t]he individuals responsible for such alteration, manipulation, or fabrication.

Ex. 31 at 4 & Ex. 4. Yet during her July 22, 2019 deposition, the Corporate Defendants' 30(b)(6) designee Geneva Oswalt admitted that she had done no investigation and made no inquiries, and had not even bothered to ask Phillip Minga—who had given her the invoices to photocopy for production—about it. *See* Oswalt Tr. at 48:9–50:2. Instead, she testified inexplicably that she "had no reason to investigate" it. *Id.* at 48:15–18. Defendants thus made it clear that they had no intention of acknowledging or curing their fraud on the Court, even after they had been caught.

G. Daniel Knotts' Testimony Reveals Previously Undisclosed Discovery Fraud by Defendants

As the Court and Roche recently learned, the reason Defendants refused to produce information about their falsification of documents is that they were actively concealing additional falsifications of which Roche was previously

unaware. The scale of Defendants' discovery fraud became clear only after Defendant Daniel Knotts approached Roche to voluntarily provide a full and complete account of what he knew and understood about Priority Care's operations. *See* Knotts Decl. ¶ 9. Mr. Knotts had, fortuitously, preserved digital copies of some of the original Current Trade invoices in his email account. *See id.* ¶¶ 20–21. These authentic invoices showed conclusively that the ones the Corporate Defendants produced to Roche had been fakes. *See id.*; Exs. 25–28. If Mr. Knotts had stayed silent—or if had he had not kept his own records in his email inbox—Defendants would have gotten away with this massive fraud on Roche and the Court.

H. Defendants Hid Their Illicit Profits to Thwart Any Meaningful Recovery and Concealed Their Asset-Protection Entities in Violation of Court Order

Defendants' misconduct at the inception of this case was not confined to concealing or doctoring evidence of their unlawful activities. They also sought to conceal the *proceeds* of their fraud to thwart any recovery by Roche, transferring millions of dollars of their ill-gotten profits to single-purpose asset-holder entities. *See infra* at 16. To deter discovery of their fraudulent transfers, they willfully violated the September Order by deliberately omitting these and other entities on Court-ordered disclosures. *See infra* at 16–17. Even after this misconduct came to light, prompting this Court's intervention to halt further asset concealment and

dissipation, Defendants continued to conceal material information—disclosing only on November 7, 2019 that the bulk of their ill-gotten assets were (at least nominally) held by an asset-protection trust. *See infra* at 17–18.

1. Defendants Sought to Protect the Proceeds of Their Scheme with Fraudulent Transfers

Shortly after Roche filed its lawsuit and obtained a stipulated preliminary injunction, Phillip and Konie Minga rapidly moved to shield the proceeds of their past fraud from Roche's grasp. From September 20 to September 25, they executed a rapid series of large transactions in which they transferred at least $11 million out of their bank accounts, withdrew $4 million in cash, and, using circuitous routes, deposited the balance in accounts belonging to KJM Holdings, LLC; Minga Investments, LLC; and Capital Asset Management, LLC (the "Asset-Holder Defendants"). *See, e.g.*, Doc. 252-2 (Declaration of Kenneth Yormark ("Yormark Decl.")) ¶¶ 8, 25; Doc. 284 at 50:21–52:23. This, the Court has already concluded, evinced "an intent to secure assets from possible reach," and the methods used were "an effort to hide or dissipate funds." Doc. 284 at 90:23–91:9.

2. Defendants Violated the September Order by Deliberately Omitting the Asset-Holders and Other Entities

As the Court further found, Defendants then attempted to cover their tracks by deliberately omitting the Asset-Holder Defendants from disclosures required by the September Order. *See* Doc. 284 at 90:12–22. That Order required Defendants

to disclose by October 2, 2018 all businesses they owned, controlled, or had interests in since January 1, 2013. Doc. 22 at 2. On October 2, Defendants produced a list identifying 30 operational and shell entities. Ex. 32. At least a dozen entities were missing from this list. The entities Defendants omitted included the entities used as dummy "wholesalers" to fool PBMs (DirecTest, Inc.; Medpoint Diagnostics, LLC; and Medwise, LLC), *see supra* at 3–5, as well as the Asset-Holder Defendants.

The next day, Roche requested explanation for why several apparent Priority Care affiliates Roche had independently identified from public sources did not appear on the list. *See* Ex. 33. This was an opportunity to correct their deliberately deficient disclosures. On October 15, 2018, Defendants' counsel produced a "supplementation," a new list that now identified *41* entities, Ex. 34, but still did not include, among others, the Asset-Holder Defendants. Roche was therefore obliged to discover these crucial entities itself by meticulously tracing the flow of funds from Priority Care to the Asset-Holder Defendants using bank records obtained by non-party subpoenas. Because of Defendants' repeated efforts to block those subpoenas, that process spanned over six months. *See infra* at 18–20.

