No._____

In The

Supreme Court of the United States

CEDRICK AND TAMARA FRAZIER,

*Petitioner*s,

v.

SOUTHEAST GEORGIA HEALTH SYSTEM, INC. ("SGHS"), COOPERATIVE HEALTHCARE SERVICES, INC. ("CHSI") d/b/a SOUTHEAST GEORGIA PHYSICIAN ASSOCIATES – Ear, Nose & Throat ("SGPA-ENT"),

And

SHERMAN A. STEVENSON, M.D.,

Respondents.

On Petition for a Writ of Certiorari To the United States Court of Appeals for the Eleventh Circuit

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

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February 27, 2025

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[DO NOT PUBLISH]

In the
United States Court of Appeals
For the Eleventh Circuit

No. 24-10976

Non-Argument Calendar

CEDRICK FRAZIER,
TAMARA FRAZIER, Plaintiffs-Appellants,

versus

SOUTHEAST GEORGIA HEALTH SYSTEM, INC.,

SHERMAN A. STEVENSON,

COOPERATIVE HEALTHCARE SERVICES, INC., d.b.a. Southeast Georgia Physician Associates-Ear, Nose, & Throat, Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Georgia
D.C. Docket No. 2:21-cv-00021-LGW-BWC

Before WILSON, LUCK, and ANDERSON, Circuit Judges.

PER CURIAM:

Cedrick and Tamara Frazier appeal the dismissal with prejudice of their medical malpractice suit against Southeast Georgia Health System, Inc., Dr. Sherman Stevenson, and Cooperative Healthcare Services ("Defendants"). The district court dismissed the lawsuit under its inherent powers after it found that the Fraziers had fabricated evidence. Both the magistrate judge and the district judge comprehensively set out the relevant facts and conducted a thorough analysis.

We write only for the parties who are already familiar with the facts. For these reasons, we include only such facts as are necessary to understand our opinion. We review a district court's decision to impose sanctions under its inherent power for abuse of discretion. *Eagle Hosp. Physicians, LLC v. SRG Consulting, Inc.*, 561 F.3d 1298, 1303 (11th Cir. 2009). Discretion means the district court has a "range of choice, and that its decision will not be disturbed as long as it stays

within that range and is not influenced by any mistake of law." *Guideone Elite Ins. Co. v. Old Cutler Presbyterian Church, Inc.*, 420 F.3d 1317, 1324 (11th Cir. 2005) (internal quotation marks omitted). "The district court's findings of fact—including determinations of the credibility of witnesses and weight of the evidence—will not be set aside unless they are clearly erroneous." *Fischer v. S/Y NERAIDA*, 508 F.3d 586, 592 (11th Cir. 2007).

Courts have the inherent power to police those appearing before them. *Chambers v. NASCO, Inc.*, 501 U.S. 32, 46, 111 S. Ct. 2123, 2133 (1991). A court also has the power to conduct an independent investigation to determine whether it has been the victim of fraud. *Martin v. Automobili Lamborghini Exclusive, Inc.*, 307 F.3d 1332, 1335 (11th Cir. 2002). This power is "governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases." *Chambers*, 503 U.S. at 43, 111 S. Ct. at 2132 (citing *Link v. Wabash R.R.*, 370 U.S. 626, 630–31, 82 S. Ct. 1386, 1389 (1962)). It "must be exercised with restraint and discretion" and used "to fashion an appropriate sanction for conduct which abuses the judicial process." *Id.* at 44–45, 111 S. Ct. at 2132–33. "A court may exercise this power 'to sanction the willful disobedience of a court order, and to sanction a party who has acted in bad faith, vexatiously, wantonly, or for oppressive reasons.'" *Purchasing Power, LLC v. Bluestem Brands, Inc.*, 851 F.3d 1218, 1223 (11th Cir. 2017) (quoting *Marx*

v. Gen. Revenue Corp., 568 U.S. 371, 382, 133 S. Ct. 1166, 1175 (2013)). "The dual purpose of this power is to vindicate judicial authority without resorting to a contempt of court sanction and to make the prevailing party whole." *Id.*

We have stated that the "key to unlocking a court's inherent power is a finding of bad faith." *Sciarretta v. Lincoln Nat'l Life Ins.*, 778 F.3d 1205, 1212 (11th Cir. 2015). And we have noted that courts have held that fabricating evidence and lying about it constitutes fraud on the court. *Rozier v. Ford Motor Co.*, 573 F.2d 1332, 1338 (5th Cir. 1978).[1]

Dismissal with prejudice "is an extreme sanction that may be properly imposed only when: (1) a party engages in a clear pattern of delay or willful contempt (contumacious conduct); and (2) the district court specifically finds that lesser sanctions would not suffice." *Betty K Agencies, Ltd. v. M/V MONADA*, 432 F.3d 1333, 1338 (11th Cir. 2005) (quotation marks omitted). It is a sanction "thought to be more appropriate in a case where a party, as distinct from counsel, is culpable." *Id.*

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[1] In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981)(en banc), this Court adopted as binding precedent all of the decisions of the former Fifth Circuit handed down prior to the close of business on September 30, 1981.

We conclude that the district court did not abuse its discretion when it invoked its inherent powers and dismissed the lawsuit. Although the Fraziers make a series of arguments regarding the decision, none are persuasive.

First, they argue that the court below erred when it found that they fabricated the evidence.[2] However, as both the district court and the magistrate court discussed in great detail, the evidence was clear that the video was not created in Dr. Stevenson's examination rooms based on a comparison of the proffered video and a video made later for the purposes of this investigation with the cooperation of both parties. And yet the Fraziers testified that that is where the video was created without any plausible explanation of how the light fixtures (inset in the ceiling), air vents, wall color, counter color, or cabinet hardware could differ so drastically. Further, the only evidence that they produced to show that the video was created on the date they alleged it was created on was a screenshot, which even their expert witness admitted could have been fabricated fairly simply. Combined with the fact that this video was not

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[2] To the extent that the Fraziers argue the question of the fabrication of the evidence should have been one for a jury, we reject that argument. The court had the power to investigate whether it had been the victim of fraud, see *Martin*, 307 F.3d at 1335-36, and as such was empowered to hold the hearing and make the factual findings before a jury could be exposed to potential fabricated evidence.

referenced by the Fraziers until the Second Amended Complaint—despite being the proverbial smoking gun that would prove their case of malpractice—and the fact that it had been conveniently deleted from Mr. Frazier's cellphone, the evidence amply supports the district court's finding that the video was not created where and when the Fraziers testified it was made or showed what it purported to show.[3]

Second, the Fraziers argue that district court did not find a clear pattern of delay or willful contempt and they attempt to attack the order by distinguishing the cases the court relied upon. But the simple fact is that the court—based upon ample evidence— properly found the Fraziers fabricated and attempted to rely on a piece of evidence that would prove their case, and continued to testify as to its veracity, showing a clear pattern of willful

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[3] To the extent the Fraziers complain that they received insufficient notice in order to prepare for the hearing, we reject that argument as frivolous. The motion was extensively briefed by the parties before the hearing before the magistrate and the Fraziers have not pointed to any surprises they suffered at the hearing.

contempt for the proceedings. See *Betty K Agencies*, 432 F.3d at 1338.[4] For that reason, the dismissal was warranted, and the court did not abuse its discretion.[5]

Because the district court did not abuse its discretion when it dismissed the case, the judgment of the district court is

AFFIRMED.

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[4] Although the Fraziers argue that we should remand the case so that they may file a sanctions motion against the Appellees, they have not shown how the Appellees' actions amounted to fraud on the court. The fraud which the Fraziers allege apparently relates to the medical records with respect to February 6, 2020, and whether there actually was an examination of Mr. Frazier on that date. However, the Fraziers' brief on appeal is so vague with respect to a description of Appellees' alleged actions and so vague with respect to any possible relevance of the matter to the issues on appeal that we cannot conclude that the district court abused its discretion in its handling of the matter.

[5] Because we affirm the dismissal of the Fraziers' suit, we need not address the other issues raised by the Fraziers.

In the United States District Court
for the Southern District of Georgia
Brunswick Division

2:21-CV-21

CEDRICK FRAZIER and TAMARA FRAZIER,
Plaintiffs,

v.

SOUTHEAST GEORGIA HEALTH SYSTEM, INC.,
SHERMAN A. STEVENSON, M.D., and
COOPERATIVE HEALTHCARE SERVICES, INC. d/b/a
Southeast Georgia Physician Associates—Ear, Nose and Throat, Defendants.

ORDER

Before the Court are Plaintiffs' objections to the Magistrate Judge's November 8, 2023, report and recommendations (hereinafter "the Report"). Dkt. No. 272. In the Report, the Magistrate Judge recommends that the Court grant Defendants' motion for dismissal sanctions, dkt. no. 184, and dismiss Plaintiffs' complaint with prejudice. Dkt. No. 268. Plaintiffs timely filed objections to the Magistrate Judge's findings, and those objections are now properly before the Court. Dkt. No. 272. After a de novo review of the Report, the Court **OVERRULES** Plaintiffs' objections and **ADOPTS** the Magistrate Judge's Report as supplemented herein. Defendants' motion for dismissal sanctions,

dkt. no. 184, is **GRANTED**, and Plaintiffs' complaint is **DISMISSED with prejudice**.

BACKGROUND[1]

This is a medical malpractice suit arising out of Plaintiff Cedrick Frazier's (hereinafter "Mr. Frazier") septoplasty performed by Defendant-Doctor Sherman Stevenson (hereinafter "Dr. Stevenson"). Mr. Frazier and his wife, Tamara Frazier, (collectively "Plaintiffs") seek damages based on claims of professional negligence, negligence per se, and loss of consortium. See generally Dkt. No. 77. Specifically, Plaintiffs allege that, following the septoplasty, Dr. Stevenson left gauze or packing in Mr. Frazier's nasal cavity, and those foreign items remained there until Dr. Stevenson removed them weeks later. Id. ¶ 41. Plaintiffs claim Dr. Stevenson's failure to remove the foreign objects caused Mr. Frazier serious pain and injury. Id. ¶ 15. Defendants deny that Dr. Stevenson left anything in Mr. Frazier's nasal cavity. See, e.g., Dkt. No. 82 ¶ 15.

The issue before the Magistrate Judge, and now before the undersigned, centers around a video produced by Plaintiffs, which shows a mound of bloody materials in a kidney-shaped dish. Plaintiffs claim Mr. Frazier took the video (hereinafter "the YouCut Video") during his follow-up visit in Dr. Stevenson's office, the Southeast Georgia Physician

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[1] The background provided here is a summary of the relevant facts. For a detailed recitation of the facts, see generally dkt. no. 268.

Associates—Ear Nose and Throat ("SGPA-ENT") office suite (hereinafter "Suite 480"),[2] on February 25, 2020. Dkt. No. 77 ¶ 42. The title, "YouCut Video," is used because the video was created when Mr. Frazier combined two separate, original videos (which he allegedly recorded on his cell phone) in the YouCut video editing app. "At the hearing on Defendants' Motion, the parties generally referred to the video as the 'YouCut Video.' The Court uses the same term here." Dkt. No. 268 at 3 n.1. The original videos used to create the YouCut Video were requested, but Plaintiffs never produced them.

The YouCut Video allegedly shows Mr. Frazier shortly after Dr. Stevenson had removed the foreign objects from his nasal cavity and "gauze packing and blood clots that were removed from his nasal cavity and placed in a kidney basin." Id. After Plaintiffs produced the YouCut Video, they filed a second amended complaint, and therein, Plaintiffs rely on the video as support for their allegations.[3] See id. ¶¶ 42, 116. As part of an initial challenge to the YouCut Video's authenticity, Defendants requested the original video files, along with the

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[2] Suite 480 is Dr. Stevenson's office suite located in the Southeast Georgia Physician Associates building on the Southeast Georgia Health Systems Brunswick Campus. It houses several exam rooms, including exam rooms 1, 2, and 3, which are relevant to this case.

[3] Plaintiffs neither mentioned nor relied upon the YouCut Video in their initial complaint or their first amended complaint. See generally Dkt. Nos. 1, 36.

associated metadata, recorded on Mr. Frazier's phone. Plaintiffs did not produce the original videos, but they did provide a screenshot of an original video that purportedly shows some of the video's metadata. See Dkt. No. 53 at 2. Ultimately, the Magistrate Judge ordered Plaintiffs to provide Defendants' expert, Vicente Rosado, with Mr. Frazier's phone. Dkt. No. 58. Even the expert was unable to locate the original video files and could not determine whether the YouCut Video was authentic. See generally Dkt. No. 184-1. Following that initial dispute, Plaintiffs requested to inspect Suite 480 and have a videographer record the inspection. Dkt. No. 55. The Magistrate Judge granted their request, and on October 5, 2021, Plaintiffs conducted their walkthrough of Suite 480. Dkt. No. 64. "Plaintiffs and Defendants both had their own videographers present for the inspection." Dkt. No. 268 at 6. The inspection revealed significant discrepancies between the features of the room in the YouCut Video and the room where the exam occurred.

Thereafter, Defendants filed the motion presently before the Court, a motion to dismiss Plaintiffs' suit as a sanction for fabricating the YouCut Video. Dkt. No. 184. Defendants argue that the YouCut Video could not have been recorded in Suite 480 during Mr. Frazier's February 25, 2020, follow-up visit because the room shown in the YouCut Video is visibly inconsistent with the exam rooms in Suite 480. Plaintiffs, on the other hand, maintain that Mr. Frazier recorded the YouCut

Video in Suite 480 immediately following his appointment with Dr. Stevenson. After an evidentiary hearing on the motion, the Magistrate Judge issued the Report, finding that the YouCut Video was indeed fabricated. Dkt. No. 268. He ultimately recommended the Court dismiss Plaintiffs' suit with prejudice. Id. Plaintiffs filed timely objections to the Magistrate Judge's factual findings and legal conclusions. Dkt. No. 272.

STANDARD OF REVIEW

District courts have a duty to conduct a "careful and complete" review of a Magistrate Judge's report and recommendation. Williams v. Wainwright, 681 F.2d 732, 732 (11th Cir. 1982) (quotations omitted). The Court "may accept, reject, or modify, in whole or in part, the findings or recommendations made by the [Magistrate Judge]." 28 U.S.C. § 636(b)(1). "A timely objection to a Magistrate Judge's Report . . . requires a district court to review the objected-to findings or recommendations de novo." Furcron v. Mail Ctrs. Plus, LLC, 843 F.3d 1295, 1308 (11th Cir. 2016) (citing 28 U.S.C. § 636(b)(1)). During an evidentiary hearing, like the one conducted in this case, the Magistrate Judge "sits as both factfinder and assessor of credibility." Castellano Cosm. Surgery Ctr., P.A. v. Rashae Doyle, P.A., No. 8:21-cv-1088, 2021 WL 3188432, at *4 (M.D. Fla. July 28, 2021) (citing Four Seasons Hotels & Resorts, B.V. v. Consorcio Barr, S.A., 320 F.3d 1205, 1211 (11th Cir. 2003)). Thus, the Court "should defer to the magistrate judge's [credibility] determinations unless his understanding of the facts appears to be

unbelievable." United States v. McGregor, No. 18-cr-20584, 2018 WL 5778235, at *1 (S.D. Fla. Nov. 2, 2018) (citing United States v. Ramirez-Chilel, 289 F.3d 744, 749 (11th Cir. 2002)).

DISCUSSION

The Court first addresses Plaintiffs' request for oral argument on this matter. See Dkt. No. 272 at 1 ("Plaintiffs request oral argument . . . under Local Rule 7.2 remotely via Zoom due to distance as counsel is based out of Middle Tennessee."). On September 18, 2023, the Magistrate Judge conducted an evidentiary hearing that lasted nearly four hours—the hearing began at 2:03 P.M. and ended at 5:52 P.M. See generally Dkt. No. 269. The Court's stenographer has since produced a transcript of the proceedings, during which the parties had the opportunity to make extensive arguments.[4] Based on the transcript, ample record evidence, and the parties' exhaustive briefing on both Defendants' motion and Plaintiffs' objections,[5]

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[4] The Magistrate Judge gave each side one and one-half hours to make their arguments during the hearing. Dkt. No. 269 at 2:22–2:23 ("Each side will have one and a half hours to present."). During that time, each side called witnesses and were allowed extensive cross-examination of each witness. At the conclusion of Plaintiffs' time, the Magistrate Judge even allowed Plaintiffs' counsel extra time to make additional argument. Id. at 127:4– 127:6.

[5] Following Plaintiffs' objections, Defendants filed a response, dkt. no. 273, Plaintiffs filed a reply, dkt. no. 275, Defendants filed a sur-reply, dkt. no. 277, and Plaintiffs filed a sur-surreply, dkt. no. 279.

the Court finds additional oral argument would be duplicative and unnecessary. See United States v. Raddatz, 447 U.S. 667, 674–84 (1980) (finding that a district court is neither constitutionally nor statutorily required to hold a hearing when conducting its review of a magistrate judge's report and recommendations); see also S.D. Ga. LR 7.2 (stating the Court has discretion in granting a party's request for a hearing, as the Court "may allow oral argument" (emphasis added)). Therefore, Plaintiffs' request for oral argument is **DENIED**.

Before turning to Plaintiffs' actual objections to the Report, the Court next handles Plaintiffs' complaints about the nature of the September 18, 2023, evidentiary hearing before the Magistrate Judge. Plaintiffs maintain that the September 18, 2023, hearing was not an "evidentiary hearing." See, e.g., Dkt. No. 275 at 2. Additionally, they argue that they lacked "sufficient notice" of the allegations against them before appearing at the hearing. Id. at 4 (Plaintiffs "did not have sufficient notice of the fabrication, false testimony, perjury[,] and bad faith as alleged by [] [D]efendants in their [response to Plaintiffs' objections]." (citing Dkt. No. 273)). They are wrong on both counts.

The September 18, 2023, hearing before the Magistrate Judge was an evidentiary hearing. Not only was each side aware that evidence could be presented, but each side proceeded to present evidence. Each party presented documentary evidence and questioned witnesses. See Evidentiary Hearing, Black's Law Dictionary (11th ed. 2019) (An evidentiary hearing is "[a] hearing at which evidence is presented, as opposed to a

hearing at which only legal argument is presented."). No credible argument can be made that the September 18, 2023, hearing was not an evidentiary hearing. Nor can it be asserted that Plaintiffs were unaware that they would have an opportunity to present evidence at the evidentiary hearing. Nine days before the hearing was to commence, the Magistrate Judge clarified, "at the August 30, 2023, hearing, the parties will be permitted to present evidence and argument related to Defendants' motion." Dkt. No. 234 at 1. Hurricane Idalia necessitated a postponement of the hearing, giving the parties even longer to prepare. See generally Dkt. No. 239.

The Court can dispose of any "lack of notice" argument with similar ease. Plaintiffs certainly had notice of Defendants' allegation that Mr. Frazier fabricated the YouCut Video. See, e.g., Dkt. No. 184 at 4 ("Mr. Frazier fraudulently manufactured evidence."). Plaintiffs had notice that Defendants were seeking dismissal of this case as a sanction. Defendants requested just that in writing. See generally id. To hammer home the consequential nature of the hearing, the Magistrate Judge denied Plaintiffs' motion to appear remotely. See Dkt. No. 234 at 1 ("Given the issues raised in Defendants' motion and the potential consequences, counsel and the parties must appear in person."). The authenticity of the YouCut Video was properly before the Magistrate Judge, and Plaintiffs had sufficient opportunity to refute Defendants' allegations.

Plaintiffs' initial objections about the nature of the proceedings are without merit. The Court now

turns to Plaintiffs' objections to the Report. Plaintiffs offer objections to the Magistrate Judge's factual findings as well as his legal conclusions. As with the quibbles about the nature of the proceedings, the actual objections to the Report lack merit. The Court first addresses Plaintiffs' factual objections.

I. Plaintiffs' objections to the Magistrate Judge's factual findings

The Report lists nine proposed findings of fact. See Dkt. No. 268 at 33. Before arriving at those findings, however, the Magistrate Judge completed an exhaustive review of the record evidence and identified any relevant factual disputes. See id. at 23–33. Plaintiffs object to proposed findings 2, 3, 4, 5, 6, 7, 8, and 9. Dkt. No. 272 at 6–8.

a.Proposed Findings 2, 6, and 8

As a threshold matter, the Court first addresses Plaintiffs' objections to proposed findings 2, 6, and 8. Plaintiffs argue that these three facts are simply "not supported by clear and convincing evidence." See id. at 6–8. The Court finds that the Magistrate Judge's review of the record was more than adequate, and moreover, all nine proposed findings of fact are supported by clear and convincing evidence in the record. For that reason, Plaintiffs' bare-bones objections to proposed findings 2, 6, and 8 are **OVERRULED**. Plaintiffs object to proposed findings 3, 4, 5, 7, and 9 for more detailed reasons.

b. Proposed Finding 3

Proposed finding 3 states: "Plaintiffs produced the YouCut Video to Defendants during discovery on July 15, 2021." Dkt. No. 268 at 33. Plaintiffs "object" to this finding, stating that they "produced the 8-second mp4/video and the 5/27/2020 audio recording on July 15, 2021." Dkt. No. 272 at 7. This is more of a semantic fight than an objection. Throughout the Report, the Magistrate Judge refers to the "8-second mp4/video" as "the YouCut Video." See Dkt. No. 268 at 3 ("The disputed video (the 'YouCut Video') is eight seconds long."); Id. at 3 n.1 ("At the hearing on Defendants' Motion, the parties generally referred to the video as the 'YouCut Video.' The Court uses the same term here."). So Plaintiffs' statement—that they produced the "8-second mp4/video" on July 15, 2021—actually supports the Magistrate Judge's proposed finding. Plaintiffs may prefer their own nomenclature over that of the Magistrate Judge, but the naming of the disputed video provides no grounds to disturb the Magistrate Judge's factual finding. Plaintiffs' objection to proposed finding 3 is **OVERRULED**.

c. Proposed Finding 4

In their objection to proposed finding 4, Plaintiffs again object based on semantics. Proposed finding 4 provides: "The YouCut Video is an electronic file created using the YouCut video editing application." Id. at 33. Plaintiffs object to this finding, arguing that, according to their forensics expert, Mr. Stafford, "[t]he YouCut Video is 'an original YouCut file.'" Dkt. No. 272 at 7 (quoting Dkt. No. 272-8 at 87:8). Well, yes, but that does not undermine the Magistrate Judge's

proposed finding that the YouCut Video was created using the YouCut video application. In fact, Mr. Stafford's testimony supports the Magistrate Judge's proposed finding because his theory is that Mr. Frazier took two video files originally recorded on Mr. Frazier's cellphone and "put them together in YouCut."[6] Dkt. No. 272-8 at 87:16–17. Too, the Magistrate Judge noted that "[t]he parties all agree Mr. Frazier created the YouCut Video using an editing application named YouCut." Dkt. No. 268 at 4. This is evidenced by Plaintiffs' own acknowledgement that the YouCut Video is not the "original" video recorded on Mr. Frazier's phone. See, e.g., Dkt. No. 54 at 6 ("Plaintiffs went on a search to locate the original 13-second video file once it was brought to their attention, and recently discovered and have produced a 3-second original file of the kidney basin clip . . . . Mr. Frazier advised and will testify under oath that various original files may have been corrupted and [are] now unable to be located." (emphasis added)). Even in their very next objection to the Report's proposed findings, Plaintiffs accept that the YouCut Video is not an original recording. See Dkt. No. 272 at 7 ("Portions of the original YouCut file were

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[1] Mr. Stafford further theorizes that the YouCut Video "could very well be the representation of exactly those two components." Dkt. No. 272-8 at 87:19–20. This is also not inconsistent with proposed finding 4, which merely states that the YouCut Video file was created using the YouCut application.

produced—8 seconds out of the 13 seconds.").

Plaintiffs' objection to proposed finding 4 is **OVERRULED**.

d. Proposed Finding 5

Next, Plaintiffs object to proposed finding 5, which states: "The original video file or files used to create the YouCut Video were not produced by Plaintiffs in discovery. The original video file or files were deleted from Mr. Frazier's electronic device and are unrecoverable." Dkt. No. 268 at 33. Plaintiffs contend, without citing to the record, that "[p]ortions of the original YouCut file were produced—8 seconds out of the 13 seconds."[7] Dkt. No. 272 at 7. To the extent Plaintiffs argue that they produced an original video file, their argument is not supported by the record. Besides the YouCut

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[7] Plaintiffs also assert that "[m]etadata of Jpg images from the video was recovered by Plaintiffs' expert Jim Stafford and admitted as exhibits during the 9/18/2023 hearing." Dkt. No. 272 at 7. But like many other objections offered by Plaintiffs, this does not actually dispute proposed finding 5. Proposed finding 5 states that Plaintiffs did not produce "original video file or files used to create the YouCut Video." Dkt. No. 268 at 33 (emphasis added). Metadata and images are not video files. The Magistrate Judge recognized this distinction, acknowledging that "Plaintiffs produced a screenshot image from Mr. Frazier's cellphone . . . [that] contain[ed] information . . . about one of the original video files used to create the YouCut video." Id. at 5. But the Magistrate Judge noted that "the original video described in [that screenshot] was not produced." Id.

Video, Plaintiffs produced only one other video—another 8-second version of the YouCut Video. See Dkt. No. 53 ("Plaintiffs' counsel provided [ ] Defendants' counsel with . . . another version of the video."). As of the date of this Order, Plaintiffs have never produced the two original videos used to make the one they created and produced. Plaintiffs' objection to proposed finding 5 is **OVERRULED**.

e. Proposed Finding 7

Proposed finding 7 provides, in relevant part: "On October 5, 2021, Suite 480 exam rooms 1, 2, and 3 each had . . . blue-green walls."[8] Dkt. No. 268 at 33. Plaintiffs object to this proposed finding because they claim the exam rooms had "[v]isibly, fresh painted blue-green walls." Dkt. No. 7 at 7. To support their argument, Plaintiffs rely on testimony of their forensics expert, Mr. Stafford. See Dkt. No. 272-8 at 73–80, 88–90. There are multiple problems with Plaintiffs' argument, none more devastating than the fact that the record in no way supports it. Mr. Stafford never states that the blue-green walls in Suite 480 were "visibly, fresh painted." His actual testimony is markedly different. His only assertion regarding paint color is that "the colors in [the YouCut Video] are really unreliable" because "[t]here's obviously color distortion present." Dkt. No. 269 at 75:4–6. This does not support Plaintiffs' objection to the wall

[8] As previously mentioned, Plaintiffs conducted a walkthrough inspection of Suite 480 on October 5, 2021. Proposed finding 7 is based on the video produced from that inspection.

color of the actual room on October 5, 2021. Mr. Stafford is discussing potential issues with the wall coloring not in the inspection video but in the YouCut Video, which was allegedly recorded nearly eight months before. Moreover, Mr. Stafford is Plaintiffs' forensic expert. He is not an expert regarding paint properties such as color and age. Even if his opinion was that the walls were freshly painted on October 5, 2021—which he decidedly does not express—the Court would be unable to find it persuasive. And lastly, ample evidence that actually is in the record supports proposed finding 7 and refutes Plaintiffs' assertion that the walls were freshly painted. For example, Shawn Crosby's[9] affidavit and testimony provide that "the paint color in the exam rooms in Suite 480 . . . has been the same since its build-out," and it is "a blue-green or greenish-blue color." Dkt. No. 184-2 at 171; see also Dkt. No. 272-8 at 55:22– 56:2 (Mr. Crosby's testimony). Aside from Plaintiffs' wishful yet inaccurate assertion, there is nothing in the record to support a finding that the walls were "visibly, fresh painted." Plaintiffs' objection to proposed finding 7 is **OVERRULED**.

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[9] "Shawn Crosby is the project manager and former 'environment of care manager'" for Southeast Georgia Health System. Dkt. No. 268 at 14. He was "involved in the original build-out" of Suite 480 in 2012, and he has "been involved in maintenance of the suite ever since." Id. (citing Dkt. No. 184-2 at 170).

f. Proposed Finding 9

Finally, Plaintiffs object to proposed finding 9, which states: "Mr. Frazier did not record the YouCut Video or the videos used to make the YouCut Video in Suite 480 [during his follow-up visit] on February 25, 2020." Dkt. No. 268 at 33. Plaintiffs object to this proposed finding for three reasons: (1) because it is "[n]ot shown by clear and convincing evidence;" (2) because it is "[c]onclusory;" and (3) because it "is a genuine issue of material fact that goes to credibility to be determined by the jury." Dkt. No. 272 at 8. As previously discussed, the Court finds that all nine proposed findings are supported by clear and convincing evidence, so Plaintiffs' first argument fails.

As to Plaintiffs' second reason—that proposed finding 9 is "conclusory"–Plaintiffs rely on a Ninth Circuit decision for support. See Sprewell v. Golden State Warriors, 266 F.3d 979, 988 (9th Cir. 2001) ("The court [is not] required to accept as true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences."). Sprewell is wholly unpersuasive to Plaintiffs' argument because, in that case, the Ninth Circuit was determining whether a complaint failed to state a claim pursuant to Fed. R. Civ. P. 12(b)(6). Id. Proposed finding 9 is not an "allegation" in a complaint. It is a finding made by a Federal Magistrate Judge. Sprewell does not apply.

