IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

ANTHONY JACOB MEHERG, a minor by and through his mother, ANGELA PRIETO,	)	
Plaintiff,	)	2018 L 003531
v.	)	Hon. James N. O'Hara
RUSH UNIVERSITY MEDICAL CENTER,	)	Calendar A
Defendant,	)	
and	)	
CARRIE L. SMITH, M.D., CAROLYN PAIGE KENNEY, D.O., DOUGLAS MARK WEBER, M.D., HOWARD T. STRASSNER, M.D., CHANNING ALEXANDRA BURKS, M.D., PAMELA MARIE FRAZZINI, M.D., and SLOAN LESLIE YORK, M.D.,	)	
Respondents in Discovery.	)	

MEMORANDUM ORDER

This matter is before the Court on (1) plaintiff Angela Prieto's fully briefed motion for sanctions and other relief against defendant Rush University Medical Center pursuant to Supreme Court Rules 201, 213, 214, and 219; (2) defendant Rush University Medical Center's motion for sanctions and costs against plaintiff Angela Prieto and her counsel pursuant to Supreme Court Rules 137, 201, 214, and 219; (3) plaintiff Angela Prieto's fully briefed emergency motion for sanctions against defendant Rush University Medical Center; and (4) plaintiff Angela Prieto's fully briefed supplemental memorandum in support of her proposed order regarding various sanctions motions pertaining to the electronic medical record inspection from February 28, 2020. After reviewing the memorandum on file, transcripts of the hearing and depositions, the briefs and exhibits attached thereto, and the applicable case law, the Court states as follows:

BACKGROUND

Plaintiff Angela Prieto brought this action on behalf of her minor son, Anthony Meherg, alleging that defendant Rush University Medical Center ("RUMC") negligently caused Meherg to suffer from hypoxic ischemic encephalopathy and respiratory distress syndrome during birth. Prieto also named various doctors as respondents in discovery.

In the early course of litigation, during written discovery, the parties arrived at what turned out to be a standoff regarding production of the audit trail and other medical record information related to Prieto and Meherg's electronic medical records. Since January 2019, the parties have litigated the merits of Prieto's request for audit trails from RUMC. In the course of this audit trail litigation, the parties have filed various motions against each other for sanctions and other relief. Before the Court now are three requests from Prieto to issue sanctions against RUMC for its conduct during audit trail litigation (two formal motions and one memorandum in support of a proposed order). RUMC has added two motions for sanctions against Prieto for her conduct (one formal motion and one request for sanctions in a response brief).

After thoroughly reviewing the extensive materials in this case, Prieto's motions are granted and RUMC's motions are denied for the following reasons.

LEGAL STANDARDS

> If a party, or any person at the instance of or in collusion with a party, unreasonably fails to comply with any provision of [the Supreme Court's discovery rules] or fails to comply with any order entered under these rules, the court, on motion, may enter, in addition to remedies elsewhere specifically provided, such orders as are just, including [various sanctions].

Ill. S. Ct. R. 219(c) (eff. July 1, 2002). "The purpose of imposing sanctions is to coerce compliance with court rules and orders, not to punish the dilatory party." *Koppel v. Michael*, 374 Ill. App. 3d 998, 1004 (1st Dist. 2007) (internal quotation marks omitted) (quoting *Sander v. Dow Chemical Co.*, 166 Ill. 2d 48, 68 (1995)). The "discovery procedures are meaningless unless a violation entails a penalty proportionate to the gravity of the violation," and discovery will be ineffective unless courts "unhesitatingly impose sanctions proportionate to the circumstances." *Id.* (internal quotation marks omitted) (quoting *Buehler v. Whalen*, 70 Ill. 2d 51, 67 (1977)). "To determine whether a sanction order [is] just, a court must look to the conduct that gave rise to the sanction

order and to the effect of that conduct on the parties." *Id.* (internal quotation marks omitted) (quoting *Hartnett v. Stack*, 241 Ill. App. 3d 157, 176 (2d Dist. 1993)).

ANALYSIS

This matter centers on the access to and discoverability of data associated with a patient's electronic medical record ("EMR"), also referred to as the electronic health record ("EHR"). To provide the legal framework, a summary of federal law governing audit trails is necessary before explaining the conduct of the parties in this case.

I. Federal Law Governing Audit Trails

Congress enacted the Health Insurance Portability and Accountability Act ("HIPAA") to "improve 'the efficiency and effectiveness of the health care system, by encouraging the development of a health information system through the establishment of standards and requirements for the electronic transmission of certain health information.'" *Bocage v. Acton Corp.*, No. 2:17-cv-01201, 2018 U.S. Dist. LEXIS 24632, at *9 (N.D. Ala. Feb 15, 2018) (quoting HIPAA). In response to HIPAA, the Department of Health and Human Services ("HHS") published HIPAA's right of access rule:

> Except as otherwise provided . . . an individual has a right of access to inspect and obtain a copy of protected health information about the individual in a designated record set, for as long as the protected health information is maintained in the designated record set.