3. Defendants Failed to Disclose the Existence of Their Asset-Protection Trust Until November 7, 2019

Long after Defendants' violation of the September Order came to light, Defendants *continued to conceal* at least one key financial entity. On November 7,

2019, Defendants moved for an "emergency stay" of the Court's Preliminary Injunction Order, disclosing for the first time that "the assets [were] held in the name of Capital Asset Management, LLC wherein Premier[] Trust is the trustee which owns all of the assets contained in the Trust." Doc. 294 at 6. Failure to identify the trust previously, the Court observed, was "in violation of court order," and "demonstrate[d] once again Defendants' recalcitrance and the need for" the preliminary injunction. Doc. 297 at 3. Defendants' statement was also false: there are *three* trustees of the undisclosed Trust: Premier Trust, Phillip Minga, and Konie Minga. *See* Ex. 35 at 2.[9] And Phillip Minga is the primary beneficiary. *Id.* § 2.4.5.

I. Defendants Abused Discovery to Cover Up and Perpetuate Their Misconduct

Defendants' record of "deceit and recalcitrance," the Court observed, also encompassed "all the roadblocks and delays that have been part of the process of this case to date." Doc. 284 at 91:12–22. These included Defendants' repeated attempts to block or limit facially relevant financial discovery; their opposition to

[9] This Trust, the "Minga 2013 Irrevocable Trust," was formed to protect assets against an ongoing investigation and was based on a fraudulent representation. The Mingas created the Trust one week after Medpoint, LLC and Medpoint Pharmacy received subpoenas from the U.S. Department of Health and Human Services Office of Inspector General announcing an investigation of the Mingas' business practices and seeking documentation of, among other things, Medpoint Pharmacy's insurance claims. *See* Ex. 36 at 1, 10; Ex. 35 at 2. Yet as Grantor, Konie Minga falsely certified that she "[was] not nor did [she] reasonably expect to be under investigation by any state or federal agency." Ex. 37.

Roche's efforts to obtain international discovery from their Canadian supplier, Current Trade; and their attempts to interfere with or hinder non-party subpoenas.

1. Defendants Repeatedly Opposed Efforts to Obtain Financial Discovery with Meritless Motions

On October 31, 2018, Roche issued subpoenas to several banks, including Wells Fargo, to obtain details about Defendants' business structure and financial transactions. *See* Doc. 277-1 ¶ 9. Knowing that these subpoenas would reveal the entities they were fraudulently concealing from Roche, Defendants attempted to block the subpoenas, first moving to stay discovery, *see* Doc. 36, and then seeking to quash the subpoenas on the ground that Priority Care's financial records were "not relevant or discoverable." Doc. 48 at 5. Magistrate Judge Putnam denied the motions. *See* Doc. 64 at 15. Wells Fargo then produced records showing that PHC had transferred millions of dollars to the previously unknown "KJM Holdings," which was later discovered to maintain an account at SunTrust Bank. *See* Doc. 277-1 ¶¶ 10, 12.

In early December 2018, Roche issued a subpoena to SunTrust, and Defendants again sought to quash the subpoena. *See* Docs. 48, 92. On February 12, 2019, Magistrate Judge Johnson denied Defendants' motion for substantially the same reasons as Magistrate Judge Putnam. *See* Doc. 137. Defendants filed objections to Magistrate Judge Johnson's Order, raising their twice-rejected arguments. Doc. 144. This Court summarily overruled Defendants' objections on

March 22, 2019. *See* Doc. 162. SunTrust finally produced records regarding KJM Holdings in early April 2019. These records revealed that KJM Holdings had transferred millions of dollars to an account at TD Ameritrade, Inc. identified only by number. Doc. 277-1 ¶ 15.

Roche could not immediately pursue this lead, however, because Defendants had earlier obtained a moratorium on further non-party subpoenas. *See* Doc. 129. As soon as that moratorium lifted in June 2019, Roche issued a subpoena to TD Ameritrade. Doc. 277-1 ¶ 18. TD Ameritrade's records, produced on June 28, 2019, made it clear why Defendants had so vigorously pursued their losing arguments for so long: They revealed that the TD Ameritrade account in question held over $30 million and belonged to a previously undisclosed entity called "Capital Asset Management," of which Konie Minga was identified as sole member and signatory. *Id.* ¶ 20. Shortly thereafter, records produced by E*Trade Financial showed an account in the name of Minga Investments that held an additional $4.8 million. *See* Doc. 252-30; Yormark Decl. ¶ 26.

2. Defendants Opposed Discovery from Current Trade to Conceal Purchases of International Strips and Prevent Discovery of Their Forged Invoices

Defendants also tirelessly resisted Roche's attempts to obtain discovery from their largest test strip supplier, Current Trade. Roche initially subpoenaed Current Trade and its owner, Vu Lam, on October 31, 2018, along with all of the other

gray-market test strip suppliers Defendants had disclosed. *See* Doc. 157 at 5–6. After trying and failing to serve Current Trade at its two associated U.S. addresses,[10] Roche ultimately sought to compel discovery by International Letter of Request (Letter Rogatory). *See generally id.* Although Magistrate Judge Putnam had already held that Roche's supplier subpoenas were relevant and proportional, *see* Doc. 64 at 13; Doc. 157 at 5–6, Defendants vigorously opposed the request. *See* Doc. 176.