In the event Plaintiffs are arguing that proposed finding 9 is "conclusory" because it is not supported

by evidence, Plaintiffs are wrong. See Batista v. S. Fla. Woman's Health Assocs., 844 F. App'x 146, 159 (11th Cir. 2021) ("[T]o withstand challenge, a factual finding by a court has to be supported by evidence."). It is not necessary to re-hash the Magistrate Judge's entire analysis of the relevant evidence, but to ensure Plaintiffs' objection is adequately considered, the Court will point out some key considerations that are sufficient to support proposed finding 9. First, the follow-up appointment, where Dr. Stevenson allegedly removed foreign objects from Mr. Frazier's nose, occurred in one of three exam rooms in Suite 480. Plaintiffs testified that the appointment occurred in Suite 480 and that Mr. Frazier recorded the YouCut Video in one of the exam rooms. Dkt. No. 65-1 at 9, 35– 38. In all fairness to Plaintiffs, they both claim they cannot remember *which* exam room was utilized. But again, they "reject any notion" that the follow-up appointment occurred anywhere other than Suite 480. Dkt. No. 268 at 27 (relying on both Plaintiffs' deposition testimony and statements made at the evidentiary hearing). Dr. Stevenson testified that he only sees patients in one of the three exam rooms in Suite 480 and has only seen patients there for a number of years. See Dkt. No. 269 at 24:6–8, 33:9– 34:10. Plus, "[t]here is no contrary evidence suggesting Dr. Stevenson ever used any other exam room in Suite 480" to see patients. Dkt. No. 268 at 27–28. It follows that "Dr.

Stevenson examined Mr. Frazier on February 25, 2020, in Exam Room 1, 2, or 3 in Suite 480."[10] Id. at 28. Second, the appearance of Suite 480 (and its exam rooms) did not materially change between Mr. Frazier's follow-up appointment on February 25, 2020, and the walkthrough inspection on October 5, 2021. Both Dr. Stevenson and Mr. Crosby testified that the rooms had not changed in appearance. See Dkt. No. 269 at 24:11–28:22 (Dr. Stevenson); Id. at 54:9–61:1 (Mr. Crosby). Crucially, Mr. Crosby provided maintenance records to support this conclusion. Dkt. No. 184-2 at 178–83. In response, "Plaintiffs offer only unsupported speculation about the sufficiency of the evidence Defendants presented to the Court." Dkt. No. 268 at 30. Put another way, there is no actual evidence to support finding the exam rooms' appearance had changed following Mr. Frazier's follow-up appointment.

Notably, the exam room shown in the YouCut video is materially different from Exam Rooms 1, 2, and 3 in Suite 480 in important respects. The

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[10] Even if the follow-up exam occurred in an exam room other than 1, 2, or 3 in Suite 480, the ultimate conclusion that Mr. Frazier did not record the YouCut Video in Suite 480 would remain the same. Dkt. No. 268 at 29 ("[T]here are other exam rooms in Suite 480 other than exam rooms 1, 2, and 3, but those other exam rooms are materially identical to exam rooms 1, 2, and 3.").

Report painstakingly details the differences, but briefly, the ceiling configurations, wall colors, drawer pulls, cabinet colors, and medical supply containers shown in the YouCut Video are all visibly different from those of the exam rooms in Suite 480.[11] Based on the foregoing, ample record evidence supports proposed finding 9. Indeed, this is exhibited by the Magistrate Judge's exhaustive review of all evidence. Proposed finding 9 is not conclusory in any sense of the word.

Plaintiffs' third reason for objecting to proposed finding 9 is also unpersuasive. Plaintiffs argue that proposed finding 9 "[i]mproperly relies on findings as to the credibility of parties and witnesses which must be reserved for the jury." Dkt. No. 272 at 8. This argument is more thoroughly addressed in Section III infra. But suffice it to say at this point that the assertion that credibility determinations cannot be made by a magistrate judge during evidentiary hearings is incorrect. In the proper context, courts "should defer to the magistrate judge's determinations unless his understanding of the facts appears to be unbelievable." McGregor, 2018 WL 5778235, at *1 (citing Ramirez-Chilil, 289 F.3d at 749). In the present case, the Magistrate Judge's understanding of the facts is not unbelievable and his determinations, including any

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[11] The Court has reviewed both the YouCut Video and the video of Plaintiffs' walkthrough of Suite 480, and the referenced material differences are visible for all to see upon comparing both videos.

of credibility, are well-founded. Thus, the Court **ADOPTS** any credibility determinations he made. At bottom, the Court is not persuaded by any of Plaintiffs' arguments against proposed finding 9. Their objections are therefore **OVERRULED**.

g.Request to Add Findings

In addition to their objections to the Report's proposed findings of facts, Plaintiffs ask the Court to adopt eight additional proposed findings of fact.[12] Dkt. No. 272 at 8. The Court hereby

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[12] The additional findings of fact proposed by Plaintiffs are:

1. There was no final sponge count verification by [Defendants] on 1/21/2020, according to the surgery record.
2. The surgical operative report on 1/21/2020 shows that pledgets were used during the surgery, but do not show that they were taken out.
3. Dr. Mikula testified at her deposition that she recognized a pledget in the kidney basin from the video and/or still images.
4. There is [] metadata from two JPEG images taken from the video showing they were created on 2/25/2020 at 3:29:53 p.m. and another at 3:26:50 p.m. [The Report] talks about [a] thumbnail in Screenshot 1 depicting Mr. Frazier reaching for his nose, but he does not do so in the YouCut. Missing portions of video would likely show Mr. Frazier reaching for his nose.
5. There are a total of 13 exam rooms identified on the Buildout of the CHSI/SGPA-ENT Suite.
6. Out of up to 10 suites in the same building as [Suite 480], half or 50% are off-beige in color. When asked this question, Mr. Crosby stated, "I'm sure."
7. Mr. Crosby, defense fact witness, has no idea of the date that he went back to Suite 480 and removed the light switch plate in Exam Rooms 1, 2, and 3 to see if

OVERRULES that request. All eight additional proposed findings offered by Plaintiffs are based on evidence that was squarely before the Magistrate Judge and sufficiently analyzed within the Report. The Court has access to the entire record in ruling on Plaintiffs' objections, and therefore, it may consider that evidence if necessary to reach its conclusion. It is unnecessary to adopt Plaintiffs' additional proposed findings.[13]

> there was a different color paint underneath; has no idea when he wrote his own affidavit; he is not sure when he "got brought in" to start dealing with this case; and he took no picture at the time he removed the light switch plate to memorialize his allegation in his sworn statement.
>
> 8. [Defendants] did not show the Court what each of the 13 exam rooms looked like, especially the ceiling and lights in each room before and/or on 2/25/2020. The defendants have the burden of proving bad faith, which clearly embraces fabricating or destroying evidence and then lying about doing so. The defendants did not prove that [Plaintiffs] fabricated or destroyed evidence and then that they lied about doing so by clear and convincing evidence. There are no proposed findings of fact that support the conclusory allegations made against [Plaintiffs].

Dkt. No. 272 at 8–10 (internal citations omitted).

[13] Even if the Court did adopt Plaintiffs' additional proposed findings of fact, most would not have any effect on the Court's decision. For example, Plaintiffs' first additional proposed finding has absolutely no bearing on the Court's determination of whether to levy sanctions. As discussed later in this Order, evidence that goes to the veracity of Plaintiffs' claims in general is not relevant to the Court's decision on the specific matter of whether Plaintiffs fabricated the YouCut Video. See infra p. 42– 43. Likewise, Plaintiffs' sixth proposed

II. Plaintiffs' objections to the Magistrate Judge's legal conclusions

Having discussed Plaintiffs' objections to the Report's factual findings, the Court now turns to Plaintiffs' objections to the Magistrate Judge's legal conclusions. The Magistrate Judge's ultimate recommendation is to dismiss Plaintiffs' suit with prejudice as a sanction for fabricating the YouCut Video. Dkt. No. 268 at 45. In reaching that conclusion, the Magistrate Judge found: (1) Plaintiffs "willfully fabricated video evidence in bad faith to bolster a pivotal claim in this case," and (2) "other, lesser sanctions" were "inadequate." Id. at 41, 45.

a. Legal Standard

It is within a court's inherent power "to fashion an appropriate sanction for conduct which abuses the judicial process." Chambers v. NASCO, Inc., 501 U.S. 32, 44–45 (1991); see also Martin v. Automobili Lamborghini Exclusive, Inc., 307 F.3d 1332, 1335 (11th Cir. 2002) ("Courts have the inherent authority to control the proceedings before them, which includes the authority to impose reasonable and appropriate sanctions." (citations omitted)). "To exercise its inherent

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finding is extraneous. Plaintiffs maintain that Mr. Frazier recorded the YouCut Video in Suite 480. See Dkt. No. 268 at 37. The paint color of other suites is unimportant. In fact, the only additional proposed finding that would have any bearing on the Court's decision is proposed finding 8, which directly contradicts the Magistrate Judge's proposed finding 9. For the same reasons the Court adopts the Magistrate Judge's proposed finding 9, the Court declines to adopt Plaintiffs' eighth additional proposed finding. See supra pp. 15–19.

power a court must find that the party acted in bad faith." Id. (citations omitted). "Bad faith exists when the court finds that a fraud has been practiced upon it, or 'that the very temple of justice has been defiled,' or where a party or attorney knowingly or recklessly raises a frivolous argument, delays or disrupts the litigation, or hampers the enforcement of a court order." Quantum Commc'ns Corp. v. Star Broad, Inc., 473 F. Supp. 2d 1249, 1268–69 (S.D. Fla. 2007) (quoting Allapattah Servs. v. Exxon Corp., 372 F. Supp. 2d 1344, 1373 (S.D. Fla. 2005)). As it pertains to this case, "the concept of bad faith clearly embraces fabricating or destroying evidence and then lying about doing so." Oniha v. Delta Airlines, Inc., No. 1:19-CV-5272, 2021 WL 4930127, at *4 (N.D. Ga. Sept. 13, 2021), aff'd, No. 21-13532, 2022 WL 580933 (11th Cir. Feb. 25, 2022); see also Quantum Commc'ns, 473 F. Supp. 2d at 1269 ("[T]he inherent powers doctrine is most often invoked where a party commits perjury or destroys or doctors evidence." (citations omitted)). Even though "outright dismissal of a law suit . . . is a particularly severe sanction, [it] is within the court's discretion." Chambers, 501 U.S. at 45 (citations omitted); see also Martin, 307 F.3d at 1335 (affirming a district court's sanction of dismissal with prejudice). To determine whether outright dismissal is an appropriate sanction, the Eleventh Circuit requires a lower court to make two findings: "There must be both a clear record of willful conduct and a finding that lesser sanctions are inadequate." Zocaras v. Castro, 465 F.3d 479, 483 (11th Cir. 2006) (citing Betty K Agencies, Ltd. v. M/V MONADA, 432 F.3d 1333, 1339 (11th Cir. 2005)). Because "the need for sanctions is

heightened when the misconduct relates to the pivotal or 'linchpin' issue in the case," courts have often dismissed suits with prejudice where a party destroys or fabricates evidence that was offered in support of their substantive claims. Quantum Commc'ns, 473 F. Supp. 2d at 1269 (collecting cases).

b. Plaintiffs' Objections

Plaintiffs may be objecting to the Magistrate Judge's recommendations in their entirety, as their objections do not specifically identify which legal conclusions they find objectionable.[14] See Dkt. No. 272 at 10–24. In general, Plaintiffs' objections appear to be centered around three of the Magistrate Judge's findings. First, Plaintiffs object to the Magistrate Judge's finding that this case warrants the Court's exercise of its inherent power. Second, they object to the Magistrate Judge's finding that Plaintiffs willfully fabricated the YouCut video. And third, they object to the Magistrate Judge's finding that dismissal is the proper sanction. The Court **OVERRULES** all

[14] In offering non-specific objections, Plaintiffs ignore the Eleventh Circuit's specificity requirement: "Parties filing objections to a magistrate's report and recommendation must specifically identify those findings objected to." Marsden v. Moore, 847 F.2d 1536, 1548 (11th Cir. 1988). The Magistrate Judge also reminded Plaintiffs of this requirement in the Report. See Dkt. No. 268 at 46 ("Objections not meeting the specificity requirement set out above will not be considered by a District Judge."). Yet, Plaintiffs still filed non-specific, and frankly unclear, objections. Nevertheless, because Defendants' motion for dismissal sanctions is a dispositive motion that could result in a dismissal of the case with

Plaintiffs' objections[15] and independently addresses the reasons for each below.

1. This case warrants exercise of the Court's inherent authority.

A Court's inherent authority is "governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases." Link v. Wabash R.R., 370 U.S. 626, 630–31 (1962). As part of that authority, courts may

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prejudice, the Court has endeavored to identify Plaintiffs' specific objections.

[15] The Court notes one other issue not framed as an objection. No party has requested recusal of the undersigned or the Magistrate Judge. And that is understandable, as no grounds for recusal exist. Nevertheless, in the conclusion of Plaintiffs' sur-sur-reply, they "request" that the Court "consider" the Eleventh Circuit decision in Szanto v. Bistritz, 743 F. App'x 940 (11th Cir. 2018). Dkt. No. 279 at 21. In Szanto, the Eleventh Circuit held that the trial court erred by dismissing with prejudice a case without finding that lesser sanctions were inadequate. Id. at 942. The Eleventh Circuit then outlined the factors it considers in deciding whether to reassign a case upon remand and found no cause for reassignment. Id. at 943. Szanto does not apply here because the Court has carefully and explicitly found both willful conduct and that lesser sanctions are inadequate. Further, it is not the place of a district court to decide reassignment should it ever be considered. But to be clear, the Court is aware of no factor that would support either recusal or reassignment.

"fashion an appropriate sanction for conduct which abuses the judicial process." Chambers, 501 U.S. at 44–45. Before exercising its inherent power, though, "a court must find that the party acted in bad faith." Martin, 307 F.3d at 1335 (citing In re Mroz, 65 F.3d 1567, 1575 (11th Cir. 1995)). Here, the Magistrate Judge found that Plaintiffs fabricated the YouCut Video in bad faith, and thus, he recommended the Court impose sanctions based upon its inherent power. Plaintiffs offer two objections to that recommendation. First, they argue that exercise of the Court's inherent power is improper without finding that Plaintiffs violated a court order or procedural rule. And second, Plaintiffs argue that their conduct constituted neither an abuse of the judicial process nor a fraud upon the Court. Both objections are **OVERRULED**.

A. Exercise of the Court's inherent authority does not require a finding that Plaintiffs violated a court order or procedural rule.

Plaintiffs initially argue that a court may "exercise [ ] its inherent sanctioning powers" only upon a finding that a party violated a "court order or procedural rule." Dkt. No. 272 at 10. And because the Magistrate Judge "did not make a finding of disobedience," Plaintiffs contend any sanctions based on the Court's inherent power

would be improper. Id. Plaintiffs' argument in this respect is wrong. "The key to unlocking a court's inherent power is a finding of bad faith." Barnes v. Dalton, 158 F.3d 1212, 1214 (11th Cir. 1998) (citing Mroz, 65 F.3d at 1575). And "[a] party demonstrates bad faith by, inter alia, delaying or disrupting the litigation or hampering enforcement of a court order." Eagle Hosp. Physicians, LLC v. SRG Consulting, Inc., 561 F.3d 1298, 1306 (11th Cir. 2009) (emphasis added). Bad faith does not require a finding of a party's disobedience of a court order or procedural rule. Still, Plaintiffs argue otherwise, relying on Eleventh Circuit guidance regarding sanctions under a court's inherent power: "Courts considering whether to impose sanctions under their inherent power should look for disobedience and be guided by the purpose of vindicating judicial authority." Purchasing Power, LLC v. Bluestem Brands, Inc., 851 F.3d 1218, 1223 (11th Cir. 2017). But in relying on that language, Plaintiffs ignore the Eleventh Circuit's most relevant pronouncement in that very same opinion: "A court may exercise [its inherent] power to sanction the willful disobedience of a court order[] and to sanction a party who has acted in bad faith, vexatiously, wantonly, or for oppressive reasons." 851 F.3d at 1223 (emphasis added) (internal quotations omitted). Too, district courts routinely invoke their inherent power to sanction parties where no court order or procedural rule has been violated. See, e.g., Quantum Commc'ns, 473 F. Supp. 2d at 1269 (collecting cases) ("[T]he inherent powers doctrine is most often invoked where a party commits perjury or destroys or doctors evidence.").

In summary, "the inherent-powers standard is a subjective bad-faith standard" that does not require a finding of a party's disobedience. Purchasing Power, 851 F.3d at 1223. And because "the concept of bad faith clearly embraces fabricating or destroying evidence and then lying about doing so," exercise of the Court's inherent power is warranted in this case. Oniha, 2021 WL 4930127, at *4. Contrary to Plaintiffs' argument, the conduct in this case— doctoring evidence—is "most often" the cause for invoking the inherent powers doctrine. Thankfully, standards of conduct have not deteriorated so far that an order warning litigants not to doctor evidence is required before a court can impose sanctions for doctoring evidence.

B. Plaintiffs abused the judicial process and committed fraud upon the court.

Next, Plaintiffs argue that the Court's use of its inherent power is improper because Plaintiffs did not abuse the judicial process and did not commit fraud upon the court. Plaintiffs argue that, regardless of the YouCut video's authenticity, the Court cannot exercise its inherent power because: the conduct at issue occurred before the instant litigation; Plaintiffs produced the YouCut video to Defendants during discovery; and Plaintiffs "turned over their cell phone in compliance with this Court's Order." Dkt. No. 272 at 13–14. Each argument is specious, but given the Court's ultimate conclusion, it is nonetheless appropriate to address all of it.

In their objections, Plaintiffs ostensibly treat abuse of the judicial process and fraud upon the court as two additional requirements for a court's use of its inherent power. But that is wrong. Under Eleventh Circuit precedent, "[t]he key to unlocking a court's inherent power is a finding of bad faith." Barnes, 158 F.3d at 1214 (citations omitted); see also Oniha v. Delta Air Lines, Inc., No. 21-13532, 2022 WL 580933, at *2 n.4 (11th Cir. Feb. 25, 2022) ("[T]he 'fraud on the court' standard comes from our precedents interpreting the requirements for a motion for relief from judgment, not the conditions under which a court may exercise its inherent power to dismiss a pending case."). Regardless of the method, the conclusion remains the same: The Magistrate Judge found Plaintiffs' conduct warranted use of the Court's inherent power because Plaintiffs acted in bad faith. In fabricating evidence presented to the Court, Plaintiffs abused the judicial process and committed a fraud upon the court. See, e.g., Quantum Commc'ns, 473 F. Supp. 2d at 1268–69 ("Bad faith exists when the court finds that a fraud has been practiced upon it, or 'that the very temple of justice has been defiled,' or where a party or attorney knowingly or recklessly raises a frivolous argument, delays or disrupts the litigation, or hampers the enforcement of a court order." (quoting Allapattah Servs., 372 F. Supp. 2d at 1373)). In the event an explicit finding of judicial abuse and fraud upon the court is necessary, the Court emphatically makes that finding now. Plaintiffs abused the judicial process and committed fraud upon the court when they fabricated the YouCut video and submitted it to Defendants during discovery. See Dkt. No. 268 at 39 ("[Plaintiffs] deliberately staged the YouCut

Video scene and created fake, bloody foreign items, all for the purpose of manufacturing evidence to use in this case against Defendants.").

The YouCut Video was hardly a minor sidepiece. As shown by Plaintiffs' reliance on the YouCut Video in multiple filings with the Court, the YouCut Video was a centerpiece of Plaintiffs' case. For example, Plaintiffs relied upon the YouCut Video in their second amended complaint. See, e.g., Dkt. No. 77 ¶ 42 ("During the [follow-up] office visit, Mr. Frazier video recorded with his cell phone the gauze packing and blood clots that were removed from his nasal cavity and placed in a kidney basin."); Id. ¶ 116 (same). This conduct alone is enough to justify the Court's use of its inherent authority to sanction Plaintiffs. See, e.g., McDowell v. Seaboard Farms of Athens, Inc., No. 95-609-CIV-ORL-19, 1996 WL 684140, at *2 (M.D. Fla. Nov. 4, 1996) ("When a party fabricates evidence purporting to substantiate its claims, federal case law is well established that dismissal is appropriate." (citations omitted)). Plaintiffs' contention that any surreptitious conduct—presumably manufacturing the YouCut Video—occurred before this litigation began is not only unpersuasive but also unsubstantiated. Plaintiffs fabricated evidence, provided it to Defendants during discovery, referenced and relied upon the fabricated evidence in pleadings filed in this Court, and fraudulently testified to its authenticity under oath. Plaintiffs abused the judicial process. They committed fraud upon the court. Accordingly, the Court affirms the Magistrate Judge's finding of bad faith conduct and **OVERRULES** Plaintiffs' relevant objections. Exercise of the Court's

inherent power to sanction Plaintiffs is appropriate.

2. Plaintiffs willfully fabricated the YouCut video.

Once a court unlocks use of its inherent power by finding a party has acted in bad faith, the next step is to determine the appropriate sanction. "[O]utright dismissal of a law suit . . . is a particularly severe sanction," but it is "within the court's discretion." Chambers, 501 U.S. at 45 (citations omitted). When determining whether an action should be dismissed with prejudice as a sanction, a court must conduct a two-part analysis: "There must be both a clear record of willful conduct and a finding that lesser sanctions are inadequate." Zocaras, 465 F.3d at 483 (citing Betty K, 432 F.3d at 1339). The Magistrate Judge made separate conclusions as to each part of this analysis, and Plaintiffs object to both. The Court will first analyze Plaintiffs' objections to the Magistrate Judge's finding of willful conduct, i.e., that Plaintiffs willfully fabricated the YouCut Video.[1] Dkt. No. 268 at 41 (Plaintiffs "willfully

[16] A finding of bad faith is a requirement for invocation of a court's inherent power, and a finding of willfulness is a requirement for dismissing a case as a sanction. Normally, these two requirements are analyzed separately. In the Report, however, the Magistrate Judge found that "the bad faith and willful inquiries are largely coextensive." Dkt. No. 268 at 27 n.16. Put another way, "[i]f Plaintiffs fabricated the YouCut video, then they did so both willfully and in bad faith." Id. The Court agrees. There is no evidence that any of this was accidental.

fabricated video evidence in bad faith to bolster a pivotal claim in this case.").

"[W]illfulness generally connotes intentional action taken with at least callous indifference for the consequences." Jove Eng'g, Inc. v. I.R.S., 92 F.3d 1539, 1555 (11th Cir. 1996) (quoting Sizzler Fam. Steak Houses v. W. Sizzlin Steak House, Inc., 793 F.2d 1529, 1535 (11th Cir. 1986)). The Magistrate Judge concluded that Mr. Frazier did not record the YouCut video in Suite 480 on February 25, 2020. Dkt. No. 268 at 38. The Magistrate Judge further found "the YouCut Video could not have been created by accident" and "Mr. Frazier deliberately recorded himself and the purported bloody, foreign materials at some unknown location on some unknown date." Id. at 39. Plaintiffs object to this finding because, they argue, Defendants have not met their burden in proving Plaintiffs willfully fabricated evidence. Dkt. No. 272 at 18. The Court disagrees.

It is Defendants' burden to prove Plaintiffs fabricated the YouCut Video. See, e.g., JTR Enters., LLC v. Colombian Emeralds, 697 F. App'x 976, 987 (11th Cir. 2017) (upholding denial of sanctions because the movant had not "prove[n] that any basis existed for sanctions"); Geiger v. Carnival Corp., No. 16-24753- cv, 2017 WL 9362844, at *7 (S.D. Fla. Oct. 4, 2017) (denying motion to dismiss suit because the movant "failed to meet its burden of showing both a clear record of . . . willful conduct and that lesser sanctions are inadequate" (citing Zocaras, 465 F.3d at 483)), report and recommendation adopted, 2017 WL 9362843 (Oct. 31, 2017). The evidentiary standard

for imposing a sanction of dismissal is less clear, but courts in the Eleventh Circuit normally require clear and convincing evidence of the offending party's willful misconduct. Roche Diagnostics Corp. v. Priority Healthcare Corp., No. 2:18-cv-1479, 2020 WL 2308319, at *4 (N.D. Ala. May 8, 2020) (collecting cases); Zocaras, 465 F.3d at 483 (requiring a "clear record of willful conduct" before imposing a sanction of dismissal (emphasis added) (citations omitted)); In re Brican Am. LLC Equip. Lease Litig., 977 F. Supp. 2d 1287, 1293 n.6 (S.D. Fla. 2013) (applying a "clear and convincing evidence standard to the request for dispositive sanctions" such as dismissal), report and recommendation adopted, 2013 WL 12092311 (Nov. 15, 2013). Thus, the Court adopts the Magistrate Judge's application of a clear and convincing evidentiary standard. Applying that standard, the Magistrate Judge found Defendants, by providing clear and convincing evidence, met their burden to prove Plaintiffs willfully fabricated the YouCut Video.

Plaintiffs object to that finding. See Dkt. No. 272 at 20 ("[T]here is no clear and convincing evidence provided by [ ] [D]efendants to prove when the [YouCut Video] was created."). Specifically, Plaintiffs note that Defendants' forensic expert, Mr. Rosado, never offered "definite findings" as to when the YouCut Video was created. See id. ("Mr. Rosado discussed many possibilities in his affidavit[ ] but no definite finding of when the [YouCut Video] was created."). Plaintiffs also argue that, even if Mr. Rosado had made a definite finding, that finding would be refuted by Plaintiffs'

forensic expert, Mr. Stafford. Id. at 20–21. Plaintiffs' arguments are unpersuasive.

As an initial note, Plaintiffs' assertion that Defendants must prove when the YouCut Video was recorded neglects an important fact: Plaintiffs have failed to produce the original videos used to create the YouCut Video. See Dkt. No. 268 at 33 ("The original video file or files used to create the YouCut Video were not produced by Plaintiffs in discovery. The original video file or files were deleted from Mr. Frazier's electronic device and are unrecoverable."). Without those original videos and the associated metadata, Defendants cannot prove when Mr. Frazier recorded the original videos. Indeed, both parties' forensic experts, Mr. Rosado and Mr. Stafford, noted the impossibility of determining when the original videos were recorded based on their absence. See Dkt. No. 184-1 (Mr. Rosado's affidavit); Dkt. No. 269 at 80:6–98:1 (Mr. Stafford's testimony). The only affirmative conclusion that Mr. Stafford could reach was when the two original videos were edited together in the YouCut video editing app. See id.

Even if Defendants could somehow prove when the original videos were recorded, it is not their burden to do so. Instead, Defendants' burden is to prove Plaintiffs fabricated the YouCut Video and, more specifically, to prove Mr. Frazier did not record the YouCut Video in Suite 480 on February 25, 2020. See, e.g., Vargas v. Peltz, 901 F. Supp. 1572, 1580 (S.D. Fla. 1995) (requiring clear and convincing evidence that plaintiff fabricated a pair of panties); Pope v. F. Express Corp., 138 F.R.D. 675 (W.D. Mo. 1990), aff'd in relevant part, 974

F.2d 982 (8th Cir. 1992). Pope is particularly instructive in this regard. There, the defendant moved to dismiss as a sanction the plaintiff's sexual harassment suit because the plaintiff fabricated a handwritten note, which she alleged the defendant wrote to her. Id. at 677. Upon review of the evidence, the court found: "Clear and convincing evidence has been presented that plaintiff knowingly advanced a document which she knew was not what she represented it to be." Id. at 683. Notably, it was not clear from the record whether the plaintiff manufactured the note or someone else manufactured it at her direction. Id. But in finding that dismissal was warranted, the court relied upon visible indications that the note was fabricated. Id. at 678 (reflecting the analysis of the note, showing it was manufactured—not handwritten by the defendant). Put plainly, the court required the defendant to prove that the plaintiff was responsible for the note's fabrication. The court did not, however, require the defendant to prove who wrote the note, how the note was manufactured, or when/where the manufacturing occurred.

Like the defendant in Pope, Defendants must prove that Plaintiffs fabricated the YouCut Video. They do not have to prove when or where the YouCut Video was recorded. And as the Magistrate Judge found, Defendants have proven that Plaintiffs fabricated the YouCut Video because they have proven Mr. Frazier did not record the YouCut Video in Suite 480 on February 25, 2020.

The material differences[17] between the exam rooms in Suite 480 and the room in the YouCut Video provide the necessary clear and convincing foundation of evidence. See Dkt. No. 268 at 38 ("Based solely on the physical appearance of the various rooms, I would find by clear and convincing evidence Mr. Frazier did not record the videos used to make the YouCut Video in Suite 480 on February 25, 2020.").

Not only have Defendants provided clear and convincing evidence proving Plaintiffs' fabrication, but Plaintiffs, even when afforded numerous opportunities,[18] have failed to provide any appropriate evidence to refute the overwhelming evidence against them. See id. at 40 ("In defense to the allegations of misconduct, Plaintiffs generally question the sufficiency of the evidence of their misconduct but offer little in the way of their own explanation or evidence."). When Plaintiffs did attempt to refute Defendants' evidence, they provided two unsubstantiated theories: (a) "Dr. Stevenson examined Mr. Frazier in a different location with a different appearance than his exam rooms 1, 2, or 3," and (b) "the appearance of the

[17] The Report exhibits an in-depth analysis of the evidence showing the material differences. See Dkt. No. 268 at 23–26.