45 C.F.R. § 164.524(a)(1). This "right of access" rule has only two exceptions: there is no patient right of access to either (1) psychotherapy notes, or (2) information compiled in reasonable anticipation of litigation. *Id.* § 164.524(a)(1)(i-ii).

With the enactment of the HITECH Act in 2009, Congress "expanded HIPAA to include individuals' rights to obtain electronic health records and added stronger privacy and security requirements to protect health information." *Bocage*, 2018 U.S. Dist. LEXIS 24632, at *12. In other words, the HITECH Act sought in relevant part to assist in the implementation of widespread and interconnected meaningful use of electronic health records. HHS thereafter implemented regulations outlining the standards with which healthcare providers must comply. The Cures Act would later respond to a growing concern that healthcare software developers and providers sought to restrict the amount and types of information accessible to individuals by adding

"information blocking" provisions (discussed *infra*) to further encourage the broad access to patients' own health information.

In sum, the U.S. Government has set forth specific standards outlining national policy stances regarding the access to and privacy of electronic health records. Whether an audit trail of an electronic health record falls within the "right of access" provisions of the Code of Federal Regulations, or is otherwise included within the meaning of an "electronic health record," is therefore of huge importance. Specifically, it informs the Court as to the relevance and importance of the plaintiff-patient's request for access and whether the need for discovery outweighs the burdens suffered by the producing party. See Ill. S. Ct. R. 201(b)(1), (c)(3) (eff. July 1, 2014) (explaining the relevance and proportionality standards applicable to discovery).

Whether the national policy instructs that individuals have access to audit trails depends first on the definitions used in the regulatory scheme. HHS defines the patient's right of access to health information as a right "to inspect and obtain a copy of *protected health information about the individual in a designated record set*." 45 C.F.R. § 164.524(a)(1) (emphasis added). Individuals under federal law therefore do not have an absolute right to all information maintained by healthcare providers and software developers; they have a federal right only to "protected" information "about the individual" in a "designated record set."

HHS defines "protected health information" as "individually identifiable health information . . . that is (i) transmitted by electronic media; (ii) maintained in electronic media; or (iii) transmitted or maintained in any other form or medium." 45 C.F.R. § 160.103. If auditing information constitutes "individually identifiable health information" that is contained in electronic media, then it is included within the federal right of access. "Individually identifiable health information" is further defined as information created by a health care provider that relates to the provision of health care to an individual, among other things, that can be used to identify the patient. *Id.* In sum, audit trail information is included in the patient's right of access if it is created or used by the healthcare provider, can be used to help treat or identify the patient, relates to the provision of health care to the patient, and is maintained in electronic media. See

id. It does not matter whether the information requested is contained on the face of the patient's medical records because a "covered entity *must provide the individual with access*" beyond just the EHR. 78 Fed. Reg. 5631-32 (Jan. 25, 2013) (emphasis added).

HHS has acknowledged that this imposes a heavy burden on healthcare providers. See *id.* However, the national policy is that this burden cannot overcome the patient's right of access. Even with this additional burden on healthcare providers, HHS went even further to impose a scheme of penalties for entities that disobey this national policy. On May 1, 2020, HHS and the Office of the National Coordinator for Health Information Technology ("ONC") finalized another rule related to enforcing the health information goals of HIPAA and the HITECH Act, this time in response to Congress's new instructions in the 21st Century Cures Act. See 85 Fed. Reg. 25642 (May 1, 2020). The Cures Act "require[d] the Secretary of [HHS], in consultation with the [ONC], to promote policies that ensure that a patient's EHI [electronic health information] is accessible to that patient and the patient's designees, in a manner that facilitates communication with the patient's health care providers and other individuals." 85 Fed. Reg. 25691. The new rule requires, among other things, that healthcare technology maintained by providers and software developers is capable of exporting or otherwise making readily available to individuals "*all EHI produced and electronically managed by a developer's technology*." 85 Fed. Reg. 25690 (emphasis added).

The Cures Act also instructed HHS to adopt regulations defining and implementing new statutory provisions involving "information blocking." HHS defines information blocking as any practice that:

> (1) [I]s likely to interfere with access, exchange, or use of electronic health information; and
>
> . . .[1]
>
> (3) If conducted by a health care provider, such provider knows that such practice is unreasonable and is likely to interfere with access, exchange, or use of electronic health information.