Defendants' opposition papers were full of misrepresentations, apparently fed to Defendants' attorneys by Phillip Minga. For example, Defendants disputed that Current Trade was a Canadian company. *Id.* at 2–6. But merely twelve days before, Defendants had issued checks made out to "Current Trade, Inc." at "32 St. Urbain Drive, Woodbridge, Ontario, Canada L4H2X2." *See, e.g.*, Ex. 38. Phillip Minga also submitted an affidavit misleadingly asserting "on information and belief" that all Accu-Chek test strips are made in Germany. *See* Doc. 176-8. Not only was this false—99% of the hundreds of thousands of boxes that Defendants dispensed state they are made in the United States, *see* Doc. 183 at 4–5—but the affidavit was in service of a larger falsehood. Defendants disputed that Current Trade had sold them international versions of Roche's test strips. But as the documents provided by Mr. Knotts later showed, that was exactly what Current

[10] The first was a fake address, provided by Priority Care; the second was an apartment in Queens belonging to Vu Lam's brother. *See* Doc. 157 at 6–7.

Trade did, and Defendants had engaged in large-scale discovery fraud to cover up that fact. *See supra* at 10–12.

In retrospect, it is clear that Defendants enlisted their unwitting attorneys in an effort to abet their fraud on the Court through groundless and bad-faith motion practice. Defendants' attempts to deter and delay discovery of their forgeries purposefully forced Roche to pursue dozens of hours of wasteful, time-consuming discovery that could have been avoided had Defendants simply complied with the September Order (or Judge Kallon's orders) by producing authentic invoices, or if they had chosen to acknowledge their fraud. Instead, they compounded their misconduct at Roche's, and the Court's, expense.

3. Defendants Improperly Interfered with and Obstructed Non-Party Discovery

In late January, Defendants sought from the Court a wholesale stay of non-party discovery. *See* Doc. 118. The Court denied the motion, but issued an Order suspending further non-party subpoenas until Roche had produced the documents identified in its initial disclosures. *See* Doc. 129. Although the Order clearly permitted Roche to proceed with pre-existing subpoenas, Defendants sent misleading letters to prior recipients of Roche's subpoenas suggesting that the Court had stayed *all* non-party discovery. *See* Ex. 39. Defendants did not notify Roche that it was sending these letters, and despite Roche's repeated requests they refused to provide copies or a list of recipients. *See, e.g.*, Ex. 40.

Defendants continued to fight tooth and nail to obstruct and delay non-party discovery. Roche moved to lift the moratorium on new subpoenas in late March, after it had made the productions identified in its initial disclosures. *See* Doc. 161. Defendants baselessly opposed the motion. Doc. 176 at 7–9. Magistrate Judge Johnson rejected their arguments, but Defendants' opposition delayed discovery for months. *See* Doc. 188 at 21. As discussed above, the non-party discovery Defendants fought so hard to block revealed that Defendants were concealing most of their liquid assets in the name of shell entities they had failed to disclose to Roche. *See supra* at 16–20.

4. Defendants Long Delayed Production of, and Now Refuse to Produce, Individual Defendants' Documents

To this day, Defendants have failed to produce material evidence. Roche's document requests, which were served on Defendants over a year ago, called for documents and communications from the individual Defendants. *See* Ex. 29 at 2. Non-party discovery confirms that the Mingas possess substantial evidence in their personal email accounts and on their cell phones. *See, e.g.*, Exs. 22, 41, 42. After delaying production of those documents until August 2019 without a proper basis to do so, Defendants began filing motions to stay, with the result that the individual Defendants have still produced no documents. *See* Docs. 197, 218, 225. Defendants' repeated motions to stay, like their prior efforts to block non-party discovery, are part of their larger campaign to obstruct the truth-seeking process.

J. Defendants Harassed and Attempted to Interfere with a Key Witness

Defendants also harassed and attempted to interfere with a key witness. The day after Defendants learned that Daniel Knotts had provided Roche with information and documents, Konie Minga began harassing him by telephone and text message. *See* Doc. 284 at 78:18–23. Mr. Knotts, who is Phillip and Konie Mingas' son-in-law, had feared that they would attempt to take revenge against him for testifying against them. *Id.* at 78:1–7. When she learned about Mr. Knotts's Declaration, Ms. Minga called him repeatedly when he was at work, then asked him by text whether he was "too afraid to answer" and mocked the job he had taken after leaving the Priority Care enterprise. *Id.* at 21–22.

Ms. Minga escalated her harassment by seeking a groundless restraining order against Mr. Knotts. *See id.* at 78:8–14. During the October 30, 2019 preliminary injunction hearing, through their formerly shared counsel, Defendants attempted to use the restraining order in an effort to discredit Mr. Knotts's testimony. *See id.* at 66:25–67:23. Roche understands that subsequent to the preliminary injunction hearing, Ms. Minga failed to appear for a hearing to confirm the restraining order and it was dissolved.

K. Defendants Improperly Attempted to Interfere with the Court's November 5, 2019 Preliminary Injunction Order

Even since Roche filed a motion for a preliminary injunction and asset

freeze and the Court granted the motion, Defendants have continued to attempt to obstruct discovery.

1. Defendants Lied About the Purpose of the Assets in the Accounts to be Frozen

In opposing the motion for an asset freeze, Defendants provided false information to their attorneys that their attorneys relayed to the Court. Defendants told Magistrate Judge Johnson that at least two of the accounts—the SunTrust KJM Holdings accounts—should not be frozen because:

> the Mingas are the primary caregivers for Mrs. Minga's parents, who are 87 and 90 years old. The primary caregiver facility debits those SunTrust accounts in the care of those elderly people. . . . And, finally, . . . they need those moneys for basic living.