[18] Plaintiffs did not provide any evidence in their response to Defendants' motion for dismissal sanctions. See generally Dkt. No. 194. Plaintiffs, even when specifically asked to do so, did not provide any relevant evidence during the evidentiary hearing before the Magistrate Judge. See Dkt. No. 269 at 131:11–134:17. Finally, Plaintiffs have failed to provide any relevant evidence in their objections, reply, and sur-reply. See generally Dkt. Nos. 272, 275, 279.

Suite 480 exam rooms materially changed between February 25, 2020 and October 5, 2021, when Plaintiffs conducted their inspection." Id. But to date, Plaintiffs have provided no real evidence to support these theories—only mere speculation. And speculation will not do.

Defendants have met their burden in proving Plaintiffs willfully fabricated the YouCut Video, and there is no evidence refuting that conclusion in the record. Plaintiffs' objection to the Magistrate Judge's legal conclusion as to willfulness is **OVERRULED**.

3. Lesser sanctions than dismissal are inadequate.

Next, the Court considers the second requirement for dismissing a case with prejudice—"a finding that lesser sanctions are inadequate." Zocaras, 465 F.3d at 483 (citing Betty K, 432 F.3d at 1339). Put plainly, "a district court must consider the possibility of alternative, lesser sanctions," but "such consideration need not be explicit." Id. at 484 (citations omitted); see also Gratton, 178 F.3d at 1374 ("Dismissal . . . is appropriate where there is . . . an implicit or explicit finding that lesser sanctions would not suffice."). The Magistrate Judge found lesser sanctions were inadequate, but Plaintiffs object to that conclusion.

Plaintiffs initially argue that the Magistrate Judge did not explicitly "find[] that lesser sanctions are inadequate." Dkt. No. 272 at 15–16. As with so many of Plaintiffs' objections, this one is demonstrably wrong. The Report provides considerable analysis of the adequacy of several

lesser sanctions in this case. See Dkt. No. 268 at 42–45 (considering the lesser sanctions of "monetary sanctions, exclusion of the YouCut Video, adverse jury instructions, striking Plaintiffs' Complaint, [and] dismissal without prejudice"). The blunt truth is it is difficult to reconcile Plaintiffs' contention that the Magistrate Judge did not find lesser sanctions inadequate with the actual wording of the Report explicitly concluding: "In sum, I have considered other, lesser sanctions, but I find them inadequate. Plaintiffs willfully fabricated video evidence in bad faith, and dismissal with prejudice is the only adequate remedy."[19] Id. at 45. Accordingly, Plaintiffs' objection that the Magistrate Judge did not consider lesser sanctions is both puzzling and **OVERRULED**.

The Court **ADOPTS** the Magistrate Judge's conclusions that Plaintiffs' conduct was willful and lesser sanctions are inadequate—the two findings required before dismissing a case as a sanction. See Zocaras, 465 F.3d at 483 (citing Betty K, 432 F.3d

[19] The Court also notes that, during the proceedings before the Magistrate Judge, "[t]he parties [took] an all-or-nothing approach to sanctions." Dkt. No. 268 at 42. While Defendants argued that dismissal with prejudice was the *only* appropriate sanction, Plaintiffs argued this case warranted no sanction. Id. "Even when Plaintiffs' counsel was pressed to assume for argument's sake Plaintiffs engaged in willful, bad faith conduct, counsel did not propose any sanction short of dismissal with prejudice." Id.; see also Dkt. No. 269 at 135:24–139:9. Indeed, Plaintiffs continue to argue no sanction is warranted in this case, and although they additionally argue dismissal is too severe, they offer no alternative for the Court to consider. See generally Dkt. Nos. 272, 275, 279.

at 1339). At this point, the Court is within its authority to sign the dismissal and conclude the case. See Gratton, 178 F.3d at 1374. However, given the nature of the sanction and to assure thoroughness, the Court will discuss Plaintiffs' remaining disagreements with the Magistrate Judge's finding that dismissal with prejudice is the appropriate sanction.

4. Fabricating critical evidence warrants dismissal.

"The dismissal of a party's complaint . . . is a heavy punishment." Eagle Hosp. Physicians, 561 F.3d at 1306 (11th Cir. 2009) (internal quotations omitted); see also Zocaras, 465 F.3d at 483 ("[D]ismissal of a case with prejudice is considered a sanction of last resort, applicable only in extreme circumstances." (quoting Goforth v. Owens, 766 F.2d 1533, 1535 (11th Cir. 1985))). Thus, a court must exercise its inherent power cautiously when choosing to dismiss a case with prejudice. Nevertheless, "federal case law is well established that dismissal is the appropriate sanction where a party manufactures evidence which purports to corroborate its substantive claims." Vargas, 901 F. Supp. at 1581 (collecting cases); see also Access Innovators, LLC v. Usha Martin, LLC, No. 1:09-cv-2893, 2010 WL 11508119, at *3 (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 . . . dismissal." (citations omitted)). Plaintiffs argue dismissal is inappropriate because they say their conduct was not "egregious" enough to warrant dismissal and the YouCut Video is not

an integral piece of evidence. Dkt. No. 272 at 16–18. Both arguments are unpersuasive.

In arguing their conduct is not egregious enough to warrant dismissal, Plaintiffs posit that this case lacks key indicators that are normally present in other cases where courts determined dismissal as a sanction was appropriate. Dkt. No. 272 at 16. For example, Plaintiffs argue "admission of the wrongdoing [is a] frequent feature[] of cases that result in dismissal." Id. at 11. And because Plaintiffs' "testimony has been substantially the same," they argue dismissal with prejudice is inappropriate here. Id. at 16. Plaintiffs further state that dismissal is inappropriate because there have been no "flagrant obstructions of the discovery process, unjustified and extreme delay, [or] egregious misrepresentations by [Plaintiffs]." Id. at 15. And in Plaintiffs' view, these are all important features of cases where dismissal is appropriate. Plaintiffs proceed to cite a few factually distinct cases, point out differences between those cases and this one, and then summarily argue dismissal is not appropriate here. But in making that argument, Plaintiffs ignore the record evidence which squarely supports dismissal here.

One common understanding underlies all cases, including those proffered by Plaintiffs, where a court is asked to dismiss a suit: Courts have the authority to sanction litigants that present fabricated evidence and then falsely testify as to its authenticity. See Roche Diagnostics Corp., 2020 WL 2308319, at *1 ("The American judicial system depends on the integrity of the participants, who seek the truth through the adversarial but good-

faith presentation of arguments and evidence."). While the features discussed by Plaintiffs may be relevant in some cases, they are not *required* before a court can dismiss a case. Plaintiffs fabricated the YouCut Video, offered it as evidence of their substantive claims, and lied about their misconduct in open court. "Even after being confronted with glaring contradictory evidence, Plaintiffs did not attempt to withdraw the video or provide a plausible explanation for" its inauthenticity. Dkt. No. 268 at 43. This conduct is "egregious" enough to warrant dismissal with prejudice. See Vargas, 901 F. Supp. at 1581.

Dismissal with prejudice is the appropriate sanction to address the prejudice Plaintiffs' conduct caused Defendants, to protect the Court's integrity, and to deter others from engaging in similar misconduct. See Chemtall Inc. v. Citi-Chem, Inc., 992 F. Supp. 1390, 1409 (S.D. Ga. 1998) (Dismissal with prejudice "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, which otherwise cannot command respect if they cannot maintain a level playing field amongst participants." (internal quotations omitted)); Vargas, 901 F. Supp. at 1582 ("Litigants would infer they have everything to gain, and nothing to lose, if manufactured evidence merely is excluded while their lawsuit continues. Litigants must know that the courts are not open to persons who would seek justice by fraudulent means." (quotations omitted)); see also Dkt. No. 268 at 43–45 (discussing how dismissal with prejudice addresses

those wrongs). Any objection otherwise is **OVERRULED**.

Furthermore, dismissal with prejudice is warranted because the YouCut Video was offered as key support for a pivotal claim in Plaintiffs' case. See Quantum Commc'ns, 473 F. Supp. 2d at 1269 ("[T]he need for sanctions is heightened when the misconduct relates to the pivotal or 'linchpin' issue in the case." (citations omitted)). Plaintiffs object to the Magistrate Judge's corresponding conclusion because the YouCut Video "was not relied upon exclusively to establish [a] breach of the standard of care, causation[, or] damages." Dkt. No. 272 at 17. In support of their argument, Plaintiffs point to multiple pieces of evidence that they assert also substantiate their underlying negligence claims. Id. at 17–18. But in doing so, Plaintiffs misinterpret the Magistrate Judge's conclusion and the relevant case law. The Magistrate Judge did not conclude the YouCut Video was Plaintiffs' only evidence to support their claims. Rather, he found the YouCut Video was offered as support for a "pivotal claim." Dkt. No. 268 at 41; see also, e.g., Quantum Commc'ns, 473 F. Supp. 2d at 1270 (finding the need for sanctions was heightened where the plaintiff's misconduct related to purchase negotiations between the parties because the plaintiff's claims turned on those negotiations). The rule Plaintiffs urge—that fabricated evidence cannot result in dismissal so long as it is not a party's only evidence—is not the law and, for obvious reasons, never should be. Thus, Plaintiffs' objection is **OVERRULED**.

III. Plaintiffs are not entitled to a jury trial.

Having failed to convince the Court on all other grounds, Plaintiffs seek to wrap themselves and their clearly fabricated video in the solemn cloak of the Seventh Amendment. That cloak will not cover the conduct here.

To review, the clear and convincing evidence of fabrication consists of:

- The nature of the YouCut Video—the YouCut Video was created by combining two separate, original videos in a video editing app, and Plaintiffs have not produced the original videos;

- The timing of the YouCut Video's production—even though Mr. Frazier allegedly recorded the YouCut Video a year before this suit began, Plaintiffs did not produce the YouCut Video until six months after initiating this suit, and Plaintiffs did not mention the YouCut Video in pleadings before the Court until their *second* amended complaint, which was filed about ten months after the initial complaint;

- The visible inconsistencies between the YouCut Video and Suite 480, including: different configuration of ceiling tiles, lights, and air vents, different wall color, different cabinet hardware, different

cabinet color, and different medical supply containers;

- Sworn testimony and voluminous maintenance records regarding the upkeep and any alterations of Suite 480, showing that no alterations or changes to Suite 480 occurred between the time Plaintiffs allege Mr. Frazier recorded the video and the time the walk through occurred;

- Sworn testimony that Dr. Stevenson uses only Suite 480.

To counter that evidence and, Plaintiffs propose, reach the jury, Plaintiffs offer speculation that these discrepancies could be explained if it is shown that someone made surreptitious changes to Suite 480's wall color, ceiling configuration, drawer pulls, and cabinets—that is, if undocumented renovations were uncovered. Yet in all the time this case has been pending, Plaintiffs have provided no evidence to support that speculation. Not one doctor, nurse, administrator, maintenance worker, contractor, patient, or other person has come forward with any evidence that it was the room that had been altered and not the video evidence. To the contrary, extensive evidence shows that Suite 480's rooms have not been altered. Still, Plaintiffs maintain their case should be submitted to a jury because the YouCut Video's authenticity is a question of fact not appropriate for the Court to determine, and the Court's determination would violate Plaintiffs' Seventh Amendment rights.

b. The Court is authorized to make factual determinations when considering whether to impose sanctions under its inherent power.

Plaintiffs contend that whether Mr. Frazier recorded the YouCut Video in Suite 480 on February 25, 2020, "is an issue of credibility for the jury and not a question of law."[20] Id. at 16. This argument is based on Plaintiffs' assertion that a judge—be it the Magistrate Judge or otherwise—may only ever make legal conclusions. Under Plaintiffs' view, even if a judge were to determine that evidence submitted in an effort to defeat summary judgment was clearly fraudulent, the Court would have to convene a jury to make a determination of fraud on the court before the defrauded court could act. That cannot be. To begin with, during an evidentiary hearing, "the Court sits as both factfinder and assessor of credibility." Castellano Cosm. Surgery, 2021 WL 3188432, at *4 (citing Four Seasons, 320 F.3d at 1211). Thus, any contention that a judge may *never* serve as a factfinder is wrong.

But in addition to their erroneous assertion that the Court *must* leave all factual determinations to the jury, Plaintiffs argue that, in this case, the Court *should* leave the determination to the jury. Dkt. No. 272 at 18–19. In so doing, Plaintiffs rely

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[20] Plaintiffs offered the same argument in their objection to the Magistrate Judge's proposed finding of fact 9, and the Court's analysis of both arguments is largely the same. See supra p. 17.

on a few cases that are factually distinct from this one. See generally Geiger, 2017 WL 9362844; Hughes v. Matchless Metal Polish Co., No. 2:04-cv-485, 2007 WL 2774214 (M.D. Fla. Sept. 24, 2007); Idearc Media Corp. v. Kimsey & Assocs., P.A., No. 8:07-cv-1024, 2009 WL 928556 (M.D. Fla. Mar. 31, 2009). Because of the distinctions explained below, these cases are unpersuasive and—if anything—bolster the Magistrate Judge's conclusion.

In both Geiger and Hughes, the court was asked to dismiss the plaintiffs' suits because, during discovery, plaintiffs had failed to disclose relevant information to the defendants. Geiger, 2017 WL 9362844, at *1; Hughes, 2007 WL 2774214, at *1. In both instances, the court found dismissal inappropriate because the plaintiffs' failure to disclose was neither in bad faith nor willful. Geiger, 2017 WL 9362844, at *7; Hughes, 2007 WL 2774214, at *4. Both courts noted, "in the absence of a 'clear showing of egregious conduct . . . allegations of inconsistency, nondisclosure, even falseness, can be brought to the jury's attention through cross-examination or impeachment.'" Geiger, 2017 WL 9362844, at *7 (quoting Hughes, 2007 WL 2774214, at *3) (emphasis added). In short, both courts determined: (1) exercise of inherent authority was improper without a finding of bad faith; (2) dismissal of the case was improper because the plaintiffs had not acted willfully; and (3) because of those two findings, the issue should be left to the jury. The dispositive distinctions are obvious here. In Geiger and Hughes, the issues were ones of failure to disclose, not fabrication of evidence. Too, bad faith and volition are clear here yet absent in the cited cases. As previously

discussed, the Magistrate Judge found, and the Court agrees, that Plaintiffs acted in bad faith and acted willfully when they fabricated the YouCut Video. See Dkt. No. 268 at 37–42 (Magistrate Judge's finding of bad faith and willful conduct); see also infra pp. 18–24 (finding bad faith); pp. 24–30 (finding willfulness). Neither Geiger nor Hughes is persuasive.

Idearc Media is also unpersuasive. There, the court was asked to dismiss a plaintiff's counterclaim because the defendant alleged the plaintiff had committed fraud upon the court. 2009 WL 928556, at *1. To that end, the defendant alleged the plaintiff coerced a third party to fabricate exhibits later produced in discovery. Id. The court denied the defendant's motion to dismiss because, based on the evidence presented, it could not "*definitively* state that the[] exhibits were fabricated." Id. at *4 (emphasis added). For reference, the evidence before the court included competing fact witnesses and an "anonymous tip" that the evidence was fabricated. Id. The third parties, who were allegedly coerced to fabricate evidence at the plaintiff's direction, sought to corroborate the anonymous tip, but their allegedly corroborating testimony was "tenuous" and countered by credible evidence from the plaintiff. Id. Moreover, the plaintiff offered credible evidence showing that, even if the exhibits were fabricated, the fabrication occurred "without his knowledge." Id. at *5. The court reiterated that a finding of bad faith—not mere negligence—is required before invoking the inherent powers doctrine. Id. And because "there [was] not enough evidence of bad faith," the court concluded it could not dismiss the

suit. Id. But even though the Idearc Media court ultimately decided the evidence neither proved the exhibits were fabricated nor supported a finding of bad faith, the court recognized that, "[i]n the Middle District [of Florida], 'there is no question that a trial court has the inherent authority, within the exercise of sound judicial discretion, to dismiss an action when the plaintiff has perpetrated a fraud upon the court.'" Id. at *3 (quoting Hughes, 2007 WL 2774214, at *3). Simply put, the court determined it would not be an exercise of sound judicial discretion to dismiss the plaintiff's counterclaim where the credible evidence did not support a finding of fabrication or bad faith.

By encouraging the Court to rely on Geiger, Hughes, and Idearc Media, Plaintiffs are essentially asking the Court to force the proverbial square peg into a round hole. That does not work. Instead, the Court looks to more factually similar cases in making its decision. See, e.g., Rossbach v. Montefiore Med. Ctr., No. 19- cv-5758, 2021 WL 3421569 (S.D.N.Y. Aug. 5, 2021), aff'd in relevant part, 81 F.4th 124 (2d Cir. 2023); Stonecreek — AAA, LLC v. Wells Fargo Bank N.A., No. 1:12-cv-23850, 2014 WL 12514900, at *2–4 (S.D. Fla. May 13, 2014) (dismissing plaintiff's suit as a sanction based on the court's factual finding that plaintiff had submitted fabricated evidence); Neal v. IMC Holdings, Inc., No. 1:06-cv-3138, 2008 WL 11334050, at *3–4, *7 (N.D. Ga. Oct. 20, 2008) (recommending dismissal of defendant's counterclaim as a sanction based on magistrate judge's factual finding that defendant fabricated e-mails to support her claim), report and recommendation adopted, 2009 WL 10669622

(Mar. 31, 2009). These cases represent the square hole in which the present case correctly fits, and Rossbach is particularly illustrative.

In Rossbach, the court was asked to dismiss the plaintiff's suit as a sanction for her intentional, bad-faith fabrication of key evidence. 2021 WL 3421569, at *1. At issue was an image purporting to depict a series of text messages proving the defendant sexually harassed the plaintiff. Id. at *2. Throughout the entire dispute regarding the image's authenticity, the plaintiff maintained that the image was not fabricated. Id. To determine whether the image was fabricated, the court held an evidentiary hearing, during which both parties presented evidence. Id. at *3. Ultimately, the court determined the plaintiff fabricated the image and outlined the evidentiary support for doing so, noting that the evidence supporting fabrication was "overwhelming." Id. The court's reasons for finding the image was fabricated included: the image "lacked characteristic metadata" normally found with original iPhone images; "analysis of the image's color characteristics, as well as a visual assessment of the image," indicated that the image was not authentic; and the image contained characteristics—e.g., the icon depicting the phone's battery level, the font size and style of the header, the design of emojis in the messages—that were inconsistent with an iPhone's normal display. Id. at *3–4. In the end, the court found the defendants had submitted clear and convincing evidence proving the image was fabricated and dismissal was an appropriate sanction. Id. at *6–7.

The present case shares pivotal similarities with Rossbach. Most importantly, the Rossbach court determined the image was fabricated largely based on visible indicators, and as previously discussed, the Magistrate Judge found the visible differences between the YouCut Video and the walk-through video to be crucial in his analysis. Id. at *4. Just as the Rossbach court hinged its analysis on the image being visibly different from an iPhone's normal style, the Court hinges its analysis on the YouCut Video depicting visibly different room characteristics than those shown in the walk-through video recorded in Suite 480. Id. Moreover, determination of the YouCut Video's authenticity relies, at least in some part, on the absence of characteristic metadata proving its authenticity. And the Rossbach court noted the same absence as a part of the clear and convincing evidence proving the image was fabricated. Id. Finally, like the plaintiff in Rossbach, Plaintiffs argue their consistent position that the YouCut Video was not fabricated bars the Court from making any factual determination. But like the evidentiary hearing conducted in Rossbach, the evidentiary hearing before the Magistrate Judge gave both parties ample opportunity to present evidence and make arguments as to their position, and as a result, the Magistrate Judge was within his authority to make factual determinations. Id. at *3; see also Stonecreek, 2014 WL 12514900, at *2–4 (finding evidence was fabricated even where the responsible party disputed fabrication); Neal, 2008 WL 11334050, at *3–4 (same).

At bottom, Plaintiffs' argument that a jury should make factual determinations regarding the

YouCut Video's authenticity is unpersuasive. Where other courts have allowed a jury to make similar determinations, they have done so for reasons not present in this case. This case more closely resembles those where courts have concluded that evidence was fabricated and ordered dismissal sanctions without the assistance of the jury.

c. Dismissal does not violate Plaintiffs' Seventh Amendment right to a trial by jury.

On a related note, Plaintiffs argue dismissal of their case would violate their Seventh Amendment right to a trial by jury. See, e.g., Dkt. No. 272 at 1 ("[Plaintiffs] were denied their right to a jury trial under [t]he Seventh Amendment."); Dkt. No. 275 at 8 (The Magistrate Judge "usurped the function of the jury to determine credibility on an issue involving a battle of both lay witness and expert testimony."); Dkt. No. 279 at 20 ("There are allegations of falsified/fabricated evidence on both sides—which shows further that these topics are genuine issues of material fact to be heard by the jury."). As worthy as the Seventh Amendment is, it does not immunize fraud.

Plaintiffs' objection on Seventh Amendment grounds "conflates [their] entitlement to a jury trial on [their] claims with the question of whether [they] engaged in sanctionable conduct." Rossbach, 81 F.4th at 138. And determining whether Plaintiffs committed sanctionable conduct—i.e., fabricated the YouCut Video— "is an exercise of the district court's equitable power, for which a party

is generally not entitled to a jury determination on the question." Id. (internal quotations omitted); see also Chambers, 501 U.S. at 46 (A court's power to impose sanctions "transcends a court's equitable power concerning relations between the parties and reaches a court's inherent power to police itself."). In determining whether to exercise its inherent power and impose sanctions, "a court has the power to conduct an independent investigation" where it acts as factfinder. Id. at 44; see also Universal Oil Prods. Co. v. Root Refin. Co., 328 U.S. 575, 580 (1946) ("The inherent power of a federal court to investigate whether a judgment was obtained by fraud, is beyond question."); Rossbach, 81 F.4th at 139 ("[O]ne of the district court's roles in resolving a motion for sanctions is to act as factfinder."). In fact, the First, Second, Sixth, Eighth, and Ninth Circuits have held that "a motion for sanctions, when premised on a party's fraud . . . does not implicate the Seventh Amendment's jury trial guarantee." Rossbach, 81 F.4th at 138 n.8 (collecting cases).

While the Eleventh Circuit has not explicitly joined those other circuits, the undersigned has no reason to anticipate that the Eleventh Circuit will be any more indulgent with those who fabricate evidence than its sister circuits have been. Indeed, the Eleventh Circuit has reiterated that "[a] court [] has the power to conduct an independent investigation to determine whether it has been the victim of fraud." Martin, 307 F.3d at 1335 (citations omitted) (affirming district court's finding that a party had committed fraud on the court); see also In re E.I. DuPont De Nemours & Co.—Benlate Litig., 99 F.3d 363, 367 (11th Cir. 1996) (concluding

district court had jurisdiction to conduct an independent civil action for sanctions based upon allegations of fraud in another case). Plaintiffs conclude that the Seventh Amendment would be illusory if they have no right to present the clearly fabricated YouCut Video to a jury. If Plaintiffs are right and the Court has no power to protect its docket, its process, and its jurors from exposure to clearly fabricated evidence, then it is the inherent power of the Court which is illusory.

Accordingly, the Court finds it is authorized to make factual findings in determining whether Plaintiffs have engaged in sanctionable conduct. Specifically, the Court can make a factual determination as to whether Plaintiffs fabricated the YouCut Video. To do so, the Court has conducted an independent investigation that included an evidentiary hearing before the Magistrate Judge, submission of a constellation of evidence by both parties, and the voluminous briefing currently before the Court. Dismissal of Plaintiffs' case based on the Court's findings of fact does not violate Plaintiffs' right to a jury trial. See Rossbach, 81 F.4th at 138–39 ("[T]he district court's findings of fact at the evidentiary hearing, and dismissal of the remainder of Rossbach's case based upon them, did not violate Rossbach's right to a jury trial."). Plaintiffs' objections are therefore **OVERRULED**.

CONCLUSION

Plaintiffs acted in bad faith, abused the judicial process, and committed a fraud upon the Court by fabricating video evidence, submitting it to the

Court, and relying on that evidence during litigation. Because their conduct was willful and egregious, sanctions other than outright dismissal with prejudice are inadequate. Dismissal of Plaintiffs' complaint with prejudice is the appropriate sanction to "vindicate judicial authority . . . and to make [Defendants] whole." Purchasing Power, 851 F.3d at 1223. Therefore, Plaintiffs' objections to the Report, dkt. no. 272, are **OVERRULED**, and the Magistrate Judge's report and recommendation, dkt. no. 268, is **ADOPTED** as augmented herein. Defendants' motion to dismiss Plaintiffs' second amended complaint as a sanction for fabricating evidence, dkt. no. 184, is **GRANTED**, and this case is **DISMISSED** with prejudice. The Clerk is **DIRECTED** to terminate all pending motions, close this case, and enter the appropriate judgment of dismissal.

SO ORDERED this 1st day of March, 2024.

/s/ L.G. Wood
HON. LISA GODBEY WOOD, JUDGE
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA

In the United States District Court
for the Southern District of Georgia
Brunswick Division

CIVIL ACTION NO.: 2:21-CV-21

CEDRICK FRAZIER, and TAMARA FRAZIER,
Plaintiffs,

v.

SOUTHEAST GEORGIA HEALTH SYSTEM, INC.,
et al., Defendants.

REPORT AND RECOMMENDATION

Defendants filed a "Motion for Dismissal Sanctions." Doc. 184. The Motion is fully briefed. Docs. 194, 208. The Court held a hearing on the Motion on September 18, 2023, where the parties were permitted to present evidence and argument. Doc. 247. For the following reasons, I **RECOMMEND** the Court **GRANT** Defendants' Motion and **DISMISS with prejudice** Plaintiffs' Complaint.

INTRODUCTION

This Report concerns a video Plaintiffs offer as evidence of Defendant Dr. Stevenson's malpractice. Plaintiff Cedric Frazier testified under oath he recorded the video during a followup exam in Dr. Stevenson's medical offices. According to Mr. Frazier, just before he started recording the video, Dr. Stevenson removed several foreign objects from

Mr. Frazier's nasal passage—objects Dr. Stevenson had negligently left in Mr. Frazier's nasal passage nearly a month earlier. The video depicts Plaintiff in a medical exam room and bloody items in a medical dish on the exam room counter.

Defendants contend the video is fake. Defendants insist the video could not have been recorded in any of Defendants' exam rooms and it was not recorded during the follow-up exam. Defendants maintain Dr. Stevenson did not improperly leave any foreign items in Mr. Frazier's nasal passage or remove such items during the follow-up exam.

Two observations about this dispute: First, the importance of the video cannot be overstated. Other than the video and Plaintiffs' testimony about the follow-up exam, it appears there is very little evidence showing Dr. Stevenson left foreign objects in Mr. Frazier's nasal passage or removed such items. Second, there is no "middle ground." Either Plaintiffs manufactured the video, which would likely require staging the scene and creating fake, bloody foreign items, or Defendants carried out an elaborate scheme to discredit the video, which would likely involve Defendants renovating their exam rooms and then covering up that work. The parties do not offer any other plausible explanation. There is no indication Plaintiffs are mistaken about where or when the video was recorded. There is no indication Defendants are mistaken about where the follow-up exam occurred. The only explanation is one side is being dishonest.

Ultimately, I conclude Defendants have demonstrated the video was not recorded where and when Plaintiffs claim it was recorded. The implication of this conclusion is that Plaintiffs manufactured the video. The Report proceeds as follows. First, I summarize relevant background information, the parties' written submissions, and evidence introduced at a hearing on Defendants' Motion. I then analyze the record and propose findings of fact. Based on my proposed findings of fact, I conclude Plaintiffs willfully fabricated the video evidence in bad faith. I conclude dismissal with prejudice is an appropriate sanction.

BACKGROUND

This case primarily concerns alleged medical malpractice. Defendant Dr. Stevenson, an employee of Defendant Southeast Georgia Health System, Inc. ("SGHS"), performed a septoplasty and inferior turbinate reduction on Mr. Frazier on January 21, 2020. Doc. 77 at 4. Plaintiffs allege Dr. Stevenson left gauze or packing in Mr. Frazier's nasal cavity for weeks after the procedure. Id. Plaintiffs allege Dr. Stevenson did not remove the foreign items from Mr. Frazier's nasal cavity until a follow-up exam on February 25, 2020. Plaintiffs claim Dr. Stevenson's action caused Mr. Frazier serious pain and injury. Defendants deny Dr. Stevenson left any gauze or packing in Mr. Frazier's nasal cavity.

The Motion now before the Court concerns one piece of disputed evidence—a short video that Mr. Frazier claims to have recorded during the February 25, 2020 exam visit. Therefore, this

Background section provides a description of the video, a brief history of the dispute about the video, and a summary of the materials the parties submitted to the Court in support of or in opposition to Defendants' Motion.

I. The "YouCut Video"

The disputed video (the "YouCut Video") is eight seconds long and vertically oriented, consistent in appearance with a video recorded using a cellphone.[1] Doc. 53, Ex. I. Generally speaking, the video depicts Mr. Frazier in what appears to be a medical examination room and bloody materials in a kidney basin. Mr. Frazier is the only individual visible in the YouCut Video, though Mrs. Frazier's voice may be heard. Dr. Stevenson does not appear in the video.