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[1] Subsection (2) relates only to conduct by health IT developers, networks, and exchanges. RUMC is none of those.

45 C.F.R. § 171.103(a). Until October 2022, the information that is subject to these information blocking provisions includes anything "identified by the data elements represented in the USCDI standard adopted in § 170.213." *Id.* § 171.213(b). This standard includes "provenance," which is defined as "*[t]he metadata, or extra information about data, regarding who creates the data and when it was created.*"[2] Therefore, the current standard includes the metadata about the electronic medical records in the patient's right of access. This standard will also continue to strengthen the patient's right of access because, starting in October 2022,[3] health information technology must be capable of giving access to "***all EHI***." 85 Fed. Reg. 25794 (emphasis added).

HHS has also defined the types of metadata that certified technology must be capable of producing. See 45 C.F.R. § 170.210(e), (h). With respect to audit trails, HHS regulations require that the technology must be able to record all actions made to an electronic health record and indicate whether the audit trail has been altered in any way, among other things. HHS also specifically *removed* lists of types of metadata that would be included or excluded from its requirements because it sought to grant the right of access to all types of metadata. See 85 Fed. Reg. 25698 ("[W]e have finalized that EHI that can be stored at the time of certification by the product is the scope of data that must be included in exports . . . . Under this revised scope of data export, it is no longer necessary to list specific metadata exclusions or inclusions.").

In sum, federal law says that audit trail data, including metadata associated with a patient's EHR, is included in the patient's right of access and that it constitutes information blocking to refuse to produce such data.

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[2] *United States Core Data for Interoperability ("USCDI") Version 1*, Office of the National Coordinator for Health Information Technology, at 13 (July 2020 Errata), *available at* https://www.healthit.gov/isa/united-states-core-data-interoperability-uscdi (emphasis added).

[3] The reason for a gradual implementation of these standards over a period of 18 months is to give a grace period for providers and software developers to adapt to their technological capabilities to become compliant with the final goal of the regulations, which is to "encourage actors to respond to requests for access, exchange, or use of EHI with as much EHI as possible." 85 Fed. Reg. 25794.

II. Audit Trail Discovery in this Case

With this legal framework in mind, the Court turns to the audit trail discovery in this case, which has been litigated since Prieto first issued written discovery requests to RUMC on January 29, 2019. In her initial discovery requests, Prieto defined the scope of the EHR and audit trail requests:

> The term "**Electronic Health Record (EHR)**" will be used herein . . . to refer to the entire and complete medical record (MR, electronic medical/health records (EMR/EHR), legal medical/health record (LMR/LHR), the complete collection of information connected to the patient's care, including but not limited to, hospital care, ambulatory treatment, progress notes, physicians' notes, nurses' notes, EKG or EEG, radiology studies, labs, vitals, **fetal monitoring strips**, or tests of any type related to care of the patient, including the billing sheets, insurance information, and audit trails, which contain data reflecting the care of the patient, including data from handwritten records, in addition to electronic data.
>
> The term "**Audit Trail**" refers to the part of the patient's EHR that displays any person logging in to the record to modify the record, correct the record, add to the record, alter the record, revise the record, complete the record, put finishing touches on the record, and any other entry or access into the medical record, or any other name synonymous with the reflection of who, when and what a person did in relation to the Electronic Health Record.

(Prieto's 6/4/20 Motion for Sanctions, Ex. 2, at 2 (emphasis in original).) These initial discovery requests asked for "a complete, unaltered EHR" with respect to both Prieto and Meherg's records. (*Id.*) Prieto also requested "a complete, unaltered Audit Trail . . . in native format" with respect to both Prieto and Meherg's records, including "[a]ll metadata for any access events by any person" and "[a]ny changes, modification, revisions, deletions, and/or amendments made to the EHR." (*Id.* at 3.) Prieto also requested "a complete, unaltered Access Log reflecting the actions in the EHR . . . so as to create a continuous chronology of events." (*Id.*) In the other specific requests, Prieto asked for "audit reports/logs for any changes or revisions" related to specific systems, all documentation pertaining to EHR system upgrades, and more. (See *id.* at 4-5.)