Doc. 262 at 9:18–10:2. Defendants later reiterated that

> [t]hese are the accounts that the Mingas live on. These are the accounts that they pay their lawyers. These are the accounts that they eat from. These are the accounts that they use for care of Mrs. Minga's elderly parents.

Id. at 16:15–19. The preceding ten months' bank statements and checks subsequently obtained by subpoena show that these statements were false. *See* Exs. 43, 44. Neither of the SunTrust accounts was automatically debited for anything, let alone elder care, nor did any of the funds go to food or expenses for "basic living." *See id.* Rather, the vast majority of expenses were apparently for

elaborate home renovations,[11] although there were notable exceptions: for example, one April 27, 2019 check was made out to the auction house "Bonhams" for $84,672,[12] and a September 27, 2019 check for $92,381 was made out to the Memphis, Tennessee Jaguar dealership, "Bluff City Jaguar." Ex. 44 at 36, 71.

2. Defendants File a Baseless "Emergency Motion"

After a hearing on October 30, 2019, the Court entered a Preliminary Injunction Order on November 5, 2019, which required, *inter alia*, that SunTrust, TD Ameritrade, and E*Trade liquidate Defendants' accounts and transfer the assets to the custody of the Court. *See* Doc. 291. Defendants immediately took steps to block and interfere with this order.

First, Defendants sought an "emergency stay" whose purported urgency was predicated on a false statement. Defendants' November 7, 2019 motion asserted that as of that date, "over $23 million of [the frozen assets] have been liquidated," but that "further immediate liquidation will necessarily create . . . tremendous brokerage fees, tax burdens and/or penalties, and in all probability substantial loss," and that "the immediate liquidation of all assets will most certainly result in

[11] These included multiple checks of thousands of dollars apiece to "Staggs Carpets and Interiors," "Pella Window Company," roofers, electrical contractors, and other suppliers; a $53,427 check to "Wilkins Builders;" and checks totaling $80,000 to "Stafford Construction Company." *See* Ex. 44.

[12] While the check itself offers no details on the purchase, it is surely no coincidence that Bonhams sponsored the "Tupelo Automotive Museum Auction" on April 26 and 27, 2019. *See* Bonhams, *The Tupelo Automobile Museum Auction,* https://www.bonhams.com/auctions/25593 (last visited January 1, 2020).

irreparable harm." Doc. 294 at 2–3, 4. In fact, *all* the restrained assets had *already* been liquidated. *See id.* at 2; Ex. 45. There was no emergency.

Second, immediately after the Preliminary Injunction Order issued, and without the knowledge of their then-counsel, Phillip and Konie Minga retained an attorney in Las Vegas to explore ways to challenge the Order in Nevada state court. *See* Ex. 46 at 3; Ex. 47 at 24:18–25:9, 27:2–13. On November 7, without notifying or copying Roche, Nevada counsel sent multiple communications to TD Ameritrade, E*Trade, and SunTrust stating that the Mingas were seeking an emergency stay and suggesting they should not to transfer the funds this Court had ordered them to transfer until further notice. *See* Exs. 48, 49, 50. When TD Ameritrade understandably interpreted this message to mean that they should not transfer the funds as ordered, counsel did not correct the bank's misimpression. *See id.* Ex. 51. The TD Ameritrade assets were ultimately transferred to the Court the following week, only after Roche's intervention, and well after the Court's deadline. *See* Ex. 52.

ARGUMENT

I. THE COURT HAS THE POWER TO ISSUE CASE-ENDING SANCTIONS

"Courts have the inherent authority to control the proceedings before them, which includes the authority to impose 'reasonable and appropriate' sanctions." *Martin v. Automobili Lamborghini Exclusive, Inc.*, 307 F.3d 1332, 1335 (11th Cir.

2002) (quoting *Malautea v. Suzuki Motor Co., Ltd.*, 987 F.2d 1536, 1545 (11th Cir. 1993)). "[T]he inherent power of a court can be invoked even if procedural rules exist which sanction the same conduct." *Chambers v. NASCO, Inc.*, 501 U.S. 32, 49 (1991). "The key to unlocking a court's inherent power is a finding of bad faith." *Eagle Hosp.*, 561 F.3d at 1306. "[B]ad faith may be found where the court finds that a 'fraud has been practiced upon it, or that the very temple of justice has been defiled,'" *Barash v. Kates*, 585 F. Supp. 2d 1347, 1362 (S.D. Fla. 2006) (quoting *Chambers*, 501 U.S. at 46), or demonstrated by, "*inter alia*, delaying or disrupting the litigation or hampering enforcement of a court order." *Eagle Hosp.*, 561 F.3d at 1306.

A court's inherent power to sanction includes the entry of default judgment. *See, e.g.*, *id.* That sanction is appropriate "only as a last resort, when less drastic sanctions would not ensure compliance with the court's orders." *In re Sunshine Jr. Stores, Inc.*, 456 F.3d 1291, 1306 (11th Cir. 2006) (entering default judgment as sanction for "history of bad faith stonewalling"). But entry of an adverse judgment is appropriate where, as here, any lesser sanction "would be an open invitation to others to abuse the judicial process." *Eagle Hosp.*, 561 F.3d at 1306.