The YouCut Video begins with a full frame shot of Mr. Frazier's face looking into the camera, as if shot with a self-facing camera. A piece of pink material protrudes from Mr. Frazier's right nostril. The material appears to be gauze, cloth, or paper. The material extends from the inside of Mr. Frazier's nose to just above his upper lip. Mr. Frazier is wearing a collared shirt and a sweater or blazer. It appears the camera is aimed up at Mr. Frazier's face from slightly below his face. The video depicts Mr. Frazier, the wall behind Mr.

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[1] As explained below, the parties agree the disputed video was made using an application called YouCut. At the hearing on Defendants' Motion, the parties generally referred to the video as the "YouCut Video." The Court uses the same term here.

Frazier, and the ceiling above Mr. Frazier. In the ceiling, there is a bright, rectangular, fluorescent-style light. Square white or off-white ceiling tiles and the corner of a square-shaped ceiling vent are visible. A plain white or off-white wall is visible behind Mr. Frazier. While looking into the camera, Mr. Frazier whispers, "What's this?"

At about the five-second mark, the camera's orientation changes. The orientation change is consistent with a change from a front-facing cellphone camera to a rear-facing cellphone camera. Once the orientation changes, the video begins depicting a close-up view of an offwhite or beige countertop. The front of the counter is partially visible, along with part of a metallic handle for a drawer or cabinet. There is a gray-blue, kidney-shaped plastic basin on the countertop. The basin is filled with multiple bloody items. There are at least two different types of blood-soaked materials in the basin. On the countertop behind the basin, there are two bottles or containers and an open box of what appears to be blue latex gloves. The video ends just as someone's hand comes into the frame and begins to lift the basin off the countertop.

The YouCut Video is not an original recording, but is, instead, an eight-second edited and saved version of an original recording or recordings. Doc. 53 at 10. The parties all agree Mr. Frazier created the YouCut Video using an editing application named YouCut.

II. History of the Dispute Concerning the YouCut Video

Plaintiffs produced the YouCut Video on or about July 15, 2021. Almost immediately after the video was produced, Defendants began asserting challenges and objections. Id. at 6. Defendants demanded Plaintiffs produce the original video files used to create the YouCut Video in an original format with all original metadata. Id. In response to Defendants' complaints, Plaintiffs produced more evidence, including at least one other video, but never produced the complete, original video files used to create the YouCut Video. Defendants contacted the Court and asked for assistance with the dispute.

The Court held a telephonic status conference about the dispute on August 13, 2021. Doc. 52. No resolution was reached during the conference, but the Court authorized Defendants to file a motion to compel related to the YouCut Video dispute. Immediately after the conference, Plaintiffs produced a screenshot image from Mr. Frazier's cellphone ("Screenshot 1"). Doc. 53 at 2. Screenshot 1 appears to contain information—or metadata—about one of the original video files used to create

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[1] As explained in more detail below, two screenshots were eventually identified (Screenshot 1 and Screenshot 2). The screenshots are important. Plaintiffs contend the screenshots show the original video files were, in fact, recorded on February 25, 2020. Plaintiffs contend this supports their position on the authenticity of the YouCut Video. Defendants contend the screenshots are additional evidence of Plaintiffs' fabrication of the original video file.

the YouCut Video, including the file name, file size, and modified date. Notably, the original video described in Screenshot 1 was not produced.[2] Defendants then filed a motion to compel, asking the Court to order Plaintiffs to provide Mr. Frazier's cellphone to Defendants' forensic expert for imaging and examination. Doc. 53. Plaintiffs opposed the motion to compel and any request for forensic inspection by Defendants' expert. Doc. 54. In support of their opposition, Plaintiffs provided a short opinion about the video from their own video forensics and image analysis expert, Jim Stafford. Doc. 54-1. Mr. Stafford opined the YouCut Video is authentic. Plaintiffs did not produce any original video files. Plaintiffs stated Mr. Frazier would "testify under oath that various original files may have been corrupted and now unable to be located[]" but provided little explanation for how the corruption or deletion might have occurred. Doc. 54 at 6. Plaintiffs maintained they searched for the original video files that were used to make the YouCut Video but could not find them.

The Court granted Defendants' motion to compel and ordered Plaintiffs to provide Mr. Frazier's cellphone to Defendants' mobile device forensics expert, Vicente Rosado, so Mr. Rosado could

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[2] As explained in more detail below, two screenshots were eventually identified (Screenshot 1 and Screenshot 2). The screenshots are important. Plaintiffs contend the screenshots show the original video files were, in fact, recorded on February 25, 2020. Plaintiffs contend this supports their position on the authenticity of the YouCut Video. Defendants contend the screenshots are additional evidence of Plaintiffs' fabrication of the original video file.

attempt to find the original video file or files and related metadata. Doc. 58. Plaintiffs complied with the Court's Order. Mr. Rosado imaged and examined Mr. Frazier's cellphone and produced a report. Doc. 184-1. Mr. Rosado did not locate the original video file or files. Mr. Rosado concluded he could not determine whether the YouCut Video was authentic, and he offered explanations about how metadata associated with the YouCut Video and Screenshot 1—specifically, the date and time of those items—could have been altered.

Around the same time Defendants filed their motion to compel, in August 2021, Plaintiffs filed a motion asking to inspect Dr. Stevenson's office, the Southeast Georgia Physician Associates-Ear Nose and Throat ("SPGA-ENT") office (referred to in this Report as "Suite 480"). Doc. 55. Plaintiffs asked to have a videographer present during the inspection. The Court granted Plaintiffs' request and allowed the inspection to go forward. Doc. 64. Plaintiffs conducted their inspection of Suite 480 on October 5, 2021. Plaintiffs and Defendants both had their own videographers present for the inspection.

In December 2021, Plaintiffs filed their Second Amended Complaint, and in that pleading, Plaintiffs expressly rely on the YouCut Video.[1] Doc. 77 at 9, 23. Plaintiffs allege the YouCut Video was recorded in Suite 480 on February 25, 2020,

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[3] There is no mention of any video recording in Plaintiffs' original Complaint, doc. 1, filed in February 2021 or in Plaintiffs' First Amended Complaint, doc. 36, filed in June 2021.

and the video shows the foreign objects Dr. Stevenson left in Mr. Frazier's nasal cavity and later removed.

Defendants have at various times questioned the authenticity of the YouCut Video, but on those occasions, Defendants failed to present any direct challenge to the video. For example, earlier in this litigation Defendants moved for summary judgment on various grounds, including lack of subject matter jurisdiction. In January 2022, Defendants filed a reply brief in support of that motion for summary judgment. Doc. 91. Defendants tacked on a few paragraphs to the end of that reply brief describing the YouCut Video, the forensic inspection, and inspection of the SPGA-ENT offices. Id. at 22–24. Defendants then alleged the YouCut Video "was not and could not have been recorded [in Suite 480] because physical characteristics of the room shown in [the YouCut Video] do not match multiple physical characteristics of [Suite 480] that have not changed since its build-out in 2012." Id. at 25. The authenticity of the YouCut Video was not germane to the issues Defendants raised in their motion for summary judgment, so it played no role in resolution of the motion. Doc. 131.

Defendants raised a similar, tangential challenge to the YouCut Video in a footnote in a brief concerning Plaintiff's request for a stay of discovery. Doc. 124 at 2 n.1. The challenge was irrelevant to the issue before the Court, so it did not factor into the Court's analysis. Doc. 125.

In October 2022, Plaintiffs tried to amend their Complaint again. Doc. 146. Defendants opposed that attempt, and in their response, argued the YouCut Video could not have been recorded in Suite 480. Doc. 149 at 3 n.3. Again, Defendants' challenge was not germane to the issue before the Court—whether Plaintiffs should be allowed to amend—so the authenticity of the YouCut Video played no role in the resolution of that dispute. Doc. 178. The Court ultimately denied Plaintiffs' request to amend.[4]

Defendants directly challenged the YouCut Video for the first time when they filed the instant Motion in March 2023. Doc. 184. Defendants argue Plaintiffs fraudulently manufactured the YouCut Video. Defendants contend the video could not have been recorded in Suite 480. Id. at 2. Defendants argue the room shown in the YouCut Video is entirely inconsistent with the physical appearance of the exam rooms in Suite 480, and the Suite 480 exam rooms have not been changed in any material way since long before February 25, 2020. Defendants rely on various pieces of evidence to support this argument, including the testimony of two people who are familiar with Suite 480: Dr. Stevenson and Shawn Crosby. Mr. Crosby works at SGHS in facilities management.

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[4] Defendants also obliquely challenged the YouCut Video in a response brief to a motion to compel Plaintiffs filed. Doc. 164 at 4 n.4. That challenge was irrelevant to the issue before the Court. Doc. 222.

Defendants also provide a video of the Suite 480 exam rooms recorded during the site inspection on October 5, 2021. Defendants also argue their position is supported by opinions and reports from the parties' forensics experts.

III. Party Submissions Related to the Dispute

The parties rely on a witness testimony, expert reports, and documents produced in discovery in support of or in opposition to the instant Motion. The Court held a hearing on the Motion on September 18, 2023, where the parties offered additional evidence. In this section, I describe all relevant materials. For witness testimony described in this section, I simply summarize material portions of the testimony but do not accept or reject any of it based on credibility.

A. Fact Witnesses

1. Mr. Frazier.

Mr. Frazier testified at a deposition on October 5, 2021, doc. 65-1, and at the September 18, 2023 hearing. Mr. Frazier's hearing testimony was substantially the same as his deposition testimony. Several portions of his hearing testimony were nearly identical to his deposition testimony.

Mr. Frazier testified at a deposition on October 5, 2021, doc. 65-1, and at the September 18, 2023 hearing. Mr. Frazier's hearing testimony was substantially the same as his deposition testimony. Several portions of his hearing testimony were nearly identical to his deposition testimony. Mr.

Frazier went to Suite 480 on February 25, 2020, for a scheduled post-operation visit with Dr. Stevenson. Id. at 32. Mrs. Frazier joined him. Id. at 33. Mr. and Mrs. Frazier both entered an exam room in Suite 480, and Mr. Frazier sat down in an exam chair. Id. Mr. Frazier could not recall in which of the three exam rooms he was. Id. at 9. Dr. Stevenson spoke with Mr. Frazier about his time away from work, his blood pressure, his pain symptoms, and his pain medicine. Id. at 33. Mr. Frazier stated to Dr. Stevenson, "[W]ould you please just humor me and look inside my nose because I feel like there's something in there." Id.

Dr. Stevenson examined Mr. Frazier. Dr. Stevenson looked inside Mr. Frazier's nose with a light. Id. Dr. Stevenson told Mr. Frazier, "I see some—one of the stiches didn't dissolve." Id. Dr. Stevenson "started probing" the right side of Mr. Frazier's nose "and then [Dr. Stevenson] kind of stopped and he said I'll be right back." Id. Dr. Stevenson left the room and came back with more instruments. Id. Using an instrument "that was a little bit longer" than the first instrument, Dr. Stevenson continued to probe Mr. Frazier's nose. Id. Mr. Frazier testified:

> And I remember feeling something wet come down my lip at that point and he was snipping and it hurt and then he started pulling stuff out. And I remember felt—I thought, well, this must be my nose is bleeding or whatever. And I remember I felt something cold and wet and it was just there on my lip. And I remember

> I felt it touching me and I just—I looked down and he said hold still. And then he cut some, he went and pulled some more. Then he said I'll be right back.

Id. Dr. Stevenson left the room a second time. Dr. Stevenson returned with "some kind of tray" and began placing pieces or shreds of gauze on it he had removed from Mr. Frazier's nose. Id. Dr. Stevenson removed "a lot of gauze" and then "blood clots were coming out . . . ." Id. Mr. Frazier told Dr. Stevenson, "I'm about to throw up," so Dr. Stevenson handed Mr. Frazier a piece of four-by-four gauze. Id. Dr. Stevenson also put a piece of four-by-four gauze on Mr. Frazier's shoulder. Dr. Stevenson placed some of the material from Mr. Frazier's nose on the gauze. Id. Mr. Frazier started spitting up blood clots onto the gauze in his hand. Dr. Stevenson handed Mr. Frazier a "kidney dish basin," and Mr. Frazier began spitting up into the basin. Id.

While Dr. Stevenson was removing material from Mr. Frazier's right nostril, Mr. Frazier yelled in pain. He told Dr. Stevenson, "I feel like you're about to pull out my left eyeball." Id. at 33–34. Dr. Stevenson looked into the left side of Mr. Frazier's nose, "and [Dr. Stevenson] looked and he was like oh, no." Id. at 34. Dr. Stevenson left the room for a third time. Id. When Dr. Stevenson returned, he "repeated the same thing [on the left side] and starts, you know, repeating the same thing snipping, pulling, cutting some off, pulling some more, looking back up there, pulling some more." Id. Dr. Stevenson left the room for a fourth time, leaving the kidney basin now on a countertop. Id.

The next portion of Mr. Frazier's testimony concerns the creation of the YouCut Video. Mr. Frazier sat with Mrs. Frazier in the exam room waiting for Dr. Stevenson to return. Mr. Frazier testified at his deposition, "I had on my blazer[.] I just pulled out my phone."[5] Id. Mr. Frazier's deposition testimony continues:

> And so it was—I had a fairly new phone and when I went to engage the camera it was like back in selfie mode. The rear—the camera that was facing me, that's the one that came on. And I was trying to figure out how to get it to flip around to do the front facing—to be facing away to me to the stuff on the counter so I can view or capture the stuff on the counter. And—and I just—after just experiencing that surreal moment, I saw what I saw, I put my phone back in my pocket. And I'm sitting down trying to take this in.

Id.

Dr. Stevenson returned to the room and told Mr. Frazier, "Yeah, you should feel better now that all that packing is out of your head." Id. Dr. Stevenson then handed Mr. Frazier some paperwork and rushed the Fraziers out of the room. Id.

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[5] During the hearing, Mr. Frazier's testimony deviated slightly. At the hearing, Mr. Frazier said Mrs. Frazier handed him his phone because he had given it to her after they walked in the exam room.

Mr. Frazier states everything shown in the kidney basin on the YouCut Video came out of his nose that day. Id. Even more "gauzelike material" came out of Mr. Frazier's nose, but it was not placed in the kidney basin and was not shown in the YouCut Video. Id. During the hearing, Mr. Frazier stated, "There was stuff [from his nose] on the counter along the wall."

Mr. Frazier edited the video on his phone with an editing application called YouCut. Id. at 37. Mr. Frazier installed the YouCut application either on February 25, 2020, or "not too long after . . . ." Id. Mr. Frazier used YouCut to shorten and combine two individual videos together: the self-facing video and the video of the counter. Id. at 37–38. Mr. Frazier testified the original video files do not exist, but he did not destroy them. Id. at 39.

2. Mrs. Frazier.

Mrs. Frazier testified at a deposition on October 5, 2021, doc. 91-2, and at the September 18, 2023 hearing. Mrs. Frazier's hearing testimony was substantially the same as her deposition testimony. Mrs. Frazier was in the exam room in Suite 480 with Mr. Frazier on February 25, 2020. Id. at 16. Mrs. Frazier observed Dr. Stevenson and Mr. Frazier discuss time off from work, then Dr. Stevenson began to examine Mr. Frazier's nose. Id. Mrs. Frazier states:

> Dr. Stevenson's demeanor changed. He got quiet. He was looking, looking and he got some other tool that—the

> headlight. He was just looking and then he said, okay, there is something in your nose and it's what we like to call boogers and so that would definitely stop you from being able to breathe and make you feel stuffy. So, he got some instrument and went in there. Cedrick was grimacing.

Id. at 17.

Dr. Stevenson left the room and returned with another instrument. Id. Dr. Stevenson snipped something in Mr. Frazier's left nostril, then snipped something in Mr. Frazier's right nostril. Id. Dr. Stevenson then used a "long tool" to pull "gunk" out of Mr. Frazier's nose. Id. Mr. Frazier gagged and spat up blood clots. Id. Dr. Stevenson placed a cloth or gauze on Mr. Frazier's shoulder. Id. Dr. Stevenson placed the material from Mr. Frazier's nose on the gauze. Id.

Dr. Stevenson left the room for a second time so "[Mr. Frazier] chose to video it real quick before Dr. Stevenson came back in." Id. The video shows material from Mr. Frazier's nose in the kidney basin. Id. at 18. "There may be some blood clots that he spit in there but the rest of that came out of his [nose]." Id. There was more material, not shown in the video, that was left on the gauze from Mr. Frazier's shoulder. Id. At the hearing, Mrs. Frazier testified her voice can be heard "at the end" of the video.

Dr. Stevenson returned and said, "[Y]ou should feel better now that that packing is out." Id. Mrs.

Frazier later reviewed the video with Mr. Frazier "in amazement." Id.

3. Dr. Stevenson.

Dr. Stevenson testified at a deposition on October 6, 2021, doc. 181-14, and at the September 18, 2023 hearing. Dr. Stevenson's hearing testimony was substantially the same as his deposition testimony, except where noted.

Dr. Stevenson examined Mr. Frazier in one of three exam rooms in Suite 480—exam room number 1, 2, or 3—on February 25, 2020. Id. at 62. At the hearing, Dr. Stevenson testified he saw Mr. Frazier between 2:25 and 3:10 p.m. Dr. Stevenson also testified he practices with other partners in his office, but Dr. Stevenson uses exam rooms 1, 2, and 3 "almost exclusively" because these exam rooms are dedicated to his use. There are other exam rooms in Suite 480, and they all have the same ceilings, countertops, wall color, and equipment.

At his deposition, Dr. Stevenson stated he did not remove any packing from Mr. Frazier's nose on February 25, 2020. Id. at 59. Mr. Frazier's exam was normal. Id. Dr. Stevenson removed some crusting, but there was no heavy bleeding. Id. Dr. Stevenson did not use four-by-four gauze during the exam. Id.

Dr. Stevenson is certain the YouCut Video was not recorded in Suite 480. Id. at 59. During his deposition, Dr. Stevenson listed several differences between the physical characteristics of the room in

the YouCut Video and the physical characteristics of his exam rooms. Id. The lights, tiles, and air vents in the ceiling in the video are arranged differently from the light, tiles, and air vents in the ceiling in the Suite 480 exam rooms. Id. The walls in the video are beige, but the walls in the Suite 480 exam rooms are "robin egg's blue." Id. The drawer handle shown in the video is different from the drawer handles in Suite 480. Id. The gloves, hand wipes, and counter cleaner shown on top of the counter in the video are brands SGHS does not carry. Id. During the hearing, Dr. Stevenson testified there is not more than one overhead light fixture in any exam room in Suite 480, and every exam room has the same end-toend configuration of air vents and light fixtures in the ceiling. Dr. Stevenson testified exam rooms 1, 2, and 3 all have identical paint color, furniture, equipment, counters, cabinetry, hardware, and light-fixture orientation. Id. at 63.

Dr. Stevenson testified the exam rooms in Suite 480 have not changed in the last 10 years. Id. at 64. The hospital has used the same brand of gloves, hand wipes, and counter cleaner and has used the same supplier of these products for as long as Dr. Stevenson can remember. Id. at 59.

4. Shawn Crosby.

Shawn Crosby is the project manager and former "environment of care manager" for Defendant SGHS. Mr. Crosby provided an affidavit dated January 27, 2022, doc. 184-2 at 169– 96, and he testified at the September 18, 2023 hearing. Mr.

Crosby's hearing testimony was consistent with his affidavit.

Mr. Crosby has worked for Defendant SGHS in facilities management since November 2002. Id. at 170. He is certified in construction and renovation projects in health care settings. Id. He is also a licensed plumber and credentialed gas installer. Id. Mr. Crosby was involved in the original build-out of the SPGA-ENT offices in Suite 480 in 2012. He has been involved in maintenance of the suite ever since. Id.

Mr. Crosby testified none of the significant features of the Suite 480 exam rooms have changed since their build-out. Id. at 171–72. The paint color on the walls in Suite 480 has not changed. Id. at 171. All of the exam room walls have always been the same blue-green color. Id. Mr. Crosby recently removed a light switch plate in one of the exam rooms to look for different paint color underneath, in an effort to confirm no other paint color had been used. Mr. Crosby did not identify any other colors under the switch plate. He testified, in his experience, if the rooms had ever been a different color, the color would have appeared underneath the light switch. Id. No other significant features of the exam rooms have changed since their build-out, including the drawer pull hardware, the cabinets, or the layout of the vents, air returns, and tiles in the ceiling. Id. at 172.

Mr. Crosby provided maintenance records to support his testimony. He provided a document showing "all work orders Facilities Maintenance addressed for Suite 480 . . . from October 1, 2019

through October 29, 2021." Id. at 171. These work orders show wall patching and touch-up painting, but the paint color did not change. Id. These records do not reflect any change in wall color, change in cabinet or drawer hardware, or change in the ceiling configuration. Id. at 178–83. Mr. Crosby testified the YouCut Video was not recorded in Suite 480 because of several differences between the physical characteristics of the facility shown in the YouCut Video and the physical characteristics of Suite 480. Id. at 174–77. Specifically, the configuration and orientation of the lights and air vents in the ceiling, the color of the walls, and the drawer pull hardware in the YouCut Video are different from those characteristics in Suite 480. Id. During the hearing, Mr. Crosby testified changing the orientation of the ceiling lights and air vents would involve intensive structural changes in the piping above the ceiling.

B. Forensics Experts

1. *Jim Stafford.*

Plaintiffs retained Jim Stafford as an expert in video forensics and image analysis. Mr. Stafford created an image of Mr. Frazier's phone on June 28, 2021.[6] Doc. 184-2 at 9, 69. Mr. Stafford issued his first expert report on August 11, 2021, doc. 54-1,

[6] As an aside, it is unclear why Mr. Stafford would create an image of Mr. Frazier's device on June 28, 2021. Plaintiffs did not produce the YouCut Video to Defendants until July 15, 2021, and the video had not been mentioned in any filing in the case. Defendants were not aware of the YouCut Video on June 28, 2021, and had not raised any challenge to the authenticity of the video.

and a second report on May 3, 2022, doc. 184-2 at 197–216. Defendants deposed Mr. Stafford on December 14, 2022, and March 8, 2023. Doc. 160-4 (first deposition transcript); Doc 184-2 at 1–112 (second deposition transcript). Mr. Stafford also testified at the September 18, 2023 hearing.

Mr. Stafford collected and analyzed relevant data from Mr. Frazier's cellphone. Relevant to the instant Motion, Mr. Stafford reviewed the YouCut Video file, Screenshot 1, and Screenshot 2. Mr. Stafford reviewed the metadata associated with these files and others in forming his opinions. Ultimately, Mr. Stafford opined Mr. Frazier recorded the original video files used to make the YouCut Video on February 25, 2020, the original files were deleted from Mr. Frazier's device and could not be recovered, and Screenshot 1 and Screenshot 2 supported the conclusion the original videos were recorded on February 25, 2020.

Mr. Stafford identified and analyzed the YouCut Video file on Mr. Frazier's device. Mr. Stafford explained the metadata associated with the YouCut Video showed a creation and modification date of September 29, 2020, as opposed to when the video was purportedly recorded on February 25, 2020. Mr. Stafford determined the disparity was caused by Mr. Frazier's habit of saving media files from his cellphone to other devices to free up storage space. Doc. 184-2 at 198. Mr. Stafford found information on Mr. Frazier's cellphone indicating Mr. Frazier performed such a save on September 29, 2020. In fact, Mr. Stafford identified numerous files bearing September 29, 2020 as a creation and

modification date, which Mr. Stafford attributed to Mr. Frazier's action on that date.

In searching for the original video files, Mr. Stafford located a file name and metadata associated with a deleted video file. Id. at 200. The actual file was not recovered. The metadata for the deleted video file shows the file was created at 3:43 p.m. on February 25, 2020. Id. At the hearing, Mr. Stafford also explained he located records showing eight instances of YouCut being used on Mr. Frazier's phone between 3:20 and 3:43 p.m. on February 25, 2020. Mr. Stafford relied on these records in support of his opinions.

Mr. Stafford also found two images that appear to be screenshots showing the metadata of the original video files (Screenshot 1 and Screenshot 2) used to create the YouCut Video. Each of the screenshots shows a small "thumbnail" image in the top half and textual metadata in the bottom half. The metadata include a file name, a file path, file size, length of the video, and a "modified" date. Id. at 202, 204. The Screenshot 1 metadata display "Modified February 25, 14:42." In Screenshot 1, the thumbnail is similar to the first portion of the YouCut Video (i.e., the front-facing camera image of Mr. Frazier).[7] The thumbnail in Screenshot 2

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[7] There is one noticeable difference between the thumbnail image in Screenshot 1 and the YouCut Video. The thumbnail in Screenshot 1 depicts Mr. Frazier reaching for his nose, but Mr. Frazier does not reach for his nose in the YouCut Video. This disparity confirms the original video or videos used to create the YouCut Video included footage of other activity that was not incorporated into the YouCut Video. The metadata for Screenshot

matches an image from the second part of the YouCut Video, showing the kidney basin full of bloody- looking material on the countertop. Id. at 204. The Screenshot 2 metadata display "Modified February 25, 14:43." Id.

Ultimately, Mr. Stafford concluded the original video files used to make the YouCut Video were recorded on February 25, 2020. Id. at 205–06. Mr. Stafford based that conclusion in large part on the metadata shown in Screenshot 1 and Screenshot 2. Mr. Stafford concluded the metadata in the screenshots are accurate and cannot be altered by a user. Therefore, Mr. Stafford concluded the YouCut Video is authentic and was recorded on February 25, 2020.

During Mr. Stafford's deposition, Defendants' counsel asked Mr. Stafford about whether a user could have reset the time and date of Mr. Frazier's cellphone before recording the original video files in order to manipulate the metadata associated with the original files. Doc. 160-44 at 11. This question was based on Defendants' forensic expert's report, which is discussed below in more detail. Mr. Stafford acknowledged the possibility of manipulation through a date and time reset, but Mr. Stafford testified he did not find any evidence of such a reset

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1 also shows the original video was 13 seconds long, but the first portion of the YouCut video is only 5 second long. This means at least 8 seconds—the majority of the original video—is likely missing from the YouCut Video.

in Mr. Frazier's phone. Id. at 11–12. At the hearing, Mr. Stafford testified if someone had performed a manual date and time reset, there would be a record of the change on the phone. However, Mr. Stafford stated he only performed a "cursory examination" of 107,000 files in Mr. Frazier's phone. Mr. Stafford did not go through "each and every file." Additionally, Mr. Stafford did not conduct any tests on Mr. Frazier's phone or any similar device to confirm a manual date and time reset would generate a record that could be identified in a forensic analysis. Even so, Mr. Stafford maintained he found no evidence of a date and time reset, and he would have expected to if such a reset had occurred.

During the hearing, Mr. Stafford also testified for the first time about the differences in wall color between the YouCut Video and Suite 480. Mr. Stafford said the colors shown in the YouCut Video are unreliable. As an example, Mr. Stafford pointed out "greens and things" in the color of Mr. Frazier's face in the YouCut Video that are not actually present. Outside of the differences in wall color, Mr. Stafford had no explanation for visual differences between the exam room in the YouCut Video and the exam rooms in Suite 480.

2. Vincente Rosado

Defendants retained Vincente Rosado as a mobile device forensics expert. Mr. Rosado analyzed Mr. Frazier's cellphone and provided a report. Doc. 184-1. Mr. Rosado discovered eight copies of the YouCut Video in Mr. Frazier's phone. Id. at 10–11. However, Mr. Rosado concluded the

date and time Mr. Frazier recorded the original videos are "forensically unverifiable" because Mr. Frazier edited the videos with the YouCut application. Id. at 10.

Mr. Rosado also analyzed Screenshot 1 and Screenshot 2. Mr. Rosado concluded the screenshots were "manipulated to the extent that no determination can or should be made as to [their] authenticity." Id. at 22, 24. Mr. Rosado discussed both the metadata of the screenshots themselves and the video metadata the screenshots purportedly show.[8] Mr. Rosado explained the file names of screenshots indicate they were created on September 24, 2020 (e.g., Screenshot_20200924-124420.png), and the metadata associated with the screenshots show the screenshots were modified on September 29, 2020. Id. at 22. For the original video files described in the screenshots, the names of the files indicate they were created on February 25, 2020, and the metadata include a "Modified" date for the video file of "February 25." Mr. Rosado notes the metadata "Modified" file includes a month and date the files were modified but does not

[1] This point warrants additional explanation. Screenshots can be analogized to digital photos of a device's screen as it appeared on a particular occasion. These two screenshots analyzed by the forensic experts appear to capture Mr. Frazier's device's screen while the device displayed information about the original video files. In other words, it appears a user was looking at the file information for the original video files (i.e., metadata showing the name, date, and thumbnail for the original video files) on a particular occasion, and then that user created the screenshots. Because a screenshot is analogous to a digital photo, each screenshot has its own metadata showing when the screenshot was made, the size of the screenshot file, etc.

show the year the files were modified. Id.

Mr. Rosado provided a lengthy explanation of how a user could manually reset the date and time on Mr. Frazier's cellphone to create a metadata screenshot with an inaccurate earlier date. Id. at 19–20. Specifically, Mr. Rosado explained on any given date, a user could reset the device's date and time to an earlier date and time, like the afternoon of February 25, 2020, then record videos and capture screenshots of the metadata associated with the original video files. Then the user could reset the device back to the actual, current date and time. That process would show inaccurate, earlier metadata for the original video files compared to when the videos were actually recorded. Mr. Rosado confirmed this theory by performing a test on a cellphone identical to Mr. Frazier's cellphone, though, to be sure, Mr. Rosado did not identify records on Mr. Frazier's cellphone showing this manual reset actually occurred.