On February 8, 2019, Judge John Callahan ordered RUMC to respond to EHR discovery by February 25, 2019. *This was the first order requiring RUMC to fully and*

completely respond to EHR discovery, and it did not comply. At the next case management conference, in front of this Court on March 11, 2019, RUMC presented a motion for a protective order regarding audit trail and EHR discovery. Prieto did not receive RUMC's response to her January 29, 2019, discovery requests until June 24, 2019, the day before another court appearance. *At this point, it had been nearly five months since Prieto first issued her EHR requests.*

At the June 25, 2019, court appearance, Prieto pointed out that the audit trail production was insufficient because it produced only an access log. At that time, RUMC's person most knowledgeable on the issues—Robert Narowski—attested that "the term 'audit trail' is interchangeable with the term 'audit log,'" and that the audit logs are also known as "'Access Logging Report By Patient.'" (Prieto's 6/4/20 Motion for Sanctions, Ex. 5, at 2.) *This would turn out to be false.* Narowski also attested that the access logging report does not contain "word-for-word, specific changes made to the electronic record." (*Id.* at 3.) Finally, Narowski concluded his affidavit stating that "no further audit logs are available for Angela Prieto or Anthony Meherg from Rush University Medical Center through the Epic medical record system." (*Id.* at 4.) *This would also turn out to be false.*

After efforts to resolve these disputes failed, on September 25, 2019, this Court granted Prieto's motion to compel and ordered that RUMC produce all of the auditing data containing revisions, among other things, by October 3, 2019. *This was the second order requiring RUMC to fully and completely respond to EHR discovery, and it did not comply.* This court order also instructed Prieto to notice a motion for *in camera*, on-site inspection of the auditing systems at RUMC in the event that production is not completed by that date.

On October 8, 2019, the Court granted Prieto's motion for on-site inspection of RUMC's EHR system over RUMC's objections. The Court thereafter denied RUMC's motion to reconsider that order. It took another six orders spanning from October 29, 2019, through January 21, 2020, to get a protective order in place to govern the on-site inspection. Finally, on January 28, 2020, the Court's order set the judge-supervised inspection for February 28, 2020, at RUMC.

The February 28, 2020, inspection revealed many aspects of the audit trail and EHR discovery that were either withheld, misrepresented, or otherwise not produced since Prieto made her requests *thirteen months earlier*. With this Court in attendance, the following notable events, among others, occurred at the EHR and audit trail inspection:

- The parties observed records related to a telephone encounter that had not been produced. (See February 28, 2020, EHR Inspection Transcript, at 31:21-32:7.)

- Narowski testified that "all the data that existed during the time that the patient [Prieto and Meherg] was receiving care is still available through the system today." (*Id.* at 31:5-9.)

- Narowski—who was admittedly part of the RUMC team that applied for and received government funding to maintain compliance with federal regulations—testified that, to the best of his knowledge, RUMC had "never not been in compliance" with the state and federal Meaningful Use Program, which triggers audit trail and other patient access regulations. (See *id.* at 37:24-40:9.)

- The parties observed records related to glucose tolerance testing that had not been produced. (See *id.* at 43:1-60:6.)

- Narowski testified that the glucose tolerance test records discovered for the first time are available in several different types of reports and that there was no apparent reason why these different reports were not produced to Prieto. (See *id.* at 53:16-56:13.)

- While observing a recorded encounter with an OB/GYN, Prieto's expert consultant, Andrew Garrett, pointed out to Narowski and everyone else present where to see the specific revision history in each record, none of which had been produced. (See *id.* at 72:23-80:9.)

- While observing options to display revision history for a specific time period, Narowski testified that the difference between types of revision histories is that one version allows you to see only if changes or revisions have been made and by who, "[w]hereas in revision history, you can see both [the record or note and the revisions] side by side." (See *id.* at 77:6-79:6.)

- RUMC's representative knowledgeable about audit trails and HIPAA security, Andrew Reeder, testified that the audit trail is not part of the patient's medical record and that there is a difference between the "legal medical record" and "individually identifiable health information." (*Id.* at 104:18-105:8.) Reeder further testified that if a patient requests their medical record outside of the litigation process, they "have the right of access to their medical record, but they don't have the right of access to the detail in the audit record" because "that

particular portion of the HITECH Act has not been enforced or created into a rule at this point." (*Id.* at 112:1-113:6.) *RUMC's interpretation of federal law, in this Court's opinion, is wrong.*

- RUMC's in-house counsel, Amy Pleuss, said that her "interpretation is that the medical record is the audit trail." (*Id.* at 126:15-16.) *This is false.*

- In the presence of Narowski and Pleuss, Garrett and Reeder agreed that an "access log" and an "audit log" are two separate things, and that there is a separate "audit trail viewer" with Epic. (*Id.* at 125:19-129:5.) *This contradicts Narowski's affidavit from RUMC's June 24, 2019, production response.*

- The parties observed Prieto's audit trail or audit log in the "audit trail viewer" and confirmed with Reeder that he could export the audit trails to Excel and that he could print them (in multiple, smaller segments so that it is easier to export). (See *id.* at 134:11-138:4.) *The ability to produce this additional audit trail information further contradicts Narowski's affidavit from RUMC's June 24, 2019, production response.*