Federal Rule of Civil Procedure 37 also empowers a court to enter a default judgment as a sanction for failure to comply with a discovery order. *See* Fed. R. Civ. P. 37(b)(2)(A); *Boswell v. Gumbaytay*, No. 2:07-CV-135-WKW[WO], 2009

U.S. Dist. LEXIS 46007, at *4–6 (M.D. Ala. June 1, 2009). Default judgment under Rule 37(b)(2)(A) "is warranted when a defendant willfully and in bad faith disregards a court order and the court finds that a lesser sanction would not suffice." *Boswell*, 2009 U.S. Dist. LEXIS 46007, at *5. Case-ending sanctions under Rule 37 "are imposed not only to prevent unfair prejudice to the litigants but also to insure the integrity of the discovery process." *Aztec Steel Co. v. Fla. Steel Corp.*, 691 F.2d 480, 482 (11th Cir. 1982). Rule 37 likewise permits a court to enter a default judgment as a sanction for failure to provide information pursuant to Rule 26(e)—including the failure to correct a disclosure known to be incomplete or incorrect—unless the failure was "substantially justified or is harmless." Fed. R. Civ. P. 37(c)(1).

II. THE COURT SHOULD SANCTION DEFENDANTS, NOT THEIR ATTORNEYS

The evidentiary record makes clear that Defendants themselves, not their counsel, are responsible for the misconduct at issue. This weighs in favor of issuing sanctions in the form of a judgment against Defendants, rather than a penalty or fine that would inevitably reflect on their attorneys. *See, e.g.*, *Inmuno Vital, Inc. v. Telemundo Grp.*, Inc., 203 F.R.D. 561, 574 (S.D. Fla. 2001) (entry of default judgment as sanction for discovery misconduct appropriate when misconduct was "attributable to Defendants themselves, in addition to their counsel"); *Gratton v. Great Am. Communs.*, 178 F.3d 1373, 1375 (11th Cir. 1999)

(affirming entry of case-ending sanctions where sanctioned party "bore 'substantial responsibility' for the delays, by his spoliation of evidence and misidentification of a witness").

Defendants' responsibility for their repeated acts of fraud on the Court is evident from the continuity between Defendants' fraudulent business practices (see *supra* at 3–5) and their approach to this litigation, and from the fact that the pattern of fraud and misconduct persisted even as Defendants repeatedly changed their counsel. Unfortunately, Defendants have treated this Court and the judicial process with the same level of incorrigible mendacity with which they defrauded Roche and their other business partners over the years. It is also clear that the Defendants' motion practice, unbeknownst to their attorneys, has been predicated on falsehoods and pursued for improper purposes. "Where a party misleads an attorney as to facts . . . then sanctions on the party alone are appropriate." *Sussman v. Salem, Saxon & Nielsen, P.A.*, 150 F.R.D. 209, 213 (M.D. Fla. 1993).[13]

III. DEFENDANTS ACTED IN BAD FAITH

Defendants' misconduct during this case more than satisfies any conceivable definition of "bad faith." As described above, "fraud has been practiced upon" the Court, *see Chambers*, 501 U.S. at 46, countless times. Indeed, Defendants have practiced nearly all the forms of bad faith reported in the case law.

[13] As noted above, *see supra* at 1–2, Roche is not seeking sanctions against any of Defendants' stable of current or previous attorneys.

A. Defendants' Fabrication and Falsification of Evidence Was Bad-Faith Conduct

"[T]he inherent powers doctrine is most often invoked where a party commits perjury or destroys or doctors evidence." *Qantum Communs. Corp. v. Star Broad., Inc.*, 473 F. Supp. 2d 1249, 1269 (S.D. Fla. 2007). Defendants' spoliation of evidence and fabrication and falsification of invoices are bad faith *per se* and by themselves warrant case-ending sanctions. *See, e.g.*, *Vargas v. Peltz*, 901 F. Supp. 1572, 1581 (S.D. Fla. 1995) (observing that "intentional misconduct committed . . . in fabricating evidence justifies dismissal of this action"); *cf. Telectron, Inc. v. Overhead Door Corp.*, 116 F.R.D. 107, 127 (S.D. Fla. 1987) ("[C]ourts have the inherent power to enter a default judgment as punishment for a defendant's destruction of documents.")

As described above, Phillip Minga's immediate response to Roche's complaint was to spirit thousands of boxes of international test strips off to an unknown location and knowingly conceal the existence of these test strips from Roche. *See supra* at 8–9. Defendants then falsified or manufactured *at least* several hundred fake invoices that were doctored to conceal facts central to Roche's case: what products Defendants were purchasing and dispensing, how many they were purchasing, and who was personally involved in the fraud. *See supra* at 9–11. "[T]he need for sanctions is heightened when the misconduct relates to the pivotal or 'linchpin' issue in the case." *Qantum Communs.*, 473 F.