As a result of his analysis, Mr. Rosado concluded the YouCut Video "cannot said to be 'authentic,' i.e., actually recorded when and where Plaintiffs testified it was, within a reasonable degree of certainty . . . ." Id. at 26.

C. Plaintiffs' Medical Expert Dr. Mikula

Plaintiffs' medical expert, Dr. Suzette Mikula, provided information relevant to this dispute. Dr. Mikula signed an expert report on August 3, 2022. Doc. 184-3 at 51–55. Dr. Mikula relied on the YouCut Video in her report. Id. at 51. Defendants deposed Dr. Mikula on December 21, 2022. Id. at 1–

40. Dr. Mikula opined Dr. Stevenson failed to meet the standard of care. Dr. Mikula also concluded the YouCut Video shows a cottonoid pledget removed from Mr. Frazier's nose.[9] Id. at 52, 54.

During her deposition, Dr. Mikula expressed doubt that everything in the kidney basin in the YouCut Video was removed from Mr. Frazier's nose. Id. at 15–16. Dr. Mikula thought the material shown in the left side of the kidney basin was gauze used to staunch or wipe up blood, not something left in Mr. Frazier's nose. Id. at 15. Dr. Mikula said she "would definitely question" any claim that all the material in the kidney basin came from Mr. Frazier's nose "because, I don't know—I mean, that looks like a pretty big piece of gauze." Id. at 16.

D. Video and Documentary Evidence

1. October 5, 2021 walk-through inspection of Suite 480.

On October 5, 2021, Plaintiffs conducted a walk-through inspection of Suite 480. Plaintiffs and Defendants each had videographers present at the inspection. Defendants submitted the affidavit of Dale Leornard, Defendants' professional videographer, along with the video Mr. Leonard prepared. Doc. 184-2 at 113–23. Mr. Leonard affirms the video fairly and accurately depicts the inspection and it has not been materially edited or modified. Id. at 114. Plaintiffs did not submit their

[1] Cottonoid pledgets, also known as surgical patties, are small, absorbent pads Dr. Stevenson uses to constrict tissue and minimize bleeding before a surgical procedure. See Doc. 251-2.

own video.

Mr. Leonard's inspection video shows several people were present during the inspection, including Mr. and Mrs. Frazier, their attorney, Plaintiffs' videographer, Mr. Leonard, Defendants' attorney, and at least two SGHS employees. The video shows the hallway outside Suite 480, the waiting area inside the suite, the hallway leading to exam rooms 1, 2, and 3, and the exam rooms. There is a nurses' station in Suite 480 just past the waiting area. The exam rooms are down a hallway from the nurses' station.

The walls of the hallway outside Suite 480 are beige or off-white. All of the walls inside Suite 480, including in the exam rooms, are painted blue-green.

The inspection video shows exam rooms 1, 2, and 3 in Suite 480. All three rooms are nearly identical. There is a woodgrain cabinet with a beige countertop in each exam room. The cabinet and drawer handle hardware are silver and rectangular with slightly rounded corners. On top of each countertop sits a green box of Kleenex tissues, a pink box of disposable gloves, and a purple container. There is one rectangular fluorescent light fixture in the ceiling. There are two square air vents abutting the light fixture, one on each end. During the video, Mr. Frazier indicates the exam rooms and the nurses' station look different than he remembers. Defendants' counsel and an SGHS employee assert the building has not changed.

2. Medical records.

Plaintiffs submitted records of Mr. Frazier's visit with Dr. Stevenson at Suite 480 on February 25, 2020. Doc. 250-1. These records show a service time of 2:25 p.m. for "ambulatory care." Id. at 2. The records state Mr. Frazier's "nose is healing as expected. There is no sign of infection or complication." Id. at 9. The records show a service time of 3:10 p.m. for "patient education." Id. at 11.

3. *Maintenance records.*

Plaintiffs submitted 47 work orders for Suite 480. Doc. 240-3. These maintenance records are consistent with the list of work orders attached to Mr. Crosby's affidavit. Forty work orders were completed between February 25, 2020 and October 5, 2021. Two work orders show the "task" as "Wall Repair–Walls–Patch/Paint/Repair Wall Covering." Id. at 24–25. This work began on April 21, 2021, and ended on April 23, 2021. The work orders show this work took a total of 13.5 hours. Id. Thirteen other work orders include ceiling tile replacement. Id. at 14– 15, 28–30, 32, 36, 39–44. Most of these work orders concern the replacement of a wet ceiling tile in the "back hallway" due to an air conditioning malfunction. There are also two work orders for replacing light bulbs. One is for ceiling lights in exam room number 5. Id. at 31. The other is for six three-way light bulbs for lamps. Id. at 45.

FACTUAL FINDINGS

1) Analysis of Record Evidence

Before proposing any findings of fact, it is necessary to analyze certain aspects of the record and to identify disputed facts.

a) The Exam Rooms in Suite 480 Are Materially Different From the Room in the YouCut Video

Defendants argue there are several differences between the physical features of the exam rooms in Suite 480, as shown in the inspection video, and the physical features of the room in the YouCut Video. Specifically, Defendants point to: the configuration of ceiling tiles, lights, and air vents; the color of the walls; the appearance of the drawer pull hardware; the color of the base cabinets; and the medical supply containers on the counters. Plaintiffs do not dispute or challenge the obvious differences in the physical features. Nonetheless, the differences are central to the Court's analysis and, therefore, are described here.

1. Configuration of ceiling tiles, lights, and air vents.

The arrangement of ceiling tiles, lights, and air vents in the Suite 480 exam rooms is plainly different from the arrangement of ceiling tiles, lights, and air vents shown in the ceiling above Mr. Frazier in the YouCut Video. Each of the Suite 480 exam rooms has one rectangular fluorescent light troffer in the ceiling. The light troffer is adjacent to

square-shaped vents on each end—one supply vent and one return vent. In the YouCut Video, two rectangular light troffers appear above Mr. Frazier's head. There are no vents on the ends of the lights. The two lights are parallel with one square-shaped vent between them. The ceilings in the rooms are obviously different.

2. Wall color.

The wall color in the YouCut Video and the wall color in Suite 480 are different. The Suite 480 exam rooms are a bright, blue-green color. The wall shown behind Mr. Frazier in the YouCut Video is off-white or beige. At the hearing, Mr. Stafford testified the colors shown in the YouCut Video are unreliable. He stated the colors shown in Mr. Frazier's face are distorted in the YouCut Video. I have reviewed the videos and considered Mr. Stafford's testimony. Mr. Stafford is correct the colors in YouCut Video appear slightly distorted, but the distortion is minimal. For the most part, the colors depicted in the video appear natural. The minor color distortions in the YouCut Video would not plausibly make a bright, blue-green wall appear off-white or beige. The wall colors in the rooms are obviously different.

3. Drawer pulls.

The drawer pull on the cabinet in the YouCut Video is different from the drawer pulls in the Suite 480 exam rooms. Each Suite 480 exam room has a brown, wood grain cabinet with a contrasting beige countertop. Each cabinet has one drawer and two doors. Each drawer and door has a metallic,

rectangular pull handle with rounded corners. Each pull has a rectangular shape, with nearly right angles.

A portion of a drawer pull is visible in the second portion of the YouCut Video. The drawer pull is an oval-shaped handle that extends from the face of the drawer at a gentle, sloping angle. The drawer pulls in the Suite 480 exam rooms and the drawer pull in the YouCut Video are obviously different.

4. Cabinet color.

The cabinet colors in the two videos are different. The base cabinets in the Suite 480 exam rooms are a brown wood grain with a beige countertop. The colors of the cabinet and countertop noticeably contrast. In the YouCut Video, both the color of the countertop and the color of the cabinet are a similar beige or yellow. The countertop and cabinet colors do not contrast.

I considered Mr. Stafford's testimony about the reliability of the colors in the YouCut Video. As noted, any color distortion in the YouCut Video is minimal. The color distortion could not plausibly account for the visual disparity between cabinet colors in the two rooms. The cabinet colors are plainly different, even considering any minor color distortion in the YouCut Video.

5. Medical supply containers.

The YouCut Video and the walk-through video of the Suite 480 exam rooms depict various items on the countertops. In the Suite 480 exam rooms,

rooms, there are three medical supply containers on each countertop in each exam room: a pink box of disposable gloves; a cylindrical white container of cleaning wipes with a purple label; and a green and white tissue box. In the YouCut Video exam room, there are also three items visible on the countertop: a blue box of disposable gloves; a cylindrical white container with a red label; and a smaller cylindrical container. The items on the countertops are obviously different.[10]

In sum, the room shown in the YouCut Video and the Suite 480 exam rooms are different in several significant ways. The ceilings, wall colors, drawer pulls, cabinet colors, and medical supplies are all obviously different.

b) Dr. Stevenson Examined Mr. Frazier on February 25, 2020, in Exam Room 1, 2, or 3 in Suite 480

Dr. Stevenson testified at his deposition he only sees patients in exam rooms 1, 2, and 3. He repeated this testimony at the evidentiary hearing on September 18, 2023. Dr. Stevenson acknowledged medical records for Mr. Frazier's February 25, 2020 exam do not identify in which of the three exam rooms the exam occurred. Dr. Stevenson was unable to recall in which of the three exam rooms he conducted Mr. Frazier's

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[10] These items are disposable and can easily be replaced, so the difference between them—without more—is of limited value. However, Dr. Stevenson testified the hospital has not and does not carry the brands of supplies shown in the YouCut Video. This point is addressed below in more detail.

February 25, 2020 exam, but he testified he was sure the exam occurred in exam room 1, 2, or 3 because he only uses those three exam rooms.

Mr. and Mrs. Frazier both testified the February 25, 2020 exam occurred in Suite 480, but neither could recall the specific exam room. Specifically, at his deposition, Mr. Frazier testified he recorded the YouCut Video on February 25, 2020, in one of the exam rooms in Suite 480, but he could not remember exactly which exam room. Doc. 65-1 at 9, 35–38. Mr. Frazier's testimony at the evidentiary hearing on this issue was almost identical. Mr. Frazier confirmed he did not record the YouCut Video anywhere else in the building or anywhere else in town. Mr. Frazier further testified he and Mrs. Frazier entered the lobby area of the Suite 480 on February 25, 2020, and checked in at the front counter. He explained Amy Williamson—a SPGA-ENT employee—was at the check-in window. Mr. Frazier explained another person, possibly Ms. Bautista, took Mr. and Mrs. Frazier "to the back," behind the lobby to an exam room.

Mrs. Frazier testified at her deposition that Mr. Frazier recorded the YouCut Video in Dr. Stevenson's exam room on February 25, 2020. Doc. 91-2 at 18. At the evidentiary hearing, Mrs. Frazier testified Mr. Frazier recorded the YouCut Video inside the same suite where the inspection video was recorded, though she could not remember which room. Mrs. Frazier further testified the February 25, 2020 office visit was her third visit to Suite 480. Mrs. Frazier had previously accompanied Mr. Frazier to an exam room in Suite 480 to see Dr. Stevenson on December 27, 2019,

and January 28, 2020. Mrs. Frazier explained on February 25, 2020, she and Mr. Frazier went to the fourth floor and entered the lobby. Mrs. Frazier testified Mr. Frazier checked in at the front check-in counter. At the hearing, Mrs. Frazier could not remember who led her and Mr. Frazier to the back, but she said it was one of "two or three women" who work there, and Mrs. Frazier would know her if she saw her. The woman took Mr. and Mrs. Frazier to an exam room; however, Mrs. Frazier could not confirm which exam room.

Considering all of the evidence together, I conclude Dr. Stevenson examined Mr. Frazier on February 25, 2020, in exam room 1, 2, or 3 in Suite 480. All of the testimony supports the conclusion the exam occurred in an exam room in Suite 480. Mr. and Mrs. Frazier expressly rejected any notion the February 25, 2020 exam occurred outside of Suite 480. Mr. and Mrs. Frazier visited Suite 480 on multiple occasions and were given an opportunity to inspect the suite during discovery. Additionally, Dr. Stevenson testified credibly he only uses exam rooms 1, 2, and 3 and has only used those rooms for many years. Dr. Stevenson, therefore, logically concluded the February 25, 2020 exam occurred in one of these three rooms. There is no contrary evidence suggesting Dr. Stevenson ever used any other exam room in Suite 480. Therefore, I conclude Dr. Stevenson examined Mr. Frazier on February 25, 2020, in Exam Room 1, 2, or 3 of Suite 480, though it is unclear in which

one of these three exam rooms the exam occurred.[1]

Plaintiffs, through counsel and during testimony, have speculated the February 25, 2020 exam might have occurred in some other exam room in Suite 480 (i.e., an exam room other than exam rooms 1, 2, or 3 but still in Suite 480). There is no evidentiary support for this theory. Plaintiffs merely question the strength of the evidence in the record or vaguely suggest there is some possibility the exam might have occurred elsewhere. For example, Plaintiffs emphasize Mr. Frazier's medical record does not specify the exam room where Dr. Stevenson examined Mr. Frazier on February 25, 2020. Doc. 194 at 3. While Plaintiffs point to portions of the evidentiary record that are silent on the location of the February 25, 2020 exam, Plaintiffs fail to address the significant evidence the February 25, 2020 exam occurred in Suite 480 in exam rooms 1, 2, or 3. Plaintiffs have not offered any evidence to rebut Dr. Stevenson's testimony that he only ever uses exam rooms 1, 2, and 3 and did so on February 25, 2020. Plaintiffs have had a full and fair opportunity to develop the record on this point, and they have failed to come forward with any evidence suggesting the February 25, 2020 exam occurred any place other than in Suite 480 in exam room 1, 2, or 3.

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[1] In a brief on the instant Motion, Plaintiffs complained that during the SPGA-ENT site inspection, they were denied access to the operating room where Dr. Stevenson performed the January 21, 2020 surgery and were only allowed to inspect a similar operating room. Doc. 194 at 3. This issue is irrelevant. The January 21, 2020 surgery took place in a different building than the February 25, 2020 exam. There is no indication the YouCut Video was recorded in an operating room, and Plaintiffs have never claimed it was.

Even if the February 25, 2020 exam occurred in a different exam room in Suite 480 — and there is no evidentiary support for that conclusion—it would not change the analysis. Dr. Stevenson testified there are other exam rooms in Suite 480 other than exam rooms 1, 2, and 3, but those other exam rooms are materially identical to exam rooms 1, 2, and 3. Dr. Stevenson explained the other exam rooms have the same ceilings, lights, vents, wall colors, and equipment as exam rooms 1, 2, and 3. Mr. Crosby testified all of the walls in Suite 480 have the same blue-green colored paint and all of the Suite 480 exam rooms have the same ceiling configuration with one light, one air supply vent, and one air return vent. Therefore, even if the YouCut Video was recorded in a different Suite 480 exam room, the YouCut Video should still depict an exam room that is materially similar in appearance to exam rooms 1, 2, and 3.[12]

c) The Appearance of Exam Rooms 1, 2, and 3 in Suite 480 Has Not Materially Changed Since February 25, 2020

The record demonstrates exam rooms 1, 2, and

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[12] Plaintiffs recently filed a motion to amend their proposed pretrial order, asserting during the site inspection Defendants' counsel "took the Fraziers in the direction that he wanted to go and showed them the rooms that he wanted to show them." Doc. 258 at 12. This fact is of little or no significance. Plaintiffs conducted the inspection on October 5, 2021, nearly two years before the evidentiary hearing on the instant Motion. There is no indication in the site inspection video Plaintiffs were prevented from inspecting other areas of Suite 480. Plaintiffs have not, at any time, asked to inspect other areas of Suite 480 or argued such additional inspection would provide material information.

3 in Suite 480 did not materially change between February 25, 2020 and October 5, 2021, when Plaintiffs inspected the exam rooms. Dr. Stevenson testified the exam rooms in Suite 480 have not changed since February 25, 2020. Shawn Crosby testified the exam rooms have not changed since they were built out in 2012. Mr. Crosby provided maintenance records showing no significant change was made to the Suite 480 exam rooms between February 25, 2020 and the date of the walk-through inspection. Mr. Crosby testified convincingly that extensive work would be required to change the configuration of ceiling lights, vents, and tiles in the Suite 480 exam rooms to make those aspects of the rooms appear consistent with the room seen in the YouCut Video, and no such work has been performed.

Plaintiffs vaguely suggest Defendants materially changed the appearance of the exam rooms between February 25, 2020 and October 5, 2021, but Plaintiffs fail to provide any compelling evidence supporting that notion. Mr. and Mrs. Frazier testified at the evidentiary hearing someone must have removed a counter from one of the exam rooms before the October 5, 2021 walk-through inspection. Mr. Frazier testified he could tell something had been removed because he observed a "brown, grayish stripe" along the baseboards in one of the exam rooms. Plaintiffs

offered no support for Mr. Frazier's speculation.[13]

Mr. Frazier also suggested the maintenance records for Suite 480 are unreliable because, in his opinion, 13.5 hours is "too long" for a maintenance person to touch up paint and replace ceiling tiles. Mr. Frazier noted the maintenance records did not specify the color of touch-up paint, suggesting, perhaps, some maintenance person painted all of the Suite 480 exam rooms a different color in 13.5 hours but only recorded work for touch-up paint and replacing tiles. Mr. Frazier also speculated it would be easy to rearrange the ceiling tiles, vents, and counters in the exam rooms, but he offered no basis for this speculation.

Plaintiffs offer only unsupported speculation about the sufficiency of the evidence Defendants presented to the Court. Plaintiffs do not offer any evidence of their own that would demonstrate the Suite 480 exam rooms were changed in any material way during the relevant time period. Plaintiffs' vague attempts to poke holes in the record evidence are not compelling. Ultimately, I conclude the evidence demonstrates the Suite 480 exam rooms were not changed in any material way during the relevant period.

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[13] There is no "brown, grayish stripe" visible in the site inspection video. Mr. Frazier merely testified he remembered seeing a stripe. The Court notes Plaintiffs had a videographer present at the site inspection, but they did not submit their own video to the Court for consideration.

d) Evidence From Forensic Experts Shows the YouCut Video Metadata and Screenshot 1 and Screenshot 2 Could Be Unreliable; Otherwise, Evidence From These Experts Is Inconclusive

Before analyzing the forensic expert opinions, it is helpful to put their work in context. All parties and the experts agree to the following facts. First, the YouCut Video was found on Mr. Frazier's cellphone, but the original video files used to create the YouCut Video could not be located. Second, Screenshot 1 and Screenshot 2 (which appear to depict metadata about the original videos) were found on Mr. Frazier's cellphone.[14]

The two screenshots are important. Plaintiffs assert the two screenshots show Mr. Frazier recorded the original video files on February 25, 2020. Plaintiffs argue the screenshots support their claim the YouCut Video was recorded during the February 25, 2020 exam. Defendants argue the screenshots could have been easily manipulated and, therefore, provide little support for Plaintiffs' position. Defendants go further and argue if the YouCut Video was not recorded in Suite 480 on February 25, 2020, then the two screenshots are additional fabricated evidence meant to buttress the fabricated YouCut Video.

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[14] As noted, the screenshots are essentially digital photos of Mr. Frazier's device display on a particular occasion. These screenshots appear to show the device display while the user viewed file information about the original video files. Neither expert could find the original video files on Mr. Frazier's device.

Defendants' forensic expert, Mr. Rosado, explained how a user could have created the two screenshots to include false metadata about the original video files. He explained if a user manually reset the date on Mr. Frazier's device to February 25, 2020, before recording the original video files, the metadata for those files would show February 25, 2020, even though the videos were actually recorded on a different date. Any screenshot of the file information for the original video files would then show the artificially set date. Mr. Rosado performed a test on a cellphone identical to Mr. Frazier's to show how this fabrication could be accomplished. Mr. Rosado did not identify actual forensic evidence of metadata manipulation. Ultimately, Mr. Rosado maintains it is impossible to determine when the videos were recorded.[15]

Mr. Stafford agrees the relevant metadata associated with the original video files, as shown in the screenshots, could have been manipulated with a manual date and time reset. But Mr. Stafford identified no evidence the date and time were reset. In his own words, Mr. Stafford only performed a "cursory examination" for evidence of a manual date and time reset. Mr. Stafford did not perform

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[15] Mr. Rosado also opined the YouCut Video could not have been recorded in Suite 480, but I place little to no weight on this opinion. Mr. Rosado's opinion about the location of where the YouCut Video is based largely, if not exclusively, on witness testimony about the appearance of the Suite 480 exam rooms. There is no indication Mr. Rosado has any unique expert qualification that would allow him to offer insight into the disparities in the physical appearance of the exam rooms.

any testing to confirm he would in fact be able to identify evidence of manipulation. Ultimately, Mr. Stafford concludes Mr. Frazier recorded the original video or videos on the afternoon of February 25, 2020, and created the YouCut Video that same day. Mr. Stafford testified he could not confirm where the original videos were recorded.

Considering the forensic expert testimony, I conclude it is feasible Plaintiffs manipulated the metadata associated with the screenshots. However, I do not find either forensic expert offered any significant information about the likelihood manipulation actually occurred. Both experts agreed manipulation was possible through a manual date and time reset, but neither found evidence of a reset that would have resulted in inaccurate metadata in the screenshots. In terms of the location where the YouCut Video and the underlying videos were recorded, the forensic experts offer no additional helpful information.

2) Proposed Findings of Fact

Based on the record before me and the foregoing analysis, I propose the following findings of fact:

1. On February 25, 2020, Mr. Frazier, accompanied by Mrs. Frazier, appeared for a scheduled post-operative appointment with Dr. Stevenson at the SPGA-ENT offices at 3025 Shrine Road, Suite 480, Brunswick, Georgia.

2. Dr. Stevenson examined Mr. Frazier in exam room 1, 2, or 3 in Suite 480.

3. Plaintiffs produced the YouCut Video to Defendants during discovery on July 15, 2021.

4. The YouCut Video is an electronic file created using the YouCut video editing application.

5. The original video file or files used to create the YouCut Video were not produced by Plaintiffs in discovery. The original video file or files were deleted from Mr. Frazier's electronic device and are unrecoverable.

6. The YouCut Video shows Mr. Frazier in a room with at least two rectangular overhead light fixtures in the ceiling with a square vent between them, drawers with oval-shaped handles, and off-white walls.

7. On October 5, 2021, Suite 480 exam rooms 1, 2, and 3 each had one, single rectangular overhead light fixture in the ceiling with adjacent square air vents, drawers with square-shaped handles, and blue-green walls.

8. Suite 480 exam rooms 1, 2, and 3 did not materially change in appearance between February 25, 2020, and October 5, 2021.

9. Mr. Frazier did not record the YouCut Video or the videos used to make the

YouCut Video in Suite 480 on February 25, 2020.

LEGAL STANDARD

Courts have the inherent power to fashion appropriate sanctions for abuses of the judicial process, including the severe sanction of outright dismissal of a lawsuit. Chambers v. NASCO, Inc., 501 U.S. 32, 44–45 (1991). This authority is "governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases." Link v. Wabash R.R. Co., 370 U.S. 626, 630–31 (1962). Courts consistently use their inherent power to sanction parties who fabricate evidence. See, e.g., Gibson v. Wash Box, LLC, No. 1:17-CV-1965, 2019 WL 13330951, at *2 (N.D. Ga. Jan. 14, 2019) ("Sanctions based on a court's inherent power are 'most often invoked where a party commits perjury or destroys or doctors evidence.'" (quoting Qantum Commc'ns Corp. v. Star Broad., Inc., 473 F. Supp. 2d 1249, 1269 (S.D. Fla. 2007))); Vargas v. Peltz, 901 F. Supp. 1572, 1581 (S.D. Fla. 1995) (collecting cases).

Typically, a court can only exercise its inherent power if it finds a party acted in bad faith. Martin v. Automobili Lamborghini Exclusive, Inc., 307 F.3d 1332, 1335 (11th Cir. 2002). "Bad faith is defined as 'dishonesty of belief, purpose, or motive.'" Yates v. Cobb Cnty. Sch. Dist., No. 1:15-CV-3211, 2016 WL 11499651, at *2 (N.D. Ga. Feb. 3, 2016) (citing Black's Law Dictionary (10th Ed. 2014)). "[T]he concept of bad faith clearly embraces fabricating or destroying evidence and then lying

about doing so." Oniha v. Delta Airlines, Inc., No. 1:19-CV-05272, 2021 WL 4930127, at *4 (N.D. Ga. Sept. 13, 2021) (collecting cases), aff'd sub nom. Oniha v. Delta Air Lines, Inc., No. 21-13532, 2022 WL 580933 (11th Cir. Feb. 25, 2022).

Once a court determines misconduct has occurred, it must determine the appropriate sanction. Dismissal with prejudice is an extreme sanction. Before dismissing a case with prejudice as a sanction, a court must make two findings: "There must be both a clear record of willful conduct and a finding that lesser sanctions are inadequate." Zocaras v. Castro, 465 F.3d 479, 483 (11th Cir. 2006); Betty K Agencies, Ltd. v. M/V MONADA, 432 F.3d 1333, 1339 (11th Cir. 2005). "[W]illfulness generally connotes intentional action taken with at least callous indifference for the consequences." Jove Eng'g, Inc. v. I.R.S., 92 F.3d 1539, 1555 (11th Cir. 1996) (citing Sizzler Fam. Steak Houses v. W. Sizzlin Steak House, Inc., 793 F.2d 1529, 1535 (11th Cir. 1986)).

Dismissal with prejudice is an appropriate sanction for parties who fabricate critical evidence and who falsely testify about the fabrication of such evidence. See, e.g., Oniha, 2022 WL 580933, at *2 (affirming dismissal for "fabrication of critical evidence and false statements when questioned about that fabrication"); Qantum Commc'ns Corp. v. Star Broad., Inc., 473 F. Supp. 2d 1249, 1269 (S.D. Fla. 2007) ("[T]he need for sanctions is heightened when the misconduct relates to the pivotal or 'linchpin' issue in the case." (citing Vargas v. Peltz, 901 F. Supp. 1572, 1582 (S.D. Fla. 1995); and then citing Nichols v. Klein Tools, Inc.,

949 F.2d 1047, 1049 (8th Cir. 1991))); Neal v. IMC Holdings, Inc., No. 1:06-CV-3138, 2009 WL 10669622 (N.D. Ga. Mar. 31, 2009) (dismissing case because plaintiff produced an altered email from defendant in a sex discrimination and retaliation case, adding "*as a mother*" to a genuine email, so fabricated email evidence read: "Perhaps the commute to Chicago is not fitting into your lifestyle as a mother?") (emphasis added); cf. Ctr. for Individual Rts. v. Chevaldina, No. 16-CV-20905, 2021 WL 8774249 (S.D. Fla. Aug. 10, 2021) (denying motions for sanctions for fabricating evidence because fabricated evidence was relevant only to a dismissed counterclaim and had no bearing on the proceedings before the court). The Eleventh Circuit has explained dismissal with prejudice is more appropriate than dismissal without prejudice where the party (not counsel) fabricates evidence. See Betty K Agencies, 432 F.3d at 1338 (citing Gratton v. Great Am. Commc'ns, 178 F.3d 1373, 1375 (11th Cir. 1999)).

The evidentiary standard required for imposing a sanction of dismissal is somewhat unsettled, but courts in this Circuit typically require clear and convincing evidence of misconduct. Roche Diagnostics Corp. v. Priority Healthcare Corp., No. 2:18-CV-01479, 2020 WL 2308319, at *4 (N.D. Ala. May 8, 2020) (collecting cases) ("The Eleventh Circuit has not specified the appropriate evidentiary standard for a court to apply when exercising its inherent power to order case-ending sanctions pursuant to a party's misconduct."); see also In re Brican Am. LLC Equip. Lease Litig., 977 F. Supp. 2d 1287, 1293 n.6 (S.D. Fla. 2013) ("The Court therefore applies . . . the more exacting clear

and convincing evidence standard to the request for dispositive sanctions."), report and recommendation adopted, 2013 WL 12092311 (S.D. Fla. Nov. 15, 2013); JTR Enterprises, LLC v. Columbian Emeralds, 697 F. App'x 976 (11th Cir. 2017) (finding no error where district court applied clear and convincing evidence standard to deny motion for sanctions).

As movants, Defendants bear the burden to prove Plaintiffs submitted false evidence. See Geiger v. Carnival Corp., 16-24753-CV, 2017 WL 9362844, at *7 (S.D. Fla. Oct. 4, 2017) (citing Zocaras v. Castro, 465 F.3d 479, 483 (11th Cir. 2006)) (recommending the court deny a motion to dismiss for fraud because moving party failed to meet its burden), report and recommendation adopted, 2017 WL 9362843 (S.D. Fla. Oct. 31, 2017).

DISCUSSION

I. Defendants' Motion Is Properly Before the Court

Plaintiffs raise a threshold challenge and contend Defendants brought this Motion prematurely, without adequate conferral, and in bad faith. Doc. 194 at 7. Plaintiffs contend they should be awarded fees and costs for having to defend the Motion. Plaintiffs' challenge is baseless.