- RUMC's litigation counsel, Elizabeth Bruer, confirmed that RUMC would produce everything observed through the audit trail viewer at a later date because it is "thousands of pages." (*Id.* at 137:2-6, 142:22-143:4.) *This would not be done until almost ten months later.*

- Bruer said that RUMC would need to discuss production of Epic's "proprietary" information and documents (Epic's workbook, data dictionary, and more) with its contract attorneys, but that "if it's something that the Court orders or . . . we're able to produce that portion of it, then I think we can produce it." (*Id.* at 151:2-14.) *Despite a later court order requiring production of this information, it has never been produced or submitted for in camera review.*

- Reeder testified that his view, "having worked [at RUMC] a number of years, is that we have never released – we've never released the audit, the actual audit data – except for the instance of one or two employee patients – the audit detail to any patient." (*Id.* at 160:18-23.)

- Pleuss confirmed that somebody would be identified "in the future" who could explain the codes used in the audit trails. (*Id.* at 162:6-9.) *Despite Pleuss's representation, this has not been done.*

Based on the on-site inspection, Prieto issued supplemental written discovery requests via email on March 5, 2020, which asked RUMC to produce (1) all audit data saved to pdf during the inspection, (2) the audit trails ran during the inspection, (3) the

RUMC Lab User Guide, and (4) the Epic code workbook/guide.[4] (Prieto's 5/17/21 Memorandum in Support of a Sanctions Order, Ex. 12b.) This Court then ordered RUMC to either produce all items requested or otherwise state its objections no later than March 19, 2020. *This was the third order requiring RUMC to fully and completely respond to EHR discovery, and RUMC did not comply.*

On June 4, 2020, after receiving nothing from RUMC, Prieto filed her first motion for sanctions against RUMC for its conduct in the audit trail litigation. That motion was fully briefed.

Soon after Prieto filed her first sanctions motion, on June 17, 2020, RUMC filed its own motion for sanctions, arguing that Prieto's counsel and expert engaged in the on-site EHR inspection knowing that much of the information observed on RUMC's computers was Epic's confidential and proprietary information. This motion was not fully briefed because discovery was necessary to determine the merits of RUMC's objections regarding the proprietary nature of certain EHR information. The Court's July 30, 2020, order stayed briefing of RUMC's motion for sanctions and granted leave for Prieto to issue discovery seeking copies of any and all communications and documents supporting RUMC's objections, including copies of contracts with Epic. The Court also ordered the *in camera* inspection of documents that RUMC said were proprietary. Prieto subsequently issued those requests on August 4, 2020. *To date, RUMC has neither responded to those discovery requests nor submitted anything for in camera review.*

On the Court's direction, Prieto filed a new emergency motion for sanctions on August 27, 2020, when RUMC did not respond to the August 4, 2020, discovery requests within 14 days. Instead of responding to those discovery requests pursuant to the Court's July 30, 2020, order, RUMC issued its own discovery requests regarding Prieto's expert consultant, Andrew Garrett on August 12, 2020. RUMC explained in its response brief in opposition to Prieto's August 27, 2020, emergency motion that there was no current order in place setting the deadline by which the parties must respond to

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[4] At the on-site inspection, RUMC's representatives explained that the user guide and workbook are necessary to understanding the codes used in auditing data.

discovery. In their Rule 201(k) discussions on their respective discovery requests, Prieto sought a deadline of August 18, 2020. RUMC requested until September 11, 2020, to answer the new discovery requests and requested until September 15, 2020, to answer discovery from March 5, 2020. No order was entered setting any of these requested deadlines. *Despite RUMC's representation that it would have full and complete discovery responses in mid-September 2020, no such responses were made.*

Instead, RUMC tendered its response to Prieto's March 5, 2020, discovery requests *three months later* on December 18, 2020. To date, RUMC has not answered Prieto's supplemental discovery as ordered by this Court on July 30, 2020.[5] *RUMC's response to the supplemental discovery requests are over 17 months delinquent.*[6]

Prieto filed her memorandum in support of a proposed sanctions order on May 17, 2021, attaching an affidavit of her expert consultant, Andrew Garrett, among other evidence. Prieto's memorandum explains that RUMC's December 18, 2020, production is still not complete, as it is missing the revision histories discussed and observed at the February 28, 2020, on-site inspection. It also attached spreadsheets that were apparently altered from their original format. In sum, Prieto says that RUMC's December 18, 2020, responses still do not include all requested auditing and EHR information.

Before filing a response memorandum, RUMC moved to permit the deposition of Garrett based on his attestations in an affidavit attached to Prieto's May 17, 2021, memorandum. This Court denied that motion and ordered RUMC to respond as to why it should not be sanctioned. RUMC thereafter timely filed its response memorandum on August 20, 2021.