Supp. 2d at 1269; *see Access Innovators, LLC v. Usha Martin, LLC*, No. 1:09-cv-2893-TCB, 2010 U.S. Dist. LEXIS 152303, at *9 (N.D. Ga. Apr. 28, 2010) ("When a party fabricates a document or provides false evidence relating to a key issue in a case, courts have made clear that the appropriate sanction is the ultimate sanction of dismissal."). Defendants' invoices are pivotal because these are the only records Priority Care kept of what they purchased and dispensed to their patients. They are at the heart of the case. Tampering with them affects Defendants' degree of liability—which is precisely the reason Defendants tampered with them.

Franklin Livestock, Inc. v. Boehringer Ingelheim Vetmedica, Inc., 251 F. Supp. 3d 962 (E.D.N.C. 2017), *aff'd*, 721 F. App'x 263, 263 (4th Cir. 2018), is on point. The plaintiff initially produced "documents [that] were held out to be original and contemporaneous records of its daily business," but these "records . . . were apparently altered in a systematic fashion and in a way that unmistakably benefited" the plaintiff. 251 F. Supp. 3d at 968. The plaintiff subsequently produced materially different versions of the same documents, "disavowing" the previous production. *Id.* at 965. Concluding that the plaintiff "intentionally fabricated thousands of documents, represented those documents as originals, altered the data within the fabricated documents to favor its case, and wrongfully withheld the actual contemporaneous documents which contradict the fabricated

documents," the court imposed case-ending sanctions in the form of dismissal of the case. *Id.* at 971.

Defendants' misconduct here is far worse than the plaintiff's in *Franklin Livestock*. There, it was the offending *party* that affirmatively corrected the record, eventually providing accurate documents and disavowing their previous production. *Id.* at 965. Here, Defendants never voluntarily corrected the record, and, to the contrary, fought vigorously to prevent Roche and the Court from learning the truth. *See supra* at 20–21. The only way Roche learned about Defendants' forgeries was through non-party discovery, obtained over Defendants' objections, and the testimony of Daniel Knotts, who testified despite Defendants' harassment and threats. *See supra* at 9–14; Doc. 284 at 66:10–67:23, 78:1–79:22; *cf. Porton v. SP One, Ltd.*, No. 8:14-CV-2847-T-17EAJ, 2015 U.S. Dist. LEXIS 48256, at *15 (M.D. Fla. Mar. 19, 2015) ("harassing and intimidating behavior towards Defendants' employees, agents, and counsel" justifies case-ending sanctions).

To this day, Defendants they have never acknowledged, explained, or attempted to cure any of their fraud on the Court. *See supra* at 12–14. That failure to explain is only the coda to Defendants' misconduct here, yet that factor alone has supported the sanction of default judgment. *See Marcelle v. Am. Nat'l Delivery, Inc.*, Case No. 3:09-cv-82-J-34MCR, 2010 U.S. Dist. LEXIS 40248, at

*14–19 (M.D. Fla. Apr. 23, 2010) (entering default against defendant where defendant offered no explanation for its failure to produce a corporate representative for deposition); *see also Montero-Hernandez v. Palisades Collection, LLC*, No. 6:12-cv-1736-Orl-22KRS, 2013 U.S. Dist. LEXIS 149556, at *15 (M.D. Fla. Sep. 26, 2013) (failures to respond to court orders "or offer any sufficient explanation for failing to do so" justifies case-ending sanction).

B. Defendants' Violation of Court Orders and Failure to Comply with Discovery Obligations Is Bad-Faith Conduct

Beyond forging documents, Defendants have violated court orders, withheld evidence, lied to the Court, and refused to comply with their discovery and disclosure obligations. This, too, is bad-faith conduct warranting sanctions under the Court's inherent powers and Federal Rule of Civil Procedure 37. *See, e.g.*, *Malautea*, 987 F.2d at 1542–43 (default judgment "richly deserved" under Rule 37(b)(2)(C) where "defendants refused to reveal . . . discoverable information, willfully violating the court's three clear orders"); *Automobili Lamborghini, S.p.A. v. Johnson*, No. 5:13-cv-1136-TMP, 2014 U.S. Dist. LEXIS 120853, at *8 (N.D. Ala. Aug. 29, 2014) (Rule 37 default judgment imposed where defendants "willfully and contemptuously delayed and obstructed plaintiff's legitimate discovery efforts, and . . . willfully ignored and disobeyed the court's orders regarding discovery"); *Sec'y of Labor v. Caring First, Inc.*, No. 6:15-cv-1824-Orl-41GJK, 2018 U.S. Dist. LEXIS 13957, at *9 (M.D. Fla. Jan. 19, 2018) (default

judgment where, "having been provided with numerous opportunities to comply, Defendants have repeatedly flouted the Court's authority by willfully destroying vital documents and failing to produce others"); *Henley v. Coosa Pines Golf Club LLC*, No. 1:10-cv-72-TMP, 2011 U.S. Dist. LEXIS 163297, at *9 (N.D. Ala. Feb. 15, 2011) (entering default judgment as sanction for discovery misconduct, noting that "the failure or refusal of a party to proceed fairly and reasonably with discovery harms not only the opposing party seeking discovery, but also the court," and that "obstructionist tactics unduly extend the time and effort necessary for the court to resolve the case"); *see also Baltimore v. Jim Burke Motors, Auto.*, 2008 U.S. Dist. LEXIS 132012, at *4 (N.D. Ala. 2008) (Bowdre, J.) (case-ending sanctions "as a sanction for . . . repeated non-compliance with discovery obligations and . . . court[] orders").