There was ample conferral before Defendants filed the Motion, Defendants timely filed it, and the Motion is meritorious. Defendants first notified

Plaintiffs about their concerns when Plaintiffs produced the YouCut Video over two years ago. Doc. 52. Defendants' counsel notified Plaintiffs' counsel over one year ago Defendants would seek relief for the YouCut Video on the theory the video was fabricated. Doc. 208-1 at 11. Defendants filed their Motion before the civil motions deadline expired. See Doc. 141.

Additionally, the parties have had sufficient opportunity to develop the record. Plaintiffs employed a video forensics and image analysis expert witness over two years ago, before they even produced the YouCut Video. The parties have had an opportunity to make discovery requests, subpoena witnesses, and question witnesses about the YouCut Video during the prolonged, two-year discovery period. Plaintiffs conducted a walk-though inspection of Suite 480 on October 5, 2021, nearly 18 months before Defendants filed their Motion. Defendants put Plaintiffs on notice more than 14 months before filing their Motion when Defendants first raised challenges about the authenticity of the YouCut Video. Doc. 91. In sum, Plaintiffs have had an extended amount of time address Defendants' arguments and develop the evidentiary record. Plaintiffs have not shown Defendants' Motion was premature, was pressed without adequate conferral, or filed in bad faith.

II. Plaintiffs Willfully Fabricated Evidence in Bad Faith[16]

Despite the extensive amount of litigation devoted to the YouCut Video and the lengthy discussion provided here, the current dispute centers on a simple, narrow question: Did Mr. Frazier record the YouCut Video (or, more specifically, the original videos used to make the YouCut Video) in Suite 480 on February 25, 2020? Plaintiffs insist he did. Defendants insist he did not. There is no middle ground. Neither party has offered any other plausible explanation.

Importantly, each party's position necessarily requires a finding the opposing party willfully fabricated evidence and acted in bad faith. If Plaintiffs are correct, then Defendants have engaged in a conspiracy to change the appearance of the Suite 480 exam rooms and cover up any evidence of that change through dishonest testimony and possible fabrication of documentary evidence. If Defendants are correct, then Plaintiffs willfully fabricated the YouCut Video, which would mean Plaintiffs staged the video, manufactured bloody, foreign items, and falsely testified about the fabrication.

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[16] A court typically may only impose sanctions under its inherent authority where there is a finding of bad faith. See Martin, 307 F.3d at 1335. Additionally, in order to impose a sanction of dismissal with prejudice, a court must find the sanctioned party's conduct was willful. See Zocaras, 465 F.3d at 483. In this matter, the bad faith and willful inquiries are largely coextensive. If Plaintiffs fabricated the YouCut Video, then they did so both willfully and in bad faith. Therefore, I address both inquiries together.

Having considered the entire record in this matter, I find by clear and convincing evidence Mr. Frazier did not record the original videos used to make the YouCut Video in a Suite 480 exam room on February 25, 2020. Dr. Stevenson examined Mr. Frazier in Suite 480 on February 25, 2020, in exam room 1, 2, or 3. The appearance of Suite 480 exam rooms and the appearance of the room in the YouCut Video are plainly different in several material ways. The appearance of the exam rooms in Suite 480 has not changed since February 25, 2020, when Plaintiffs say Mr. Frazier recorded the video. Plaintiffs have not presented any objective evidence to explain the differences in appearance between the room shown in the YouCut Video and the exam rooms in Suite 480. Based solely on the physical appearance of the various rooms, I would find by clear and convincing evidence Mr. Frazier did not record the videos used to make the YouCut Video in Suite 480 on February 25, 2020.

But there is other evidence, beyond the differences in the physical appearance of the exam rooms, that supports my conclusion. Plaintiffs' own medical expert expressed doubt that all the materials visible in the YouCut Video could have been removed from Mr. Frazier's nose. Even so, Plaintiffs maintain even more materials were removed from Mr. Frazier's nose, but the materials are not visible in the video. The fact that Plaintiffs' own medical expert doubts Plaintiffs' representations about what is shown in the video seriously undermines Plaintiffs' claims about the authenticity of the video. I have also considered evidence provided by the forensic experts. The forensic experts provide little helpful information

about exactly where and when the YouCut Video was recorded, but the one thing they agree on is the metadata Plaintiffs relied on could be fabricated and relatively easily so. The ease with which Plaintiffs could falsify metadata in support of their fabrication of video evidence supports my conclusion.

Because I conclude the YouCut Video was not recorded in Suite 480 on February 25, 2020, and Plaintiffs have not offered any other plausible explanation for the origin of the YouCut Video, I necessarily must conclude Plaintiffs willfully fabricated the YouCut Video in bad faith. Obviously, the YouCut Video could not have been created by accident. Mr. Frazier deliberately recorded himself and the purported bloody, foreign materials at some unknown location on some unknown date. There is no suggestion Mr. Frazier attended some other legitimate medical procedure, recorded the YouCut Video during that procedure, and then passed it off as a recording from the February 25, 2020 exam by Dr. Stevenson. Therefore, the only plausible explanation is Mr. and Mrs. Frazier deliberately staged the YouCut Video scene and created fake, bloody foreign items, all for the purpose of manufacturing evidence to use in this case against Defendants. Plaintiffs' conduct was plainly willful and done in bad faith.

Unfortunately, the misconduct goes further. At some point, the original video files were deleted, forever destroying critical metadata, and the YouCut Video was created. Screenshot 1 and Screenshot 2 were inexplicably created, which purport to show metadata from the original files.

The experts agree the metadata that have been provided could be faked, and, possibly, easily so. Given the conclusions above, the destruction of the original video files and the creation of the screenshots are entirely consistent with a deliberate effort to cover up the initial fabrication. Indeed, the creation of the screenshots is particularly troubling. Plaintiffs created screenshots showing the original video file metadata in an effort to reinforce the fabricated YouCut Video, knowing the dates shown in the screenshots were false, and then offered those screenshots into evidence to obscure the initial fabrication. To make matters worse, Plaintiffs appeared at depositions and the evidentiary hearing before the Court and testified under oath about the creation of these items, further doubling down on their willful misconduct. This is bad faith and willful misconduct of the highest order and warrants the imposition of serious sanctions.

In defense to the allegations of misconduct, Plaintiffs generally question the sufficiency of the evidence of their misconduct but offer little in the way of their own explanation or evidence. As set forth above, the evidence of misconduct is substantial and is more than adequate to support a finding of willful, bad faith misconduct by clear and convincing evidence. Plaintiffs' attempts to point to minor gaps in the evidentiary record do not undermine this conclusion.

Plaintiffs vaguely assert two alternative theories for the obvious differences in the appearance of the room in the YouCut Video and the Suite 480 exam rooms: (1) Dr. Stevenson examined Mr. Frazier in

a different location with a different appearance than his exam rooms 1, 2, or 3; or (2) the appearance of the Suite 480 exam rooms materially changed between February 25, 2020 and October 5, 2021, when Plaintiffs conducted their inspection. At the evidentiary hearing in this matter, Plaintiffs' counsel was equivocal about which of the two explanations is the actual explanation, suggesting either explanation was possible. But Plaintiffs and their counsel were unable to point to any compelling evidence that supported either of these two theories, and, instead, relied on speculation. Regardless, neither of these theories are supported by any evidence, and the Court should reject them.

Plaintiffs' overall defense to the allegations of misconduct is built on a web of coincidences and assumptions that are too farfetched to believe. Plaintiffs suggest on February 25, 2020, Dr. Stevenson examined Mr. Frazier in an exam room in Suite 480, but not one of Dr. Stevenson's ordinary exam rooms, and the room used looked materially different from the ordinary exam rooms. Or, perhaps, the exam occurred in one of the ordinary exam rooms, but Dr. Stevenson and numerous SGHS employees conspired to make radical renovations to the exam rooms after the examination, and then covered up and lied about the renovations. Regardless, during the exam—but not when Dr. Stevenson or any other SGHS employee was present—Mr. Frazier recorded direct evidence of Dr. Stevenson's malpractice. Despite the importance of the recording, Mr. Frazier destroyed the original video files, severely hindering the ability to investigate and evaluate

the authenticity of the recordings. Then Plaintiffs filed this suit but did not mention the critical video for the first several months of the litigation. Plaintiffs then fiercely opposed any forensic examination of Mr. Frazier's cellphone, despite arguing the deletion was an innocent mistake. Now Plaintiffs are noncommittal on what actually happened, suggesting they are merely victims of circumstances. Plaintiffs' theories are implausible on their face and are simply incredible when compared to the substantial evidence Defendants presented.

Ultimately, I find by clear and convincing evidence Mr. and Mrs. Frazier willfully fabricated video evidence in bad faith to bolster a pivotal claim in this case.[17] Therefore, the imposition of sanctions is appropriate.

However, I do not find Plaintiffs' counsel, Mr. Thomas, engaged in willful or bad faith misconduct. Mr. Thomas has repeatedly asserted the YouCut Video is authentic and defended Plaintiffs' reliance on the video. That position appears to be motivated by Mr. Thomas's earnest

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[1] Plaintiffs have suggested the Court already determined they did not act in bad faith. That is incorrect. Defendants previously moved the Court to sanction Plaintiffs for failing to timely produce original video files. I denied Defendants' motion and found Plaintiffs had "not acted evasively or in bad faith" in failing to produce the original video files because the original files no longer exist. Doc. 58 at 7. That ruling only concerned whether Plaintiffs had complied with their discovery obligations and is not analogous to, or binding on, the issue addressed in this Report. Defendants now raise a different challenge and rely on different—and far more extensive—evidence.

belief in his clients. While not all lawyers would persist in advocating for their clients in circumstances like these, this does not mean Mr. Thomas knowingly engaged in or perpetuated Plaintiffs' misconduct. Indeed, there is no evidence Mr. Thomas engaged in any misconduct.

III. Sanctions Less Than Dismissal Are Not Appropriate

The parties take an all-or-nothing approach to sanctions. At the September 18, 2023 evidentiary hearing, Defendants' counsel argued dismissal with prejudice is the only appropriate sanction. Plaintiffs' counsel argued it would be inappropriate for the Court to impose any sanctions. Even when Plaintiffs' counsel was pressed to assume for argument's sake Plaintiffs engaged in willful, bad faith conduct, counsel did not propose any sanction short of dismissal with prejudice.

Lesser sanctions—i.e., sanctions short of dismissal with prejudice—might include monetary sanctions, exclusion of the YouCut Video, adverse jury instructions, striking Plaintiffs' Complaint, or dismissal without prejudice. None of these lesser sanctions are appropriate in these circumstances. Dismissal with prejudice is the only appropriate sanction.

Courts simply cannot tolerate deliberate attempts by parties to present fabricated evidence, especially image and video evidence. "The American judicial system depends on the integrity of the participants, who seek the truth through the adversarial but good-faith presentation of

arguments and evidence." Roche Diagnostics Corp., 2020 WL 2308319, at *1. "The federal case law is well established that dismissal is the appropriate sanction where a party manufactures evidence which purports to corroborate its substantive claims." Vargas, 901 F. Supp. at 1581 (collecting cases).

The severity of Plaintiffs' misconduct plainly warrants dismissal with prejudice as a sanction. Dismissal with prejudice is appropriate because Mr. and Mrs. Frazier fabricated the YouCut Video. Mr. and Mrs. Frazier testified at depositions under oath the YouCut Video was recorded in Suite 480 on February 25, 2020. That testimony was false. Mr. Frazier recorded the YouCut Video in a place other than Suite 480 with the deliberate intent to fabricate evidence. Mr. Frazier then edited the video and destroyed the original video files. Plaintiffs conducted a site inspection and observed the differences between Suite 480 and the place where Mr. Frazier recorded the YouCut Video. Even after being confronted with glaring contradictory evidence, Plaintiffs did not attempt to withdraw the video or provide a plausible explanation for the differences. Instead, Mr. and Mrs. Frazier testified under oath again, this time in open court, the video was filmed in Suite 480 on February 25, 2020. Mr. and Mrs. Frazier's efforts to fabricate the YouCut Video and to falsely testify to its authenticity weigh strongly in favor of the harsh sanction of dismissal with prejudice.

Plaintiffs' misconduct has caused Defendants significant unfair prejudice. This prejudice supports dismissal with prejudice and cannot be

remedied with lesser sanctions. This case has been litigated for more than two and a half years. A large portion of that litigation concerns the events of February 25, 2020, and the YouCut Video. Defendants have expended significant resources investigating Plaintiffs' claims and evidence. It would be unjust to subject Defendants to continued litigation costs when they have already expended so much to counter Plaintiffs' misconduct.

Lesser sanctions that would involve this case going forward in any form would be inadequate for protecting this Court's integrity. Dismissal with prejudice as a 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, which otherwise 'cannot command respect if they cannot maintain a level playing field amongst participants.'" Chemtall, Inc. v. Citi-Chem, Inc., 992 F. Supp. 1390, 1409 (S.D. Ga. 1998) (citing Derzack v. County of Allegheny, 173 F.R.D. 400, 414 (W.D. Pa. 1996)). Allowing Plaintiffs to pursue these claims further would threaten the integrity of the Court, given Plaintiffs' demonstrated disregard for this institution. See Oniha, 2022 WL 580933, at *2 (holding "no sanction short of complete dismissal would be sufficient to deter future misconduct and 'vindicat[e] judicial authority'" where plaintiff fabricated evidence and lied about it) (alteration in original) (citing Chambers v. NASCO, Inc., 501 U.S. 32, 46 (1991)). Given the fabrication of such significant evidence, all of Plaintiffs' other allegations and evidence would necessarily be suspect, exponentially expanding this litigation.

Dismissal of Plaintiffs' case with prejudice would also deter others from engaging in similar misconduct. Plaintiffs' conduct "so violates the judicial process that imposition of a harsh penalty is appropriate not only to reprimand the offender, but also to deter future parties from trampling upon the integrity of the court." Parcher v. Gee, No. 8:09-CV-857, 2016 WL 7446630, at *12 (M.D. Fla. Oct. 19, 2016) (citing Zocaras, 465 F.3d at 484), report and recommendation adopted, 2016 WL 7440922 (M.D. Fla. Dec. 27, 2016). Image and video evidence is ubiquitous and often highly persuasive. Technological advancements continually increase the risk of fabrication of such evidence. Therefore, when confronted with fabrication of video and image evidence, the Court should take appropriate steps to deter others from engaging in similar misconduct. This need for deterrence further supports dismissing Plaintiffs' claims with prejudice as a sanction.

In sum, I have considered other, lesser sanctions, but I find them inadequate. Plaintiffs willfully fabricated video evidence in bad faith, and dismissal with prejudice is the only adequate remedy.

CONCLUSION

For the reasons described above, I **RECOMMEND** the Court **GRANT** Defendants' Motion and **DISMISS with prejudice** Plaintiffs' Complaint.

Any objections to this Report and Recommendation shall be filed within 14 days of today's date. Objections shall be specific and in writing. "Parties filing objections to a magistrate's report and recommendation must specifically identify those findings objected to." Marsden v. Moore, 847 F.2d 1536, 1548 (11th Cir.1988). Failure to file timely, written objections will bar any later challenge or review of the Magistrate Judge's factual findings and legal conclusions. 28 U.S.C. § 636(b)(1)(C); Harrigan v. Metro Dade Police Dep't Station #4, 977 F.3d 1185, 1192–93 (11th Cir. 2020). To be clear, a party waives all rights to challenge the Magistrate Judge's factual findings and legal conclusions on appeal by failing to file timely, written objections. Harrigan, 977 F.3d at 1192–93; 11th Cir. R. 3-1. A copy of the objections must be served upon all other parties to the action.

Upon receipt of Objections meeting the specificity requirement set out above, a United States District Judge will make a de novo determination of those portions of the report, proposed findings, or recommendation to which objection is made and may accept, reject, or modify in whole or in part, the findings or recommendations made by the Magistrate Judge. Objections not meeting the specificity requirement set out above will not be considered by a District Judge. A party may not appeal a Magistrate Judge's report and recommendation directly to the United States Court of Appeals for the Eleventh Circuit. Appeals may be made only from a final judgment entered by or at the direction of a District Judge.

SO REPORTED AND RECOMMENDED, this 8th day of November, 2023.

__/s/ B. Cheesbro_____
BENJAMIN W. CHEESBRO
UNITED STATES MAGISTRATE JUDGE
SOUTHERN DISTRICT OF GEORGIA

In the United States District Court
for the Southern District of Georgia
Brunswick Division

2:21-CV-21

CEDRICK FRAZIER, and TAMARA FRAZIER,
Plaintiffs,

v.

SOUTHEAST GEORGIA HEALTH SYSTEM, INC.,
et al., Defendants.

ORDER

Before the Court are Defendants' partial motions for summary judgment. Dkt. Nos. 181, 182. The motions have been fully briefed and are ripe for review. Dkt. Nos. 181-1, 182-1, 183, 201, 202, 213, 214, 217, 220, 221. For the reasons stated below, Defendants' motions are **GRANTED**.

BACKGROUND

This case arises out of Plaintiff Cedrick Frazier's surgery and post-operation treatment at Southeast Georgia Health System, Inc. ("SGHS"), in January and February of 2020. Dkt. No. 77.

On December 27, 2019, Defendant Dr. Sherman Stevenson examined Mr. Frazier and diagnosed him with a severe left-sided deviated septum. Dkt. No. 181-2 at 18:63:11-22; Dkt. No. 181-15 at 78 (hospital records showing Dr. Stevenson's notes

from this visit stating his examination of Mr. Frazier's nose revealed "[s]evere left-sided deviated septum obstructing greater than 90% of the view by anterior rhinoscopy, turbinate hypertrophy bilaterally").

Plaintiff Tamara Frazier, Mr. Frazier's wife, accompanied Mr. Frazier to the December 27, 2019 visit. Dkt. No. 181-13 at 10:32:16-22. Mrs. Frazier recalls that Dr. Stevenson used a headlight to look into her husband's mouth and down his throat. Id. at 10:33:6-13. Plaintiffs do not recall everything Dr. Stevenson said during the December 27, 2019 visit, but they do remember Dr. Stevenson explaining that Mr. Frazier could continue using medications to try to get some relief but that the better option might be a septoplasty and reduction of inferior turbinates. Dkt. No. 181-2 at 18:65:15-66:21; Dkt. No. 181-13 at 10:33:15- 11:35:6; Dkt. No. 77 ¶ 19; Dkt. No. 181-14 at 25:97:10-19 (Dr. Stevenson's testifying that during the December 27, 2019 visit, he verbally reviewed Mr. Frazier's diagnosis which required the recommended surgical procedure).

During the December 27, 2019 visit, Dr. Stevenson verbally reviewed both Mr. Frazier's diagnosis and the nature and purpose of the procedure with Plaintiffs. Dkt. No. 181-1 ¶ 47; Dkt. No. 201-1 ¶ 47. Dr. Stevenson testified that during this visit, he also reviewed the material risks of the procedure, including risks of infection and bleeding, temporary pain and numbness around the front of the nose, teeth, and lips, and the risks of anesthesia that the anesthesiologist also typically reviews with the patient on the day of surgery along with an additional anesthesiology

consent. Dkt. No. 181-14 at 19:75:22-76:10, 20:77:2-20, 30:119:4- 5, 30:117:18-119:3, 31:122:25-123:15. Dr. Stevenson also testified that he reviewed the likelihood of success of the procedure, the practical alternatives to the procedure, and Mr. Frazier's prognosis if he rejected the procedure. Id. at 25:97:10- 19, 26:102:7-103:18. Plaintiffs, however, dispute whether Dr. Stevenson orally reviewed the material risks of the procedure, but, ultimately, do not recall everything Dr. Stevenson said during this visit. Dkt. No. 181-2 at 11:35:9-15.

Mr. Frazier underwent the septoplasty and inferior turbinate reduction procedure on January 21, 2020. Dkt. No. 181-2 at 8:19- 21. That day, before the surgery took place, Mr. Frazier signed the Patient Consent for Anesthesia ("Anesthesia Consent Form") after reading and discussing it with nurse Rachel Faircloth and anesthesiologist Dr. Kristin West. Dkt. No. 181-2 at 23:84:3- 85:12, 23:85:13-24:88:22.

At that same time, Mr. Frazier also signed Defendants' Informed Consent for Procedure Form ("Informed Consent Form"). Id. at 2-3; see also Dkt. No. 181-16 (Informed Consent Form showing that Mr. Frazier and Nurse Faircloth signed it at approximately 11:01 a.m. on January 21, 2020). However, Mr. Frazier claims that Nurse Faircloth explained that the form, titled "Southeast Georgia Health System Informed Consent for Procedure/Treatment[,]" was only for the purpose of administering Mr. Frazier medication to help bring his pulse rate down on the day of surgery. Dkt. No. 181-2 at 18:64:11-65:5. Mr. Frazier further contends Nurse Faircloth presented him only the

second page of the Informed Consent Form and that he did not see the first page. Id. 20:71:16- 72:4, 21:76:19-77:2. Mr. Frazier saw Dr. Stevenson in the pre-operation area before his surgery but contends that when he saw Dr. Stevenson, Mr. Frazier was "medicated" and getting drowsy. Id. at 23:83:5-84:2. Plaintiffs contend that because of the surgery, Mr. Frazier "suffers with chronic pain syndrome within the setting of trigeminal neuralgia, front teeth numbness, persistent headaches, nasofacial pain episodes," and nosebleeds. Dkt. No. 77 ¶¶ 16, 31. On at least two occasions, on April 20, 2020, and October 26, 2020, Plaintiffs requested from Defendants copies of Mr. Frazier's medical records. Dkt. No. 77 ¶¶ 126, 132. Requests for medical records are handled by the Medical Records and Resource Management department. Dkt. No. 83-3. Plaintiffs contend that the medical records Defendants' produced in response to their requests were fabricated, incomplete, and not provided in the time required by Georgia law. Dkt. No. 77 ¶¶ 100-13, 125-35.

In their second amended complaint brought against Defendants SGHS, Dr. Stevenson, and Cooperative Healthcare Services, Inc. (doing business as Southeast Georgia Physician Associates-Ear, Nose & Throat), Plaintiffs allege Defendants committed professional negligence, failed to acquire informed consent, committed fraud, and altered and fabricated portions of Mr. Frazier's medical records. Dkt. No. 77. Defendants now move for partial summary judgment on Plaintiffs' claims in two separate motions. Dkt. Nos. 181, 182. In the first motion, Defendants argue they satisfied the legal requirements for

informed consent. Dkt. No. 181-1 at 14-25. In the second, Defendants argue Plaintiffs' claims under the Health Insurance Portability and Accountability Act of 1996 ("HIPPA") and O.C.G.A. § 31-33-2 ("Records Claims") fail as a matter of law, and that they are entitled to partial summary judgment on Plaintiffs' punitive damages claims. Dkt. No. 183 at 3-11.

LEGAL STANDARD

Summary judgment "shall" be granted if "the movant shows that there is no genuine dispute as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A dispute is "genuine" where the evidence would allow "a reasonable jury to return a verdict for the nonmoving party." FindWhat Inv. Grp. v. FindWhat.com, 658 F.3d 1282, 1307 (11th Cir. 2011) (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986)). A fact is "material" only if it "might affect the outcome of the suit under the governing law." Id. (quoting Anderson, 477 U.S. at 248). Factual disputes that are "irrelevant or unnecessary" are not sufficient to survive summary judgment. Anderson, 477 U.S. at 248.

The moving party bears the initial burden of demonstrating the absence of a genuine issue of material fact. See Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). The movant must show the court that there is an absence of evidence to support the nonmoving party's case. See id. at 325.

If the moving party discharges this burden, the burden shifts to the nonmovant to go beyond the pleadings and present affirmative evidence to show that a genuine issue of fact does exist. See Anderson, 477 U.S. at 257. The nonmovant may satisfy this burden in one of two ways. First, the nonmovant "may show that the record in fact contains supporting evidence, sufficient to withstand a directed verdict motion, which was 'overlooked or ignored' by the moving party, who has thus failed to meet the initial burden of showing an absence of evidence." Fitzpatrick v. City of Atlanta, 2 F.3d 1112, 1116 (11th Cir. 1993) (quoting Celotex Corp., 477 U.S. at 332 (Brennan, J., dissenting)). Second, the nonmovant "may come forward with additional evidence sufficient to withstand a directed verdict motion at trial based on the alleged evidentiary deficiency." Id. at 1117. Where the nonmovant attempts to carry this burden with nothing more "than a repetition of his conclusional allegations, summary judgment for the [movant is] not only proper but required." Morris v. Ross, 663 F.2d 1032, 1033- 34 (11th Cir. 1981) (citing Fed. R. Civ. P. 56(e)).

DISCUSSION

I. Defendants are entitled to summary judgment on Plaintiffs' Informed Consent claims.

Defendants are entitled to summary judgment on Plaintiffs' informed consent claims because there is no genuine issue of material fact regarding Defendants' compliance with Georgia's informed consent statute. Dkt. No. 181-1 at 15-16. Plaintiffs

insist Defendants failed to apprise Mr. Frazier of the information required by O.C.G.A. § 31-9.6.1(a) ("Informed Consent Statute") because Defendants' Informed Consent Form "does not meet the requirements under the Georgia informed consent law and Rules of Georgia Composite Medical Board at Chapter 360-14, including Exhibit (360-14) B." Dkt. No. 77 ¶¶ 69-80, 104.

As an initial matter, during a hearing before the Court, Plaintiffs conceded that Defendants' Informed Consent Form is consistent with the Informed Consent Statute. Dkt. No. 219. Accordingly, there is no genuine issue of material fact regarding the sufficiency of Defendants' Informed Consent Form.

Furthermore, Plaintiffs fail to show there is a genuine issue of material fact on their claim that Defendants failed to provide the Informed Consent Statute's required disclosures.

The Informed Consent Statute provides: "any person who undergoes any surgical procedure under general anesthesia, spinal anesthesia, or major regional anesthesia . . . must consent to such procedure and shall be informed in general terms of the following:

> (1) A diagnosis of the patient's condition requiring such proposed surgical or diagnostic procedure;
>
> (2) The nature and purpose of such proposed surgical or diagnostic procedure;

> (3) The material risks generally recognized and accepted by reasonably prudent physicians of infection, allergic reaction, severe loss of blood, loss or loss of function of any limb or organ, paralysis or partial paralysis, paraplegia or quadriplegia, disfiguring scar, brain damage, cardiac arrest, or death involved in such proposed surgical or diagnostic procedure which, if disclosed to a reasonably prudent person in the patient's position, could reasonably be expected to cause such prudent person to decline such proposed surgical or diagnostic procedure on the basis of the material risk of injury that could result from such proposed surgical or diagnostic procedure;
>
> (4) The likelihood of success of such proposed surgical or diagnostic procedure;
>
> (5) The practical alternatives to such proposed surgical or diagnostic procedure which are generally recognized and accepted by reasonably prudent physicians; and
>
> (6) The prognosis of the patient's condition if such proposed surgical or diagnostic procedure is rejected.

O.C.G.A. § 31-9-6.1(a).

The Informed Consent Statute "does not impose a general requirement of disclosure upon physicians; rather, it requires physicians to disclose only those factors listed." Blotner v. Doreika, 678 S.E.2d 80, 81 (Ga. 2009) (citing Albany Urology Clinic v. Cleveland, 528 S.E.2d 777, 780 (Ga. 2000)). There is no "common law duty to inform patients of the material risks of a proposed treatment or procedure" aside from what is explicitly required under the Informed Consent Statute. Id. at 80. Moreover, the Informed Consent Statute "must be strictly construed and cannot be extended beyond its plain and explicit terms," meaning there can be no "impermissibly expanded[,] . . . judicially-created[ ] duty of disclosure." Id. at 81.

The Informed Consent Statute provides for an action for medical malpractice, as defined in O.C.G.A. § 9-3-70, upon a showing:

> (1) That the patient suffered an injury which was proximately caused by the surgical or diagnostic procedure;
>
> (2) That information concerning the injury suffered was not disclosed as required by this Code section; and
>
> (3) That a reasonably prudent patient would have refused the surgical or diagnostic procedure or would have chosen a practical alternative to such proposed surgical or diagnostic procedure if such information had been disclosed; provided, however,

> that, as to an allegation of negligence for failure to comply with the requirements of this Code section, the expert's affidavit required by Code Section 9-11-9.1 shall set forth that the patient suffered an injury which was proximately caused by the surgical or diagnostic procedure and that such injury was a material risk required to be disclosed under this Code section.

O.C.G.A. § 31-9-6.1(d).

So, "[s]trictly construing section (d) of Georgia's informed consent statute, the statute contemplates a cause of action based on an injury from an undisclosed material risk of the procedure." Callaway v. O'Connell, 44 F. Supp. 3d 1316, 1329 (M.D. Ga. 2014). "This is apparent from reading subsection (d)(2), requiring an injury resulting from information that was not disclosed, with the requirement that an expert testify that such injury was caused by a material risk required to be disclosed pursuant to subsection (a)(3)." Id.

Further, the Informed Consent Statute enumerates the types of material risks requiring disclosure. See O.C.G.A. § 31-9- 6.1(a)(3). So, if the Informed Consent Statute did not require disclosure of the allegedly non-disclosed risks, then, plainly, a failure to disclose them does not constitute a violation of the Informed Consent Statute. See Callaway, 44 F. Supp. 3d at 1330 ("If a fistula does not fall within this category, however, then failure to disclose that risk cannot be the basis

of an informed consent claim because it is not one of the enumerated risks in the statute."). Moreover, a claim based solely on the alleged failure to disclose "practical alternatives" also fails as a matter of law. Id. at 329-30.