After considering all of the materials before it, the Court finds that the various motions requesting sanctions are now ripe for ruling.

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[5] To the extent that RUMC argues that Prieto has likewise not answered supplemental discovery that was issued by RUMC on August 12, 2020, those discovery requests were not subject to the Court's July 30, 2020, order. Any failure by Prieto to answer RUMC's new discovery requests were subject to the Rule 201(k) obligation. If those discussions failed to resolve the dispute, RUMC should have moved to compel answers and obtained a ruling. In any event, RUMC's supplemental requests would later be denied with respect to Prieto's expert consultant.

[6] As will be discussed *infra* section III, RUMC's responses to the discovery ordered on July 30, 2020, are necessary before ruling on RUMC's own motion for sanctions. Still, RUMC has not complied.

III. Sanctions

Trial courts have broad powers to enforce the Supreme Court's discovery rules and their discovery orders. See *Koppel*, 374 Ill. App. 3d at 1003. Nevertheless, "[d]ismissal of a cause of action or sanctions which result in a default judgment are drastic sanctions and should only be employed when it appears that all other enforcement efforts of the court have failed to advance the litigation." *Id.* at 1004 (alteration in original) (quoting *Sander v. Dow Chemical Co.*, 166 Ill. 2d 48, 67-68 (1995)). Such a sanction "is justified only where the party [being sanctioned] has shown a deliberate and contumacious disregard for the court's authority." *Id.* (quoting *Sander*, 166 Ill. 2d at 68); see *Vaughn v. Northwestern Mem. Hosp.*, 210 Ill. App. 3d 253, 259 (1st Dist. 1991) (explaining that such a drastic sanction "is authorized where the conduct of the offending party is characterized by a deliberate and pronounced disregard for the rules, orders, and authority of the court").

There are six factors that courts use to determine what, if any, sanction is appropriate:

> (1) [T]he surprise to the adverse party;
> (2) [T]he prejudicial effect of the proffered testimony or evidence;
> (3) [T]he nature of the testimony or evidence;
> (4) [T]he diligence of the adverse party in seeking discovery;
> (5) [T]he timeliness of the adverse party's objection to the testimony or evidence; and
> (6) [T]he good faith of the party offering the testimony or evidence.

Shimanovsky v. GMC, 181 Ill. 2d 112, 124 (1998). No single factor is dispositive. *Id.*

RUMC's motions for sanctions against Prieto need little discussion. At the on-site inspection, RUMC's counsel learned for the first time that some information requested by Prieto may be Epic's proprietary information that could, in fact, be properly withheld. As a result, this Court authorized RUMC to withhold producing or displaying certain information that may be proprietary in nature to Epic, which is not a party, until the Court rules on the issue. The Court permitted Prieto to issue supplemental discovery on this issue, *and RUMC has to this date still not tendered responses to that discovery.* RUMC has done nothing in response to this Court's July 30, 2020, order requiring it to produce all communications and documents relevant to its objections based on

information believed to be proprietary in nature. To this day—*over 17 months since the Court's order*—RUMC has produced nothing in this regard, nor has it submitted anything for *in camera* review.

RUMC's argument on this issue is that the Court set no deadlines for RUMC to tender its responses. Although Prieto asked that RUMC respond to the August 4, 2020, discovery requests by August 18, 2020, RUMC's counter was that it would provide answers by September 11, 2020 (and it agreed to produce responses to the March 5, 2020, requests by September 15, 2020). RUMC says that it violated no court orders because this Court did not enter either of these proposed orders.

Nonsense. This is no excuse for RUMC's complete failure to tender any responses to the August 4, 2020, requests for now over 17 months. RUMC proposed an order representing that it would be able to respond to those requests by September 11, 2020. A year and a half later, RUMC has still done nothing. See Ill. S. Ct. R. 214(a) (eff. July 1, 2018) (explaining that the standard for tendering a response to a party's production requests is "reasonable time, which shall not be less than 28 days after service of the request"). Failing to respond to production requests in excess of 17 months can hardly be considered "reasonable." What is more, it has already been over 23 months since Prieto first issued her discovery requests. Not only has RUMC failed to comply with discovery rules and orders, but its most recent brief regarding sanctions fails to offer any explanation as to why it has refused to comply with these discovery requests. (See RUMC's 8/20/21 Memorandum.)