Each of Defendants' violations of court orders and decisions to disregard their discovery obligations has been calculated to shield themselves from liability or cover up their misconduct. The pattern began even before Roche filed its complaint in this case, when Defendants repeatedly defied Judge Kallon's orders, even after being held in contempt. *See supra* at 5–7. It continued when Defendants violated the September Order by withholding information and producing fake documents. *See supra* at 9–11, 16–18. Their cover-up attempts (and failure to correct the record) continued even after Roche *exposed* Defendants'

misconduct. *See supra* at 17–21. Taken together, their actions have irredeemably tarnished the integrity of these proceedings. Such "[c]ontemptuous defiance of the judicial process," *Chemtall Inc. v. Citi-Chem, Inc.*, 992 F. Supp. 1390, 1411 (S.D. Ga. 1998), cannot be rewarded by permitting Defendants to continue participating in this case. Defendants deserve nothing less than a default judgment.

C. Defendants' Interference with Court Orders Was Bad-Faith Conduct

Defendants' attempts to "hamper[] enforcement of a court order" likewise constitute sanctionable bad faith conduct. *Barnes v. Dalton*, 158 F.3d 1212, 1214 (11th Cir. 1998). As recounted above, Defendants directed counsel to file an "emergency" motion to stay, preventing the Court-ordered transfer of funds into constructive trust, and to persuade banks to postpone compliance. *See supra* at 23–25. Defendants sought to improperly circumvent a court order and frustrate this Court's management of its own affairs as a last-ditch attempt to protect their fraudulent proceeds.

IV. ROCHE HAS BEEN PREJUDICED BY DEFENDANTS' MISCONDUCT

Unlike the Court's inherent powers, which can support a sanction of default to deter similarly egregious misconduct by others, *see Eagle Hosp.,* 561 F.3d at 1306, the sanction of default judgment under Federal Rule of Civil Procedure 37 requires the Court find that "the moving party was prejudiced by [defendant's]

violation." *Inmuno Vital, Inc. v. Telemundo Grp., Inc.*, 203 F.R.D. 561, 571 (S.D. Fla. 2001). Roche has been profoundly prejudiced by Defendants' prolonged violation of the Court's orders and their unrepentant misconduct. Among other things:

- Defendants' failure to comply with the Court's September 17 Order required Roche to spend months (and hundreds of thousands of dollars) tracking down and identifying Defendants' secret entities. *See supra* at 16–20.

- Defendants' stonewalling obliged Roche to expend substantial time and resources pursuing third-party subpoenas to obtain evidence from alternate sources. *See id.*

- Defendant's attempts to stop or stymie necessary non-party discovery caused substantial delays, spawned hundreds of pages of motion practice, and needlessly occupied Roche's, the Court's, and the Magistrate Judges' time. *See id.* at 18–21.

- Defendants' production of forged documents required Roche to undertake significant recalculations and to reevaluate Defendants prior productions in their entirety. *See supra* at 9–14; Doc. 252-3.

Roche has also been prejudiced because Defendants have proven themselves totally untrustworthy, even to their own counsel. *See, e.g.*, *supra* at 25. Neither the Court nor Roche can have any confidence that anything Defendants produce going forward is accurate and authentic, or that anything they argue has a good-faith basis. All told, the Mingas' dishonesty has added millions of dollars of unnecessary litigation costs on top of the tens of millions of dollars out of which Defendants defrauded Roche, and it has introduced unacceptable levels of risk and

uncertainty into Roche's efforts to obtain a remedy for its losses. Indeed, if Roche had not discovered Defendants' fraud on the Court at great expense, Defendants might have gotten away with concealing their assets and the full extent of their fraud, and the prejudice to Roche would be even worse. But there can be no dispute that Roche has been greatly prejudiced.

V. ANY SANCTION LESS THAN DEFAULT JUDGMENT WOULD BE INSUFFICIENT

Defendants have already demonstrated that a lesser sanction than a default judgment would not suffice. After Judge Kallon held them in contempt, Defendants' continued noncompliance with the subpoena and court orders cost them over $100,000. *See supra* at 5–6. Even then, they continued to defy the court by deliberately withholding nearly a thousand responsive documents. *See supra* at 6–7. The imposition of prior lesser sanctions is not required to find that no lesser sanction will suffice, *see Malautea*, 987 F.2d at 1544, but Defendants have already shown that lesser sanctions would not deter them. *See Mishkin v. Jeannine Gurian Tr. No. One*, No. 06-80489-CIV-RYSKAMP/VITUNAC, 2008 U.S. Dist. LEXIS 20038, at *16–17 (S.D. Fla. Mar. 12, 2008) (entry of default pursuant to inherent power warranted where "[t]he Court ha[d] already placed [a defendant] in contempt and the New York Court has done the same to [another defendant]," but "entry of these orders has had no effect on their conduct"). Case-ending sanctions are the only sanction that can adequately address Defendants'

audacious wrongdoing and promote respect for the judicial system. *See, e.g.*, *Franklin Livestock*, 251 F. Supp. 3d at 970–71 (finding, where the plaintiff had falsified numerous key documents and withheld the accurate originals, that "[n]othing less [than dismissal] is warranted by conduct which has fundamentally undermined these entire proceedings"); *Vargas*, 901 F. Supp. at 1582 (case-ending sanctions for conduct that "severely obstruct[ed] the discovery process and imped[ed] ability to conduct discovery vital" to the case).