Even assuming Plaintiffs' alleged non-disclosed risks fall into one of the enumerated material risks of the Informed Consent Statute, the record evidence does not show Defendants failed to disclose those required material risks. The undisputed evidence shows that Mr. Frazier signed the Informed Consent Form that all agree complies with the Informed Consent Statute and that Mr. Frazier signed the Anesthesia Consent Form as well. See Dkt. No. 181-16.

Defendants' Informed Consent Form states, in pertinent part,

> (physician/practitioner) has discussed with me the reasons, anticipated benefits of this procedure/treatment, the probability of its success and the possible consequences of not having this procedure/treatment. I further understand that any operation or procedure and recuperation involve some risks and hazards. I have been made aware of the risks associated with this particular operation or procedure. This authorization is given with the understanding that the practice of medicine and surgery is not an exact science and no guarantees

> have been made to me by anyone as to the results of the procedure/treatment. I recognize that during the course of treatment(s) or procedure(s), unforeseen conditions may necessitate additional or different procedures or treatments than those set forth above[.] I, therefore, further authorize and request that my physician and the appropriate staff perform such procedures or treatments as are deemed necessary.

Id. at 2. Defendants' Informed Consent Form also includes notices, including those for "surgical tasks," informing Plaintiffs that other surgeons and practitioners may be performing aspects of the surgery, SGHS's "tissue disposal" procedure, the requirement that "implants and devices [will be] implanted during the operation/procedure," the "allograft consent" for use of donated bone or tissue products, and the acknowledgment of the use of and risks associated with "blood transfusion." Id. at 2-3.

Defendants' Informed Consent Form concludes with a section titled "Patient Consent," which states,

> I acknowledge that I have had the opportunity to discuss my condition, proposed treatment, concerns or questions with my physician/practitioner, including risks, benefits and alternative

> treatments. I have been given enough information, have had my questions answered, have adequate knowledge to make an informed decision and wish to proceed with the proposed treatment/procedure. I have read and understand this form and I voluntarily authorize and consent to the operation or procedure.

Id. at 3.

Moreover, Defendants' Anesthesia Consent Form explains that anesthesia is necessary for the underlying surgical procedure and describes the purpose and use of anesthesia generally and the method by which it would be administered during the procedure. Dkt. No. 181-16 at 4. The Anesthesia Consent Form also defines the various types of anesthesia and outlines the "risks and complications" associated with using anesthesia, including, but "not limited to:"

> Allergic/adverse reaction, aspiration, backache, brain damage, coma, dental injury, headache, inability to reverse the effects of anesthesia, infection, localized swelling and/or redness, muscle aches, nausea, ophthalmic (eye) injury, pain, paralysis, pneumonia, positional nerve injury, recall of sound/noise/speech by others, seizures, sore throat, and death.

Id.

So, Defendants' Informed Consent Form states, in short, that Mr. Frazier, through his signature, understands that the elements of O.C.G.A. § 31-9-6.1 have been met. As a result, under Georgia law, there is a rebuttable presumption of informed consent. See O.C.G.A. § 31-9-6.1 ("If a consent to a diagnostic or surgical procedure is required to be obtained under this Code section and such consent discloses in general terms the information required in subsection (a) of this Code section, is duly evidenced in writing, and is signed by the patient or other person or persons authorized to consent pursuant to the terms of this chapter, then such consent shall be rebuttably presumed to be a valid consent.").

Moreover, Plaintiffs fail to identify any evidence in the record to support their argument that Mr. Frazier was already under anesthesia when he signed Defendants' Informed Consent Form. Mr. Frazier's deposition testimony does not say any anesthesia or medication that affects his cognition was administered before Mr. Frazier signed the Informed Consent Form. Instead, Mr. Frazier's deposition testimony shows that Nurse Faircloth at least showed Mr. Frazier the second page of the Informed Consent Form, which Mr. Frazier signed, and which Mr. Frazier contends was presented "to get medication –- to allow for her to give [Mr. Frazier] medication to bring [his] pulse rate down and help [Mr. Frazier] relax." Dkt. No. 181-2 at 20:71:6-72:2. Mr. Frazier further testified that he saw only the second page of Defendants' Informed Consent Form and that, while he agrees he signed the second page, he says he did not read it because of Nurse Faircloth's representation to him that the

second page of Defendants' Informed Consent Form was solely to allow her to administer "medication to bring [his] pulse rate down and to help [him] relax." Dkt. No. 181-2 at 20:71:16-72:4; see id. at 20-23. When asked whether Mr. Frazier recalls if Dr. Stevenson saw him before the operation and asked him if he had any questions, Mr. Frazier testified, "[a]t that point I was medicated and I was -- I remember getting drowsy. I remember him leaving out of the room because I thought to myself, well, certainly he's going to come back in and wake me up and let me speak with him." Id. at 23:83:5-84:2. The only other mention of anesthesia during Mr. Frazier's deposition is as follows:

> Q. Okay. After you got in the operating room, you were taken to the operating room, do you recall -- what do you recall? Let's ask it that way.
>
> A. After I was taken into the operating room I don't recall because I started drifting off and the -- I think I was drifting off by the time I got there.
>
> Q. Okay. So you believe you were given something to anesthetize you or start that process before you were taken into the operating room?
>
> A. Yes, sir.

Dkt. No. 181-2 at 24:90:4-14.

Mr. Frazier's deposition testimony does not show, as Plaintiffs argue, that he was provided

with anesthesia before he signed Defendants' Anesthesia Consent Form and the second page of Defendants' Informed Consent Form. All Mr. Frazier's testimony shows is that he believes he was "given something to anesthetize" him before he was taken into the operating room. Id. It says nothing about being given any anesthesia or other medication that affects cognition before he signed either form. Id. Consequently, Plaintiffs fail to support their contention that Mr. Frazier was under anesthesia or medication when he signed either form.

Finally, Plaintiffs' argument that Mr. Frazier saw only the second page of Defendants' Informed Consent Form is insufficient to show a genuine issue of material fact. Under Georgia law, "[a] consent to surgical or medical treatment which discloses in general terms the treatment or course of treatment in connection with which it is given and which is duly evidenced in writing and signed by the patient or other person or persons authorized to consent pursuant to the terms of this chapter shall be conclusively presumed to be a valid consent in the absence of fraudulent misrepresentations of material facts in obtaining the same." See Harris v. Tatum, 455 S.E.2d 124, 127 (Ga. Ct. App. 1995). That rebuttable presumption applies even where the signer claims they did not read the consent form in full. Winfrey v. Citizens & S. Nat'l Bank, 254 S.E.2d 725, 727 (Ga. Ct. App. 1979) ("Because no legally sufficient excuse appears, appellant is bound by the consent document in spite of her failure to read it."); Cf. Gill Plumbing Co. v. Jimenez, 714 S.E.2d 342, 350 (Ga. Ct. App. 2011) ("One signing a document has a duty

to read it and is bound by the terms of a document he does not read . . . . This is true even if the signer cannot read, because in that circumstance the signer has a duty "to procure some reliable person to read and explain it to him." (first quoting Pioneer Concrete Pumping Serv. v. T & B Scottdale Contractors, 462 S.E.2d 627 (Ga. Ct. App. 1995) (citation and punctuation omitted), and then quoting Brewer v. Royal Ins. Co. of Am., 641 S.E.2d 291 (Ga. Ct. App. 2007) (citation and punctuation omitted))). Notably, the top right corner of the second page of Defendants' Informed Consent Form—bearing Mr. Frazier's signature— reads "SOUTHEAST GEORGIA HEALTH SYSTEM CONSENT FOR PROCEDURE Pg 2 of 2." Dkt. No. 181-16 at 3. Therefore, Mr. Frazier contends, at best, that he overlooked the inscription indicating he was signing the second page of the Informed Consent Form. Even taken in the light most favorable to Plaintiffs, that Mr. Frazier did not see the first page is due to his own oversight. Winfrey, 254 S.E.2d at 727.

Plaintiffs concede Defendants' Informed Consent Form lines up with statutory requirements. What's more, Mr. Frazier signed both the Informed Consent Form and the Anesthesia Consent Form. See Dkt. No. 181-16. So, without any legal excuse, Plaintiffs are bound by the signed Informed Consent and Anesthesia Consent Forms despite Mr. Frazier's own failure to read the former in full.

Accordingly, Defendants are entitled to summary judgment on Plaintiffs' claims in Counts I and VI, and portions of Counts III, IV, V, and IX

filed pursuant to the Georgia Informed Consent Statute.

II. Defendants are entitled to summary judgment on Plaintiffs' Records Claims.

Defendants contend Plaintiffs' Records Claims (Counts VI, VII, VIII,[1] X, XI, and XII) fail as a matter of law because neither HIPAA nor O.C.G.A. § 31-33-2 "creates or supports a private cause of action." Dkt. No. 220 at 2.

A. HIPAA

As an initial matter, to the extent Plaintiffs allege HIPAA violations, those claims necessarily fail because there is no private right of action under HIPAA.[2] Laster v. CareConnect Health Inc., 852 F. App'x 476, 478 (11th Cir. 2021); Meadows v. United Servs., Inc., 963 F.3d 240, 244 (2d Cir. 2020); Crawford v. City of Tampa, 397 F. App'x 621, 623

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[1] In their partial motion for summary judgment, dkt. no. 182, Defendants list "Count VII" twice. Clearly Defendants intended to include Count VIII which is titled "Fraudulent Medical Records and Constructive Fraud on 2/25/2020." Dkt. No. 77 at 23. All Parties have proceeded as such, and the Court will as well.

[2] The second amended complaint appears to allege violations of HIPAA. See, e.g., Dkt. No. 77 at 25 (Count X); see also id. at 26 (Count XI). However, in their briefing, Plaintiffs explain, "[t]he Health Records statutes at issue in O.C.G.A. §§[ ]31-33-2 and 31 33-5 references [sic] HIPAA, which is why it is cited in the operative Complaint. The Fraziers' records allegations are based on the Georgia statutes identified above in Title 31, Chapter 33." Dkt. No. 202 at 1.

(11th Cir. 2010); Sneed v. Pan Am. Hosp., 370 F. App'x 47, 50 (11th Cir. 2010); Acara v. Banks, 470 F.3d 569, 572 (5th Cir. 2006).

To the extent Plaintiffs seek to hold Defendants liable under O.C.G.A. § 51-1-6 for a breach of legal duty under HIPAA, that claim also fails. Under O.C.G.A. § 51-1-6,

> When the law requires a person to perform an act for the benefit of another or to refrain from doing an act which may injure another, although no cause of action is given in express terms, the injured party may recover for the breach of such legal duty if he suffers damage thereby.

However, O.C.G.A. § 51-1-6 "does not give rise to aprivate cause of action unless the statutes outlining the legal duty provide for a civil remedy." Barbara v. Meeks, No. 1:20-cv-4422 AT, 2021 WL 2274457, at *5 (N.D. Ga. Apr. 30, 2021) (citing Reilly v. Alcan Aluminum Corp., 528 S.E.2d 238 (Ga. 2000) (employee cannot sue his employer under O.C.G.A. § 51-1-6 where the statute creating the legal duty does not provide a civil right of action)). To the contrary, HIPAA creates no civil remedy, so O.C.G.A. § 51-1-6 cannot salvage these claims. See Scoggins v. Floyd Healthcare Mgmt. Inc., No. 414CV00274HLMWEJ, 2016 WL 11544908, at *27 (N.D. Ga. Aug. 30, 2016) ("Plaintiff's negligence per se claim fails as a matter of law, because HIPAA does not provide a civil remedy and, under Georgia law, a plaintiff may not pursue a negligence per se claim under

O.C.[G.A.] § 51-1-6 if the statute or regulation that supposedly gives rise to the legal duty does not provide a civil remedy."). Accordingly, Defendants are entitled to summary judgment on Plaintiffs' HIPAA claims.

B. O.C.G.A. §§ 31-33-2 and 31-33-5

Plaintiffs' claims under O.C.G.A. §§ 31-33-2 and 31-33-5 of the Georgia Health Records Act likewise fail.

Plaintiffs contend Defendants are liable for various alleged violations of O.C.G.A. § 31-33-2 by: (1) failing to provide complete medical documentation within thirty days of Plaintiffs' request on two occasions; (2) providing to Plaintiffs and utilizing in this suit records with "fabricated" dates of service; (3) "refusing to document" details of the removal of the packing/gauze and blood clots; and (4) stating during a May 2020 visit that no request for records was received despite a request sent in "March/April 2020." Dkt. No. 77 ¶ 65(f), ¶¶ 100-106 (Count VI), ¶¶ 107-113 (Count VII), ¶¶ 114-121 (Count VIII) ¶¶ 125-29 (Count X), ¶¶ 130-35 (Count XI), ¶¶ 136-37 (Count XII). Defendants, on the other hand, insist there is no private right of action under O.C.G.A. § 31-33-2, and that, in the alternative, they are entitled to immunity from civil liability. Dkt. No. 183 at 5-11.

O.C.G.A. § 31-33-2 governs the conditions and procedures for copying medical records. "It is, of course, fundamental that 'the cardinal rule to guide the construction of laws is, first, to ascertain the legislative intent and purpose in enacting the law,

and then to give it that construction which will effectuate thelegislative intent and purpose.'" City of Jesup v. Bennett, 176 S.E.2d 81, 82-83 (Ga. 1970) (quoting Ford Motor Co. v. Abercrombie, 62 S.E.2d 209, 213 (Ga. 1950)).

Georgia courts have explained that the intent of the legislature in enacting the Health Records Act "was to ensure that patients have access to medical records in the custody and control of health care providers without being charged more than the reasonable costs of copying and mailing them." Cotton v. Med-Cor Health Info. Sols., Inc., 472 S.E.2d 92, 95 (Ga. Ct. App. 1996).

Accordingly, O.C.G.A. § 31-33-2 requires "provider[s] having custody and control" of certain medical records to retain those records for a minimum of ten years from the date the record was created. O.C.G.A. § 31-33-2(a)(1)(A). O.C.G.A. § 31-33-2 further mandates, in pertinent part,

> (2) Upon written request from the patient or a person authorized to have access to the patient's record . . . the provider having custody and control of the patient's record shall furnish a complete and current copy of that record, in accordance with the provisions of this Code section. . . .
>
> (b) Any record requested under subsection (a) of this Code section shall within 30 days of the receipt of a request for records be furnished to the patient. . . .

> (e) Any provider or person who in good faith releases copies of medical records in accordance with this Code section shall not be found to have violated any criminal law or to be civilly liable to the patient, the deceased patient's estate, or to any other person.

O.C.G.A. § 31-33-2.

So, O.C.G.A. § 31-33-2 addresses a provider's obligation to furnish records within thirty days of the receipt of a request from an authorized person. Moreover, O.C.G.A. §§ 31-33-2(e) and 31-33-5 protect providers who in good faith release copies of medical records pursuant to the statute's requirements from criminal and civil liability "to the patient, guardian, parent, or any other person for such release." Furthermore, the Georgia Health Records Act makes a violation of any of its provisions a misdemeanor. O.C.G.A. § 31-5-8. Clearly, there is no civil remedy provided.

Under Georgia law,

> [C]ivil liability may be authorized where the legislature has indicated a strong public policy for imposing a civil as well as criminal penalty for violation of a penal statute[,] . . . the indication that the legislature meant to impose a civil as well as criminal penalty must be found in the provisions of the statute at issue, not

> extrapolated from the public policy the statute generally appears to advance.

Anthony v. Am. Gen Fin. Servs. Inc., 697 S.E.2d 166, 172 (Ga. 2010). In Murphy v. Bajjani, the Supreme Court of Georgia explained,

> There is no indication that the legislature intended to impose civil liability in addition to the criminal sanctions set forth in a statute where, as here, nothing in the provisions of the statute creates a private cause of action in favor of the victim purportedly harmed by the violation of the penal statute. Troncalli v. Jones, 237 Ga. App. 10(1), 514 S.E.2d 478 (1999) (enactment of criminal stalking statute did not create a tort of stalking); Vance v. T.R.C., 229 Ga. App. 608(1)(a), 494 S.E.2d 714 (1997); Cechman v. Travis, 202 Ga. App. 255(1), 414 S.E.2d 282 (1991) (penal statute requiring report of suspected child abuse does not create a private cause of action in tort in favor of child whose abuse was not reported). While [O.C.G.A.] § 20–2–1184 establishes Georgia's public policy concerning the need to report timely to the appropriate authorities the identity of students who commit certain proscribed acts on school grounds, it does not create a civil cause of action for damages in favor of the victim or

> anyone else for the purported failure to report timely.

647 S.E.2d 54 (Ga. 2007); Compare Chisolm v. Tippens, 658 S.E.2d 147, 152-53 (Ga. Ct. App. 2008) (statute prohibiting school systems from denying parents the right to inspect and review child's educational records contains no provision creating a private cause of action for parents who are denied access to such educational records) with Williams v. DeKalb Cnty., 840 S.E.2d 423, 433 (Ga. 2020) (finding language in the Open Meetings Act stating the Attorney General's enforcement authority was "in addition to any action that may be brought by any person," contemplated a private cause of action to enforce the Act).[3]

A broader look at the Georgia Health Records Act strengthens the conclusion that civil liability is not contemplated. The relevant provisions of the Georgia Health Records Act are O.C.G.A. §§ 31-33-2, 31-33-5, 31-5-8, and 31-5-9. O.C.G.A. § 31-33-5 states, "[a]ny provider releasing information in good faith pursuant to the provisions of this chapter shall not be civilly or criminally liable to the patient, guardian, parent, or any other person for such release." That same title, in its "Administration and Enforcement" chapter, O.C.G.A. § 31-5-8, states, "[a]ny person violating the provisions of this title shall be guilty of a

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[3] Compare O.C.G.A. §§ 31-33-2, 31-33-5 with Ellison v. Southstar Energy Servs., LLC, 679 S.E.2d 750, 754-55 (Ga. Ct. App. 2009) (citing Cotton, 472 S.E.2d 92 (addressing O.C.G.A. § 31-33-2, a statute with no private right of action, as compared to the Gas Act which does provide a private right of action)).

misdemeanor, provided that this Code section shall not apply to violations of the provisions of Chapter 20, 22, or 24 of this title." O.C.G.A. § 31-5-9(a) also empowers "[t]he Department of Public Health and all county boards of health and the Department of Community Health" to seek injunctive relief to enjoin "violation[s] of any provision of this title as now existing or as may be hereafter amended or of any regulations or order duly issued by the department, any county board of health, or the Department of Community Health," as well as "to abate any public nuisance which is injurious to the public health, safety, or comfort." O.C.G.A. § 31-5-9(a) further provides, "[s]uch actions may be maintained notwithstanding the fact that such violation also constitutes a crime and notwithstanding that other adequate remedies at law exist."

True, the text and structure of the Georgia Health Records Act make it clear that a private cause of action for civil damages is prohibited. But there is more. The legislature clearly knows how to provide a private cause of action for civil damages if it wants to do so. It has done so in other contexts. See e.g., O.C.G.A. § 31-8-126(a) (providing "[a]ny person or persons aggrieved because a long-term care facility has violated or failed to provide any right granted under this article shall have a cause of action against such facility for damages and such other relief as the court having jurisdiction of the action deems proper. No person shall be prohibited from maintaining such an action for failure to exhaust any rights to administrative or other relief granted under this article"); O.C.G.A. § 31-8-136(a) (providing, alongside the Attorney General's

enforcement power, that "[a]ny resident or the representative or legal surrogate of the resident, if any, may bring an action in a court of competent jurisdiction to recover actual and punitive damages against a personal care home or its governing body, administrator, or employee for any violation of the rights of a resident granted under this article").

In a last-ditch effort to find some authorization for civil liability, Plaintiffs point to § 31-33-2(e) which, again, provides,

> (e) Any provider or person who in good faith releases copies of medical records in accordance with this Code section shall not be found to have violated any criminal law or to be civilly liable to the patient, the deceased patient's estate, or to any other person.

By its terms, that subsection makes it clear that no one who overshares—that is releases records in good faith even when such records shouldn't be released—will be subject to liability of any kind. Of course, in this case, the Court is not tasked with deciding whether anyone should be punished for releasing medical records when no release was warranted.[4]

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[4] Plaintiffs appear to be attempting to force the proverbial square peg into the proverbial round hole. They insist that their allegation of a "fabricated" or "fraudulent" medical record is sufficient to show bad faith under this statute. However, O.C.G.A. § 31-33-2 makes no mention of fabricated or fraudulent medical records. Instead, it provides a pathway for patients to receive copies of their

Accordingly, Defendants are entitled to summary judgment on Plaintiffs' Records Claims (Counts VI, VII, VIII, X, XI).

C. Defendants' Immunity from Punitive Damages Claims

Defendants SGHS and Cooperative Healthcare Services, Inc. contend they "are related entities

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records within the required time and at a reasonable price. The immunity provided thereunder is for the good faith release of records pursuant to those requirements. Under Georgia law, a fraud claim is a separate and independent claim that Plaintiffs did not raise. O.C.G.A. § 9-11-9(b) ("In all averments of fraud or mistake, the circumstance constituting fraud or mistake shall be stated with particularity."). Moreover, while Plaintiffs do not make this argument, their claims under Counts VI, VII, and VIII are insufficient to stand alone as claims for fraud. The elements of a Georgia fraud claim are: "a false representation by a defendant, scienter, intention to induce the plaintiff to act or refrain from acting, justifiable reliance by plaintiff, and damage to plaintiff." Roberts v. Nessim, 676 S.E.2d 734, 739 (Ga. Ct. App. 2009) (quoting Johnson v. Rodier, 529 S.E.2d 442 (2000)). Plaintiffs fail to appreciate the specificity with which a fraud claim must be pled, and instead lump the term "fraudulent" in with their informed consent and records claims. See e.g., Dkt. No. 77 ¶¶ 100-106 (Count VI titled "Fraudulent/Altered Medical Record and Constructive Fraud on 1/21/2020" alleging Defendants "represented and wrote down" the date and time on the Informed Consent Form "without Mr. Frazier's permission," despite Plaintiffs' allegations that Mr. Frazier did not see the first page of the Informed Consent Form and that Defendants did not meet the requirements of the Informed Consent Statute); See also Dkt. No. 202 at 1 (stating Plaintiffs' "records allegations are based on" O.C.G.A. §§ 31-33-2 and 31-33-5); id. at 3 (arguing O.C.G.A. § 31-33-1 imposes liability on Defendants for releasing "alleged fraudulent records," and that in that circumstance, O.C.G.A. § 31-33-5's immunity provision does not apply).

doing business in association with the Hospital Authority," which warrants summary judgment in their favor on Plaintiffs' punitive damages claims. See Dkt. No. 183 at 11 (citing Dkt. Nos. 46, 48, 49); Dkt. No. 48 (Defendant Cooperative Healthcare Services, Inc. listing "Defendant Southeast Georgia Health System, Inc." under its "list of officers, directors, or trustees").

Under Georgia law, public hospitals cannot be held liable for punitive damages. See Hosp. Auth. of Clarke Cnty. v. Martin, 438 S.E.2d 103 (Ga. Ct. App. 1993), aff'd, Martin v. Hosp. Auth. of Clarke Cnty., 449 S.E.2d 827 (Ga. 1994) (holding hospital authorities cannot be held liable for punitive damages because they are government entities); see also Crisp Reg'l Nursing & Rehab. Ctr. v. Johnson, 574 S.E.2d 650, 655 (Ga. Ct. App. 2002) (same). In Crisp, the court granted summary judgment to the hospital-defendants where the hospital's administrator "testified that the Hospital Authority of Crisp County does business as Crisp Regional Health Care Systems, Inc., and that Crisp Regional Nursing & Rehabilitation Center is part of Crisp Regional Health Care Systems." Id.

Here, record evidence shows that "effective May 1, 2015," the Glynn-Brunswick Memorial Hospital Authority ("Hospital Authority") executed a lease and transfer agreement pursuant to which Defendant Southeast Georgia Health System, Inc. "assumed substantially all of the operations, assets, and liabilities of the Hospital Authority and agreed to operate as a community healthcare provider." Dkt. No. 220-1 at 4; Id. at 6-55 (Lease and Transfer Agreement between Glynn-

Brunswick Memorial Hospital Authority and SGHS); Id. at 56-113 (Bylaws of the Hospital Authority); Id. at 114-22 (SGHS Articles of Incorporation); Id. at 123-48 (SGHS Bylaws); Id. at 171-249 (Amended and Restated Master Trust Indenture between Hospital Authority, SGHS, Cooperative Healthcare Services, Inc., SGHS Holdings, Inc., and U.S. Bank National Association, Inc.).

The record further shows that Defendant SGHS is Defendant Cooperative Health Services' "sole corporate member," and Defendant Cooperative Health Services' "function is the operator of physician practices on behalf of" Defendant Southeast Georgia Health System. Id. at 4-5; Id. at 149-58 (Cooperative Healthcare Services Certificate and Articles of Incorporation); Id. at 159 70 (Cooperate Healthcare Services Bylaws). Accordingly, Defendant Cooperative Healthcare Services' "functions are primarily billing and administrative," and it "has no employees," because Defendant SGHS "employs both the professional and non-professional staff who work at [Cooperative Healthcare Services] physician practices including Southeast Georgia Physician Associates – Ear Nose and Throat." Id. at 5. Moreover, "Sherman A. Stevenson, M.D. has never been an employee of [Cooperative Healthcare Services] but has instead been an employee of [SGHS] at all times during his treatment of Mr. Frazier to the present." Id. at 5.

The record clearly shows that the Hospital Authority does business as SGHS, and Cooperative Healthcare Services is part of SGHS. Accordingly,

Defendants are entitled to summary judgment on Plaintiffs' punitive damages claims (Count XII).

CONCLUSION

For the foregoing reasons, Defendants' motions for partial summary judgment, dkt. nos. 181, 182, are **GRANTED**. Accordingly, Plaintiffs' Informed Consent Claims (Counts I, VI, and portions of Counts III, IV, V, and IX), Records Claims (Counts VI, VII, VIII, X, and XI), and Punitive Damages Claims (Count XII) are **DISMISSED with prejudice**. Counts II, III, IV, V, and IX remain pending. The parties are **ORDERED** to file their proposed consolidated pretrial order by Monday, October 23, 2023. Further, a pretrial conference will be held on Monday, November 6, 2023 at 2:30 p.m. and a jury trial will be held on Tuesday, January 16, 2024, both at the federal courthouse in Brunswick, Georgia.

SO ORDERED, this 31st day of August, 2023.

__/s/L.G.Wood_____
HON. LISA GODBEY WOOD, JUDGE
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA

In the United States District Court
for the Southern District of Georgia
Brunswick Division

CIVIL ACTION NO.: 2:21-cv-21

CEDRICK FRAZIER; and TAMARA FRAZIER,
Plaintiffs,

v.

SOUTHEAST GEORGIA HEALTH SYSTEM,
INC. ; et al., Defendants.

ORDER

This matter is before the Court on Plaintiffs' Motion to Compel Discovery. Doc. 158. Defendants filed a Response in Opposition. Doc. 164. Plaintiffs filed a Reply. Doc. 173. For the following reasons, I **DENY** Plaintiffs' Motion.

BACKGROUND

In the Second Amended Complaint, the operative pleading in this case, Plaintiffs allege Defendants committed professional negligence and fraud, failed to provide informed consent, altered some of Plaintiff C. Frazier's medical records, and fabricated some portions of Plaintiff C. Frazier's medical records. Doc. 77. These claims arise from a surgery and post-operation treatment of Plaintiff C. Frazier in January and February of 2020.

Relevant to the instant Motion, Plaintiffs asked for leave to amend their Complaint a third time, seeking to add claims for breach of fiduciary duty, assisting and furthering fraud, infliction of emotional distress, and race-based discrimination and retaliation. Doc. 146. In their proposed Third Amended Complaint, Plaintiffs alleged Defendants retaliated against Plaintiffs for filing a racial discrimination complaint against one of Defendant Southeast Georgia Health System's (SGHS's) physicians, Dr. Nunneman. Id. The "Nunneman incident" occurred in August 2020, after Defendant Dr. Stevenson performed surgery on and treated Plaintiff C. Frazier, but before Plaintiffs initiated this lawsuit on February 25, 2021. Id. The Court denied Plaintiffs' third request to amend. Doc. 178. Therefore, claims related to Dr. Nunneman and the "Nunneman incident" are not part of this case.

Discovery in this case has been contentious and protracted. The parties have been engaged in discovery for nearly two years, since at least June of 2021. See Doc. 41. The Court has extended the discovery deadlines at the parties' requests five times. See Docs. 57, 74, 94, 113, 141. The parties have frequently brought discovery disputes to the Court, filing at least 15 discovery-related motions, including motions to compel, motions to quash subpoenas, motions to modify subpoenas, motions for protective orders, and motions for clarification of previous discovery orders. See Docs. 53, 55, 61, 63, 95, 101, 133, 135, 143, 152, 154, 156, 159, 166, 177.

Plaintiffs now bring another motion to compel, asking the Court to order:

1. The deposition of Defendant SGHS's general counsel, Christy Jordan;

2. Production of the personnel files of three SGHS employees: Christy Jordan, Melissa Purvis, and Ashley Foster;

3. Production of documents related to the internal investigation of Dr. Rudolf Nunneman;[1] and

4. Attorney's fees for the motion to compel.

Doc. 158 at 23. Defendants oppose Plaintiffs' motion to compel, arguing Plaintiffs seek discovery that is privileged, protected, and not proportional to the needs of the case, and argue the requests are overly broad, unduly burdensome, and harassing. Doc. 164 at 1–2.