Appallingly, RUMC's own requests for sanctions against Prieto is premised on the fact that Prieto's counsel and expert consultant may have knowingly placed RUMC in a position to breach its contract with Epic by disclosing proprietary information.[7] RUMC has asked this Court to award sanctions against Prieto on this basis, but has yet to produce *anything*—even for *in camera* review—that would support such a finding. As far as anyone else can tell, RUMC has no evidence that supports the proprietary nature of any information. RUMC has provided no evidence to support its motions for sanctions

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[7] RUMC also argues in its requests for sanctions that Prieto has continued to seek sanctions against RUMC without any basis, which it says is an independent reason for sanctions. The Court disagrees.

and has not otherwise withdrawn them. This Court is therefore left to believe that RUMC's requests for sanctions are nothing but frivolous attempts to redirect attention away from its own discovery abuses. Additionally, this Court ordered the on-site inspection over RUMC's objection. Thus, Prieto has not engaged in any misconduct even assuming RUMC was placed in a position to breach its contract with Epic.

Whereas RUMC's motions must be denied, Prieto's motions for sanctions are well-taken. As an initial matter, the parties have disputed the use of terms such as "audit trail," "audit log," "access log," "audit data," and perhaps others. These terms have been disputed in briefing, affidavits, and at the February 28, 2020, on-site inspection. Regardless, what remains true is that Prieto has asked for—and this Court has ordered—production of all of that information notwithstanding its technical name. It does not necessarily matter what those terms mean because everything related to RUMC's EHR and auditing systems was requested by Prieto in her initial discovery requests from January 2019. Whether particular information in RUMC's EHR and auditing systems are styled as an "audit trail," "audit log," "access log," or other types of information, the ultimate rule remains the same: RUMC has an obligation, pursuant to the Supreme Court's discovery rules in conjunction with federal law, to provide all discoverable information as requested. It has shown no regard for that obligation.

The scope of the information requested, discussed *supra* section II, included everything associated with Prieto and Meherg's medical records in any of RUMC's auditing and EHR systems. Per the Court's February 8, 2019, order, RUMC was ordered to respond to discovery requests by February 25, 2019. And yet, RUMC did not produce anything until June 2019 when it produced an access log. RUMC's person most knowledgeable, Robert Narowski, attested that the "audit trail" is the same as the "audit log," which is what was produced in June 2019. He attested that there were no additional audit logs, and RUMC has maintained that argument to this day.

But these statements are false. After continued discussions over the scope of production failed, this Court ordered an on-site, *in camera* inspection of RUMC's EHR and auditing systems. At that inspection, several records were discovered that were not produced, including glucose tolerance testing and at least one other encounter. RUMC's

own representative testified that there is no explanation for why these hidden records were not previously produced. Had this Court not ordered an on-site inspection, these missing records may never have been produced. RUMC, by its counsel and corporate representatives, has never controverted the fact that these records were not previously produced.

Also at the inspection, RUMC's other person most knowledgeable, Andrew Reeder, agreed with Garrett that there is, in fact, a difference between "audit trails," "audit logs," and "access logs." Reeder helped the parties navigate through an audit trail viewer and observed hundreds of additional pages of auditing data and documents that were not produced. While searching through RUMC's auditing and EHR systems, the parties also discovered the tools to obtain revision histories and several different, undisclosed means of obtaining metadata and auditing data that was requested in January 2019. None of this had been produced. Contrary to Narowski's affidavit and RUMC's continued assertions, there actually were several different categories of information that were discovered for the first time at the on-site inspection. See *Buehler*, 70 Ill. 2d at 67 (explaining that "the trial court would have been justified in striking the answer of this defendant and submitting to the jury only the issue of damages" at least in part because "the opposing party may well have been forced to trial without truth, [which] is the heart of all discovery"); see also *Boettcher*, 243 Ill. App. 3d 940, 948 (5th Dist. 1993) ("It is the obligation of counsel to impress on their clients, and to remain mindful themselves, that while the compliance contemplated by our discovery rules may require the disclosure of facts damaging to the answering party's case, nothing less than full compliance is satisfactory.").

The parties dispute the discoverability of the auditing data. Reeder testified during the on-site inspection that RUMC's custom and practice is that it does not release auditing data to patients. In fact, he testified that RUMC *has never* released that auditing data, except maybe to some employees. Reeder explained that he does not believe that the audit trail is part of the patient's medical record. Even assuming Reeder is correct, this fact does not justify ignoring discovery requests and court orders mandating production of those items. If RUMC intended to object on the basis that audit

trail and EHR information is not discoverable even after this Court ordered production, then it was required to produce everything over its objections. To the extent that RUMC believed it should not have had to produce the documents over objections, then it should have prepared a privilege log and set forth those arguments. The only articulable reason in the record as to why RUMC might be permitted to withhold production would be if the auditing data itself were genuinely proprietary and confidential, a fact that RUMC admits is not the case. (See RUMC's 8/20/20 Response at 11 ("Plaintiff continues to insist that RUMC is failing to produce audit data because it believes the audit data to be proprietary. . . . [N]o one at or on behalf of RUMC has ever indicated that to plaintiff's counsel or this Court.")).