Putting Defendants' prior defiance of contempt orders aside, the sanction of default judgment is necessary here because there is no other adequate remedy for Defendants' continuing litigation misconduct. Roche still does not have (and, frankly, never expects to have) a complete collection of authentic invoices from Priority Care. It does not have a complete list of Defendants' entities. It does not have the thousands of boxes of international test strips that Mr. Minga concealed or destroyed. Given the Mingas' demonstrated inability to provide truthful and accurate information even when required to do so, case-ending sanctions are necessary to preserve the integrity of the judicial process. *See, e.g.*, *Chemtall*, 992 F. Supp. at 1409 ("Use of the 'ultimate sanction' addresses not only prejudice suffered by the opposing litigants, but also vindicates the judicial system as a whole, for such misconduct threatens the very integrity of courts."); *McDowell v. Seaboard Farms*, CASE NO. 95-609-CIV-ORL-19, 1996 U.S. Dist. LEXIS 19558,

at *27 (M.D. Fla. Nov. 4, 1996) (imposing case-ending sanctions against party for producing a fabricated diary and giving false testimony at his deposition).

The Eleventh Circuit has held that default judgment is an appropriate sanction where, as here, the scope and pervasiveness of misconduct has "ma[d]e it untenable . . . to continue litigating against" the defendants. *Eagle Hosp.*, 561 F.3d at 1306; *see Skywark v. Isaacson*, 96 Civ. 2815 (JFK), 1999 U.S. Dist. LEXIS 23184, at *58, *62–63 (S.D.N.Y. Oct. 14, 1999) (lesser sanction than dismissal for plaintiff's misconduct was not appropriate because plaintiff's discovery misconduct had created a "distorted" and "tainted" evidentiary record); *cf. Parcher v. Gee*, CASE No. 8:09-CV-857-T-23TGW, 2016 U.S. Dist. LEXIS 179454, at *31 (M.D. Fla. 2016) ("[P]ermitting the plaintiff to continue the lawsuit he attempted to win by fraudulent means, even with the striking of a claim, is an insufficient punishment.").

Imposing any less severe sanction would fail to deter future litigants from engaging in similar misconduct. *See National Hockey League v. Metro. Hockey Club*, 427 U.S. 639, 643 (1976) (noting that case-ending sanctions are appropriate "to deter those who might be tempted to such conduct in the absence of such a deterrent"); *Eagle Hosp.*, 561 F.3d at 1306 (same). Throughout this case, Defendants have demonstrated disrespect for both the basic rules governing judicial processes (by, for example, producing doctored invoices and attempting to

move assets out of the court's reach) and for the Court's time and energy (by filing obstructive motions with the goal of preventing exposure of their misdeeds). Faced with such "continual and flagrant abuse of the judicial process," the most severe sanction is the only proportionate response. *Martin*, 307 F.3d at 1336 & n.2; *Tarasewicz v. Royal Caribbean Cruises, Ltd.*, Case No. 14-CIV-60885-BLOOM/VALLE, 2016 U.S. Dist. LEXIS 186120, at *18–19 (S.D. Fla. Feb. 9, 2016) (noting that cases involving sanctions for use of fabricating evidence concern "the most egregious misconduct").

CONCLUSION

For the above-stated reasons, the Court should grant Roche's request for a default judgment and to schedule a damages inquest against Phillip Minga, Konie Minga, and the Corporate Defendants, and for all other relief the Court deems just and proper.

DATED: New York, New York
January 3, 2020

Respectfully submitted,

/s/ Geoffrey Potter

Geoffrey Potter
Aron Fischer
Timothy H. Gray
PATTERSON BELKNAP WEBB & TYLER LLP
1133 Avenue of the Americas
New York, NY 10036-6710
Tel: 212-336-2000
Fax: 212-336-2222
gpotter@pbwt.com

afischer@pbwt.com
tgray@pbwt.com

David J. Canupp
J. Bradley Emmons
LANIER FORD SHAVER & PAYNE, P.C.
P. O. Box 2087
2101 West Clinton Avenue, Suite 102 (35805)
Huntsville, AL 35804
Tel: 256-535-1100
Fax: 256-533-9322
djc@LanierFord.com
jbe@LanierFord.com

Attorneys for Plaintiffs
Roche Diagnostics Corporation and
Roche Diabetes Care, Inc.

CERTIFICATE OF SERVICE

The foregoing was filed electronically this 3rd day of January, 2020. Notice of this filing will be sent to all attorneys of record by the Court's CM/ECF system. The Declaration and Exhibits in support of this Memorandum will be filed with the Court by hand and served by electronic mail on all counsel of record this 3rd day of January, 2020.

/s/ *Geoffrey Potter*
Geoffrey Potter