DISCUSSION

The discovery requested in Plaintiffs' motion concerns the actions of three SGHS employees who worked on this litigation well after Plaintiffs filed their Complaint. Plaintiffs' claims arise from the following events: (1) a surgery that Defendant Dr. Stevenson performed on Plaintiff C. Frazier on January 28, 2020; (2) an examination on February 25, 2020, during which Stevenson allegedly

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[1] Because Plaintiffs have no pending claims related to the Nunneman incident, the Court **DENIES** the portion of Plaintiffs' Motion to Compel concerning the production of the Nunneman investigation and related documents.

extracted surgical packing from C. Frazier's nasal cavity; and (3) Stevenson's creation of an allegedly false or fabricated medical record on April 10, 2020. Doc. 77. Plaintiffs filed their initial Complaint on January 25, 2021. Doc. 1. Plaintiffs amended their Complaint on December 7, 2021, adding the medical-records claims based in part on an electronic medical records audit trail Defendants produced during discovery. Docs. 70, 77. Plaintiffs now request a deposition and personnel records to discover more information about SGHS employees Christy Jordan, Melissa Purvis, and Ashley Foster because of these individuals' involvement in this litigation after Plaintiffs filed suit. There is no indication any of these three individual employees were involved in the conduct that gives rise to Plaintiffs' pending claims.

I. Deposition of Christy Jordan

Plaintiffs argue they should be allowed to depose Christy Jordan about non-privileged matters. Doc. 158 at 8. Jordan is SHGS's general counsel. Plaintiffs acknowledge this fact, but note she was also SGHS's Chief Operations Officer at the time of C. Frazier's surgery and currently serves in other roles, beyond that of general counsel, including vice president. Id. at 7-8. Plaintiffs intend to ask Jordan about several topics: SGHS's HIPAA policies and procedures; an investigation file related to Dr. Nunneman; some unspecified documents she signed; her access of C. Frazier's electronic medical record; and her role in opposing Plaintiffs' earlier motion to compel the complete audit trail of C. Frazier's electronic medical record. Id. at 7–10.

Defendants argue Plaintiffs should not be allowed to depose Jordan because she is an attorney with involvement in the litigation. Doc. 164 at 7–8. Defendants are concerned about SGHS's general counsel disclosing privileged information because, during a phone call between the parties' counsel, Plaintiffs' counsel said the topics for the proposed Jordan deposition would be "wide open." Id. at 7. Defendants also argue, Plaintiff have failed to "established that no other means exist to obtain the information" and Plaintiffs have not attempted "to submit additional interrogatories as to particular issues." Id. at 8.

Defendants urge the Court to apply the three-part test established in Shelton v. Am. Motors Corp., 805 F.2d 1323 (8th Cir. 1986), to determine whether Plaintiffs should be allowed to depose Jordan. Doc. 164 at 8. However, this test has not been adopted by the Eleventh Circuit, and it is typically used to evaluate deposition requests for attorneys representing parties in litigation, not for in-house general counsel. See, e.g., Gaddy v. Terex Corp., No. 1:14-CV 1928, 2015 WL 13545486, at *2 (N.D. Ga. Oct. 28, 2015) (noting "several courts have held that Shelton does not apply to non-litigation counsel" and collecting cases). In this Circuit, courts vary in the standards they apply to requests to depose in-house, non-litigation counsel attorneys. Some courts use the Shelton test, limiting attorney depositions to situations where (1) there are no other means to get the information sought; (2) the attorney actually possesses relevant and non-privileged information; and (3) the information sought is crucial to the preparation of the case. See, e.g., McDill v. Bd. of Pardons &

Paroles, No. 2:18-CV-597, 2021 WL 6883424 (M.D. Ala. June 24, 2021); Stull v. Suntrust Bank, No. 09-82302-CIV, 2011 WL 13224911 (S.D. Fla. Jan. 20, 2011). Some courts apply a "weighing and balancing" approach, evaluating the would be deposing party's need for the information sought against the opposing party's interests in its attorney-client relationship. See Bank of Am., N.A. v. Ga. Farm Bureau Mut. Ins. Co., No. 3:12 CV-155, 2014 WL 4851853, at *3 (M.D. Ga. Sept. 29, 2014); Gaddy, 2015 WL 13545486, at *2.

Both Shelton and the weighing and balancing approach consider the need for the information sought. Plaintiffs have not shown any need to depose Jordan. The topics Plaintiffs want to question Jordan about largely—if not exclusively—concern Jordan's work with Plaintiff C. Frazier's electronic medical record after Plaintiffs filed suit. Jordan submitted an affidavit in a discovery dispute between the parties, opposing Plaintiffs' motion to compel unredacted (i.e., complete) audit trail information from Plaintiff C. Frazier's electronic medical record. Doc. 103-4. In the affidavit, Jordan said she and others, including SGHS employees Melissa Purvis and Ashley Foster, accessed C. Frazier's electronic medical record on March 30, 2021 and May 6, 2021 "for reasons including attorney work product, materials prepared for use in litigation." Id. at 2. Jordan explained she "did not add to, delete, or otherwise modify the medical records in any way" and states she "merely viewed them." Id. The Court granted Plaintiffs' motion to compel the complete audit trail. Doc. 110. The complete audit trail showed

Jordan had accessed C. Frazier's electronic medical record on March 30, 2021 and May 6, 2021, as she stated in her affidavit. Plaintiffs now want Jordan to answer questions about her access to the electronic medical record at a deposition, and to explain why she opposed the production of the audit trail on privilege grounds. Doc. 158 at 9–10 ("[Plaintiffs] want to ask what she meant by these statements in her affidavit.").

The facts surrounding Jordan's work with the electronic medical record are not facts at issue in this litigation. Plaintiffs allege Defendant Dr. Stevenson—not Jordan—fabricated Plaintiff C. Frazier's medical record. In the earlier discovery dispute, the Court rejected Jordan's assertion of privilege and Plaintiffs prevailed. There is nothing showing Jordan participated in any fraud or fabrication. The discovery dispute has been resolved. There is no indication Defendants' privilege arguments were made in bad faith. Plaintiffs have not shown their proposed line of questioning about the electronic medical record, the audit trail, or the related motion to compel is needed to discover any information relevant to Plaintiffs' pending claims.

The other topics Plaintiffs intend to ask Jordan about are also irrelevant, and there is no indication Jordan would be uniquely situated to address the topics. In other words, Plaintiffs have not shown it is necessary to depose Jordan on the other topics and have not shown they could not obtain the information through other means. Plaintiffs want to question Jordan about "policies and procedures," "institutional knowledge," and "HIPAA related

questions." Doc. 158 at 24. Plaintiffs have not shown Jordan has unique, non-repetitive firsthand knowledge of these broad topics. Such information is just as easily obtained from a Rule 30(b)(6) witness, interrogatories, or requests for production. Plaintiffs also seek to depose Jordan about the "Nunneman investigation file," doc. 158 at 8, but Plaintiffs were not permitted to amend to add the claims regarding Dr. Nunneman.

Because Plaintiffs have not shown a need to depose Christy Jordan, the Court **DENIES** the portion of Plaintiffs' Motion to Compel seeking to conduct the deposition of Jordan.

II. Personnel Records

Plaintiffs ask the Court to order Defendants to produce personnel records of three SGHS employees: Christy Jordan; Melissa Purvis; and Ashley Foster. As explained above, Christy Jordan is SGHS's general counsel and vice president. Melissa Purvis is a registered nurse and SGHS's Director of Risk Management. Ashley Foster is a registered nurse and an SGHS risk analyst. Plaintiffs say they need these employees' personnel files to prepare for the deposition of Christy Jordan. Doc. 158 at 12. As explained above, Plaintiffs have not made the necessary showing to depose Jordan so this reason can no longer serve as the basis for the request.

Plaintiffs also argue these employees have been involved in this litigation since Plaintiffs filed suit, and, therefore, Defendants should be required to produce the records. Plaintiffs state the audit trail

logs show these employees accessed Plaintiff C. Frazier's electronic medical record in March and May 2021, and this fact supports their requests for the employees' personnel files. Plaintiffs do not allege these employees directly added to, deleted, or modified the medical records themselves, only that they accessed the records after suit was filed. Plaintiffs also point out that Purvis verified several of Defendants' interrogatories and document production responses. Id. at 15.

Defendants argue the personnel files are not relevant and not proportional to the needs of the case. Doc. 164 at 10. Defendants contend each personnel file "contains privileged information regarding care and treatment provided to other patients or that is irrelevant and otherwise potentially embarrassing or concerning to the employee or former employee." Id.

"In the context of discovering an employee's personnel file, courts in the Eleventh Circuit and elsewhere have 'recognized a heightened standard of relevance for discovery of information contained in personnel files.'" Oakwood Ins. Co. v. N. Am. Risk Servs., Inc., No. 618CV437ORL31, 2020 WL 10456804, at *2 (M.D. Fla. June 24, 2020) (quoting Hatfield v. A+ Nursetemps, Inc., No. 5:11-CV-416-OC-10, 2012 WL 1326120, at *4 (M.D. Fla. Apr. 17, 2012) and Sanchez v. Cardon Healthcare Network, LLC, No. 3:12-CV-902-J-34, 2013 WL 2352142, at *2 (M.D. Fla. May 29, 2013)). "The files are only discoverable if '(1) the material sought is clearly relevant and (2) the need for discovery is compelling because the information sought is not otherwise readily obtainable.'" W&C Real Est.,

LLC v. Amguard Ins. Co., No. 1:16-CV-62, 2017 WL 8777468, at *2 (M.D. Ga. Mar. 21, 2017) (quoting Coker v. Duke & Co., 177 F.R.D. 682, 685 (M.D. Ala. 1998)). Personnel files are clearly relevant only when the associated employee had "more than incidental or minimal involvement" in the claims at issue. Maharaj v. GEICO Cas. Co., 289 F.R.D. 666, 673 (S.D. Fla. 2013), aff'd, No. 12-80582-CIV, 2013 WL 1934075 (S.D. Fla. Apr. 5, 2013); O'Connor v. GEICO Indem. Co., No. 8:17-CV-1539-T-27, 2018 WL 1409750, at *6 (M.D. Fla. Mar. 21, 2018) (limiting production of personnel files to those of employees "who had more than minimal involvement with Plaintiffs' claim").

Defendants' relevance objections are valid, especially considering the heightened standard for obtaining personnel records. First, there is no indication Jordan, Purvis, or Foster participated in any of the alleged professional negligence or fabrication of medical records underlying Plaintiffs' claims. Instead, Plaintiffs have only shown that Jordan, Purvis, and Foster worked on on this litigation after the facts underlying Plaintiffs' claims occurred. Plaintiffs want to examine Foster's file to explore whether she was trained to identify fraudulent medical records. Id. at 20. But Foster's conduct is not at issue in this case, and Plaintiffs fail to explain how such training would have any bearing on their claims in this case.

Plaintiffs also argue they are entitled to Purvis's personnel file so they can determine whether she has personal knowledge as to the facts of the case, given her verification of some of Defendant SGHS's discovery responses and her attendance at

Plaintiffs' depositions. Doc. 158 at 15–17. Plaintiffs say Purvis "may have knowledge of the facts dating back" to Plaintiff C. Frazier's surgery. However, Plaintiffs do not explain how anything in Purvis's personnel file would be relevant to those facts. Just because someone is a fact witness does not necessarily mean their personnel file contains relevant information. Instead, Plaintiffs' request appears to be a fishing expedition, even under a general, non-heightened standard of relevance.

Plaintiffs have not established the heightened degree of relevance necessary to compel production of the personnel files. Further, information about the extent of these employees' knowledge of relevant facts is more readily obtained from other sources. Defendants raised a valid relevance objection to Plaintiffs' discovery request, and, therefore, the Court **DENIES** the portion of Plaintiffs' Motion to Compel seeking the production the personnel files of Christy Jordan, Melissa Purvis, and Ashley Foster.

III. Attorney's Fees

Plaintiffs ask the Court to impose sanctions and award attorney's fees for this Motion to Compel. Doc. 158 at 21–22. The Court has previously stated it will likely award costs and fees to the prevailing party on any discovery disputes brought before the Court by motion. See Doc. 140. However, Plaintiffs have not prevailed here, so the Court **DENIES** their request for attorney's fees. Plaintiffs contend Defendants are presently acting together with Christy Jordan, Melissa Purvis, Ashley Foster, and other witnesses "to further a fabricated and

falsified encounter between Dr. Stevenson and Mr. Frazier." Doc. 158 at 22. Plaintiffs assert C. Frazier's medical record "has not been corrected to date" and this is "a continuing and ongoing falsification." Id. at 23. However, Defendants have denied Plaintiffs' fraud and fabrication claims. Whether C. Frazier's medical record legally requires correction is a disputed matter. Accordingly, Plaintiffs fail to show any basis for the award of fees or for the imposition of any other sanctions.

CONCLUSION

For these reasons, I **DENY** Plaintiffs' Motion to Compel Discovery.

SO ORDERED, this 21st day of June, 2023.

__/s/B. Cheesbro_____
BENJAMIN W. CHEESBRO
UNITED STATES MAGISTRATE JUDGE
SOUTHERN DISTRICT OF GEORGIA

In the United States District Court
for the Southern District of Georgia
Brunswick Division

CIVIL ACTION NO.: 2:21-cv-21

CEDRICK FRAZIER; and TAMARA FRAZIER,
Plaintiff,

v.

SOUTHEAST GEORGIA HEALTH SYSTEM, INC. ; SHERMAN A. STEVENSON; and COOPERATIVE HEALTH SERVICES, INC.,
Defendants.

ORDER

This matter is before the Court on Defendant Southeast Georgia Health System's Motion to Compel. Doc. 53. Plaintiff filed a Response, opposing Defendant's Motion. Doc. 54. For the following reasons, I **GRANT in part** and **DENY in part** Defendant's Motion.

Defendant's Motion is **GRANTED** for the limited purpose of recovering the original video purportedly recorded on February 25, 2020, and the metadata related to that video and other videos or photographs previously produced by Plaintiffs, including the 8-second video and screenshot produced in discovery. Plaintiffs are **ORDERED** to comply with this Order by providing Mr. Rosado with his cellphone **within 14 days of this Order**. However, the Court **DENIES** Defendant's request that Mr. Rosado be permitted to produce any and

all text messages on Mr. Frazier's phone. Defendant's request under Rule 37 for fees and costs associated with its Motion to Compel is also **DENIED**.

In light of these rulings, Mr. Rosado is permitted to create a forensic image of Plaintiff C. Frazier's cell phone. The Court understands that image may include text messages, as well as other data. At this time, Mr. Rosado is only permitted to share data and information related to the video purportedly recorded on February 25, 2020, and the metadata related to that video, which includes both the 8-second video and the original 13-second video (if it is recovered) and all metadata related to those videos. However, Mr. Rosado is not permitted to share data related to text messages or any other items on Plaintiff C. Frazier's cell phone with Defendant, Defendant's counsel, or anyone else—with the one exception that Mr. Rosado may share all data with employees of Mulholland Forensics, LLC (Mr. Rosado's employer) as necessary for performing the forensic investigation.

Finally, Mr. Rosado and Mulholland Forensics, LLC, may retain the forensic image of Mr. Frazier's cell phone and related data for the duration of this litigation. Defendant's counsel is **ORDERED** to notify Mr. Rosado and Mulholland Forensics, LLC, when this litigation concludes and, at that time, Mr. Rosado and Mulholland Forensics, LLC, shall destroy all data related to the forensic image of Mr. Frazier's cell phone.

I. Factual Background

Plaintiffs have brought a claim against Defendants alleging Sherman Stevenson, who is employed by Defendant Southeast Georgia Health Systems, left packing material in Plaintiff C. Frazier's nose during a nasal surgery. Defendant's Motion to Compel concerns a video Plaintiff C. Frazier produced in discovery. Plaintiff C. Frazier produced a video purporting to be from a doctor's appointment with Defendant Stevenson occurring on February 25, 2020. Doc. 52; Doc. 53 at 5. Defendant represents the video appears to be edited and does not contain metadata, including data related to when and where the video was recorded. Doc. 53 at 1. In an effort to resolve the dispute, Plaintiffs hired their own forensic expert, who produced a report to Defendant. Doc. 53 at 2–3; Doc. 54 at 2–3. However, the report produced by Plaintiffs still did not contain the original video or the metadata showing where and when the video was recorded. Defendant now requests a forensic imaging examination of Plaintiff C. Frazier's cellphone by their own forensic expert, Vicente M. Rosado. Doc. 53. Defendant also requests Plaintiff pay the reasonable expenses incurred in filing this Motion, including attorneys' fees, as provided by Federal Rule of Civil Procedure 37. Id. at 6.

II. Defendant is Permitted Forensic Imaging of the Cellphone to Recover Videos and Metadata

A. Legal Standard

The Federal Rules of Civil Procedure "strongly

favor full discovery whenever possible." Farnsworth v. Procter & Gamble Co., 758 F.2d 1545, 1547 (11th Cir. 1985). "Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case . . . ." Fed. R. Civ. P. 26(b)(1). Discovery into electronically stored information, including forensic examinations, is subject to the scope of discovery under Rule 26(b). Fed. R. Civ. P. 34(a); U&I Corp. v. Advanced Med. Design, Inc., 251 F.R.D. 667, 674 (M.D. Fla. Mar. 26, 2008).

"When determining whether a forensic examination is warranted, the Court considers both the privacy interests of the parties whose devices are to be examined and, also, whether the parties withheld requested discovery, will not search for requested discovery, and the extent to which the parties complied with past discovery requests." Classic Soft Trim, Inc. v. Albert, Case No. 6:18-cv-1237, 2020 WL 6731027, at *2 (M.D. Fla. Sept. 2, 2020) (citations omitted). "Mere speculation that electronic discovery must exist is insufficient to permit forensic examination of a party's personal computer or cellphone." Id. Motions to compel are committed to the sound discretion of the trial court. Comm. Union Ins. Co. v. Westrope, 730 F.2d 729, 731 (11th Cir. 1984).

B. Imaging to Recover Original Video and Related Metadata

Defendant asks the Court to compel Plaintiff C. Frazier to produce his cellphone to allow forensic imaging in an effort to recover the original video

and metadata showing where and when the video was taken. Doc. 53. Defendant states it initially asked Plaintiff to produce any videos taken in connection with the lawsuit. Id. at 9.

In response, Plaintiff produced an 8-second video, which appears to be edited, and a screenshot showing a 13-second video existed at some point. Id. at 11. The edited video does not contain relevant metadata showing where and when the video was taken. Id. Although Plaintiffs hired their own forensic expert, Jim Stafford, the report produced by Stafford still does not contain the original video or metadata showing where or when the video was taken. Id. Defendant represents to the Court it will use the services of Vicente Rosado, a forensic expert, for the forensic imaging and analysis to determine the date and location the videos and screenshot were taken and to recover the original video. Id. at 8, 12.

Plaintiffs oppose Defendant's request for forensic imaging to recover the original video and relevant metadata.[1] Doc. 54. Plaintiffs assert the forensic report provided by Stafford is sufficient and Defendant has not established its forensic expert will be able to recover the original video or produce relevant metadata. Id. at 2. Further, Plaintiffs argue Defendant should depose Plaintiff C. Frazier prior to any forensic investigation before drawing conclusions about why he does not have

[1] Plaintiffs dedicate a portion of their Response discussing other evidence from relevant medical records; however, these records do not provide Defendant with the discovery it seeks. Doc. 54 at 3–5.

the original video file. Id. at 6.

Although Plaintiffs have made good efforts at attempting to produce responsive materials—including hiring their own forensic expert—they still have not produced the discovery Defendant seeks. Importantly, it is undisputed Plaintiff C. Frazier took a 13-second video at some point and no such video has been produced at this time. Further, it is undisputed the video is relevant to Plaintiffs' claims, primarily the factual dispute of whether surgical packing was left in Plaintiff C. Frazier's nose. Doc. 53 at 7. Plainly, the information Defendant seeks is relevant to the claims and defenses in this matter. See Ramos v. Hopele of Fort Lauderdale, LLC, Case No. 14-62100-CIV, 2018 WL 1383188, at *2 (S.D. Fla. Mar. 19, 2018) (explaining the proper inquiry is whether a forensic examination would reveal information relevant to claims and defenses and whether such an examination is proportional to the needs of the case).

Moreover, a forensic examination seeking to recover the original video and relevant metadata is proportional to the needs of this case, even when considering Plaintiffs' legitimate privacy concerns. U&I Corp., 251 F.R.D. at 672. As explained above, the information Defendant seeks to recover is relevant to the case. This portion of Defendant's Motion to Compel is relatively narrow, seeking only a video which Plaintiffs admit existed at some point and metadata related to that video and other videos and images Plaintiffs already produced. Fed. R. Civ. P. 26, 34. Such a request is also in accordance with the Federal Rules of Civil Procedure

preference for "full discovery whenever possible." Farnsworth, 758 F. 2d at 1547.

While Plaintiffs argue it is "mere speculation" whether the video and metadata can be recovered, especially considering its own forensic expert was unable to recover the information, this argument is unpersuasive. Doc. 54 at 7. The information Defendant seeks existed at some point, as evidenced by Plaintiffs' admission and a screenshot of the video. Defendant's expert should have an opportunity to obtain the data as well. Similarly, the Court sees no reason, given these circumstances, why Defendants first must depose Plaintiff C. Frazier before a forensic examination.

Accordingly, this portion of Defendant's Motion to Compel is **GRANTED**. Mr. Rosado is permitted to conduct a forensic examination of Plaintiff's cellphone for the purpose of recovering the original 13-second video and related metadata, as well as metadata connected to the 8-second video and screenshot already produced in discovery. Plaintiff C. Frazier is ordered to provide his cell phone to Mr. Rosado within 14 days of this Order. Mr. Rosado may share all information related to the two videos, including all related metadata, with Defendant and Defendant's counsel.

A. Text Messages

Defendant also explains text messages between Plaintiff C. Frazier and his son regarding the medical procedures at issue were not produced during discovery. Doc. 53 at 8. To that end, Defendant requests Mr. Rosado be permitted to

produce "any and all texts discovery on Mr. Frazier's phone." Doc. 53 at 9. Plaintiffs oppose this request.[2] Doc. 54 at 6–7.

Federal Rule of Civil Procedure 37 requires a motion to compel "include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make disclosure or discovery in an effort to obtain it without court action." Furthermore, this Court's Local Rule 26.5 also requires "a party seeking a protective order or moving to compel discovery certify that a good faith effort has been made to resolve the dispute before coming to the court." Defendant's Motion is devoid of any indication it conferred in good faith with Plaintiffs and does not include the necessary certification. Similarly, this issue has not been previously brought to the Court's attention; thus, Defendant has not taken the steps outlined in the Court's Rule 26(f) Order, including scheduling a telephonic conference with the Court. See Doc. 2 at 5–6. Accordingly, the Court **DENIES** this portion of Defendant's Motion.

III. Sanctions Are Not Appropriate

Defendant requests an award of costs and attorneys' fees incurred with its Motion to Compel.

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[2] Plaintiffs raise issues about Defendant's discovery failures related to Plaintiff C. Frazier's medical records and purported Health Insurance Portability and Accountability Act ("HIPAA") violations. Doc. 54 at 6, 8–10. Any discovery dispute related to Plaintiff C. Frazier's medical records or a claim related to purported HIPAA violations are not properly before the Court at this time.

Doc. 53 at 6. Federal Rule of Civil Procedure 37 authorizes the award of expenses and attorney's fees to a party that successfully brings a motion to compel. Specifically, the Rule states:

> If the motion is granted—or if the disclosure or requested discovery is provided after the motion was filed—the court must, after giving an opportunity to be heard, require the party or deponent whose conduct necessitated the motion, the party or attorney advising that conduct, or both to pay the movant's reasonable expenses incurred in making the motion, including attorney's fees. But the court must not order this payment if: (i) the movant filed the motion before attempting in good faith to obtain the disclosure or discovery without court action; (ii) the opposing party's nondisclosure, response, or objection was substantially justified; or (iii) other circumstances make an award of expenses unjust.

Fed. R. Civ. P. 37(a)(5)(A).

Here, an award of expenses and attorney's fees is not appropriate. Plaintiffs' non disclosure and objection to a forensic examination were substantially justified, and the circumstances of Plaintiffs' failure to produce the original video and metadata make an award of expenses unjust. While Plaintiffs have not provided the original video and metadata, Plaintiffs have provided a good

explanation for their inability to do so. Plaintiffs, in an effort to produce the original video and metadata, hired their own forensic expert, who was unable to recover the discovery Defendant seeks. Thus, Plaintiffs have not acted evasively or in bad faith throughout discovery. Charles A. Wright & Arthur R. Miller, Fed. Prac. & Proc. § 2281 (3d ed. 2010) (explaining the reason for the failure to answer discovery "is relevant in determining what sanction, if any, to impose"). Moreover, it is unclear whether the information Defendant seeks even exists anymore. The Court cannot punish Plaintiffs for failing to produce information that may no longer exist. Finally, given the ubiquitous nature of cellphones and the broad nature of Defendant's request, including a request to obtain all text messages, Plaintiffs' opposition to Defendant's motion was substantially justified. Maddow v. Procter & Gamble Co., Inc., 107 F.3d 846, 853 (11th Cir. 1997) ("Substantially justified means that reasonable people could differ as to the appropriateness of the contested action."). Accordingly, the Court **DENIES** the portion of Defendant's Motion seeking sanctions under Rule 37.

SO ORDERED, this 22nd day of September, 2021.

__/s/ B. Cheesbro_____
BENJAMIN W. CHEESBRO
UNITED STATES MAGISTRATE JUDGE
SOUTHERN DISTRICT OF GEORGIA

In the
United States Court of Appeals
For the Eleventh Circuit

NO. 24-10976

CEDRICK FRAZIER, TAMARA FRAZIER,

Plaintiffs-Appellants,

versus

SOUTHEAST GEORGIA HEALTH SYSTEM, INC.,

SHERMAN A. STEVENSON,

COOPERATIVE HEALTHCARE SERVICES, INC., d.b.a. Southeast Georgia Physician Associates-Ear, Nose, & Throat,

Defendants-Appellees,

SOUTHEAST GEORGIA HEALTH SYSTEM BRUNSWICK CAMPUS AUXILIARY, INC. et al.,

Defendants.

Appeal from the United States District Court
for the Southern District of Georgia
D.C. Docket No. 2:21-cv-00021-LGW-BWC

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

Before WILSON, LUCK, and ANDERSON, Circuit Judges.

PER CURIAM:

The Petition for Rehearing En Banc is DENIED, no judge in regular active service on the Court having requested that the Court be polled on rehearing en banc. FRAP 35. The Petition for Panel Rehearing also is DENIED. FRAP 40.

Constitutional and Statutory Provisions Involved

The Fifth Amendment of the U.S. Constitution reads:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

The Seventh Amendment of the U.S. Constitution reads:

"In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

18 U.S.C. §1035 - False statements relating to health care matters

(a) Whoever, in any matter involving a health care benefit program, knowingly and willfully
(1) falsifies, conceals, or covers up by any trick,

scheme, or device a material fact; or (2) makes any materially false, fictitious, or fraudulent statements or representations, or makes or uses any materially false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry, in connection with the delivery of or payment for health care benefits, items, or services, shall be fined under this title or imprisoned not more than 5 years, or both.

(b) As used in this section, the term "health care benefit program" has the meaning given such term in section 24(b) of this title.

28 U.S.C. § 1254 - U.S. Code - Unannotated Title 28. Judiciary and Judicial Procedure § 1254. Courts of appeals; certiorari; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

O.C.G.A. §9-11-9.1(e) states:

If a plaintiff files an affidavit which is allegedly defective, and the defendant to whom it pertains alleges, with specificity, by motion to dismiss filed on or before the close of discovery, that said affidavit is defective, the plaintiff's complaint shall be subject to dismissal for failure to state a claim, except that the plaintiff may cure the alleged defect

by amendment pursuant to Code Section 9-11-15 within 30 days of service of the motion alleging that the affidavit is defective. The trial court may, in the exercise of its discretion, extend the time for filing said amendment or response to the motion, or both, as it shall determine justice requires.

O.C.G.A., Title 31 – Health Records are legal documents

(O.C.G.A. § 31-33-2(a)(2)), requires a physician to provide a current copy of the record to the patient under most circumstances. Also, O.C.G.A § 31-33-2(b) allows a patient or his/her designee to receive a copy of the requested record(s).

O.C.G.A. §51-12-5.1 - Punitive damages

(a) As used in this Code section, the term "punitive damages" is synonymous with the terms "vindictive damages," "exemplary damages," and other descriptions of additional damages awarded because of aggravating circumstances in order to penalize, punish, or deter a defendant.

(b) Punitive damages may be awarded only in such tort actions in which it is proven by clear and convincing evidence that the defendant's actions showed willful misconduct, mal ice, fraud, wantonness, oppression, or that entire want of care which would raise the presumption of conscious indifference to consequences.

(c) Punitive damages shall be awarded not as compensation to a plaintiff but solely to punish, penalize, or deter a defendant.