Consequently, RUMC ignored its obligation under Supreme Court Rule 201(b)(1) and (4) to ***fully*** produce everything that is requested, including "data or data compilations in any medium from which electronically stored information can be obtained." See Ill. S. Ct. R. 201(b)(1), (4) (eff. July 1, 2014); *Boettcher*, 243 Ill. App. 3d at 947-48. The Supreme Court has explained that "half-truths are equivalent to outright lies and 'fractional disclosure' is not the disclosure contemplated by our discovery rules." *Boettcher*, 243 Ill. App. 3d at 947 (quoting *Buehler*, 70 Ill. 2d at 67-68). Fractional disclosure and half-truths "'have the effect of affirmative concealment, since they imply that there is no information or evidence to be sought.'" *Id.* (quoting *Ostendorf v. Int'l Harvester Co.*, 89 Ill. 2d 273, 282 (1982)).

RUMC went even further to disregard the discovery rules. While the Supreme Court has said that fractional disclosure and half-truths *imply* that there is no information or evidence to be sought, Robert Narowski—on behalf of RUMC—signed a sworn statement in June 2019 confirming that all applicable information from RUMC's EHR and auditing systems had been produced. This is proved to be demonstrably false, as was seen during the February 28, 2020, on-site inspection. See *Koppel*, 374 Ill. App. 3d at 1007 (affirming default judgment against defendants who "repeatedly ignor[ed] the court's orders" and filed a "'seemingly false affidavit' with the court").

After everyone present at the on-site inspection saw proof of its failure to produce the requested auditing and EHR information, RUMC apparently did not learn its lesson.

Attached to its brief in opposition to sanctions filed on August 20, 2021, is a new affidavit signed by Narowski. In this affidavit, he again attests that, to his knowledge, all requested information was produced on December 18, 2020. In response to Prieto's argument that the December 18, 2020, production did not include revision histories, Narowski's affidavit says that the revision history information has already been produced "through the multiple versions of the narrative notes and modifications to the flowsheets which are shown on the face of the [medical] record." (RUMC's 8/20/21 Response, Ex. A, at 5.)

RUMC's position throughout the entire audit trail litigation has been that a *substitute* for various types of auditing and EHR information is sufficient. This is false, and it is continued evidence of RUMC's complete disregard for controlling law and the Supreme Court's discovery rules. See 78 Fed. Reg. 5631-32 (explaining that a "covered entity must provide the individual with access" beyond just the EHR); Ill. S. Ct. R. 214(b) (eff. July 1, 2018) ("*[I]f a request does not specify a form* for producing electronically stored information, a party must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms" (emphasis added)); *Boettcher*, 243 Ill. App. 3d at 947-48 (citing two Supreme Court cases holding that half-truths and fractional disclosure are akin to affirmative concealment). As explained in detail *supra* section I, national policy in the United States says that all of the information associated with a patient's medical record belongs to the patient. The law has, over the last several years, continued to strengthen the patient's right to access his or her own medical information. This information includes metadata and other auditing information. Importantly, Illinois' discovery rules are even broader than the federal patient right of access. Unless there is an identifiable privilege or other genuine objection to production of documents, "*a party may obtain by discovery full disclosure regarding any matter relevant to the subject matter involved in the pending action.*" Ill. S. Ct. R. 201(b)(1) (emphasis added). This Court has been clear with RUMC: *all of the auditing and EHR information is relevant and discoverable*. Whether RUMC believes that certain auditing data is not part of the patient's medical record is of no concern to this Court; RUMC has

been ordered repeatedly to produce *any and all* auditing and EHR information pertaining to Prieto and Meherg's medical records, but to no avail.

It also does not matter whether RUMC believes that the revision histories and other auditing information can be found or gleaned from the face of the medical records. The February 28, 2020, transcript shows that Garrett walked RUMC's counsel and representatives through precisely how to find side-by-side revision histories, among several other types of auditing information. RUMC has never controverted the fact that it did not produce the revision histories despite specific requests to do so, even after it ultimately produced hundreds of pages of previously unproduced information in December 2020.

To the extent that RUMC believes that producing information that can be found elsewhere is burdensome, federal law has *chosen* to impose that burden on medical providers. Medical providers such as RUMC have received funding to aid in their efforts to comply with federal regulations as a way of lessening that burden. The fact that it may be burdensome is intentional, and it is no excuse to ignore the discovery rules. RUMC has also attempted to justify its conduct in this case by saying that any additional auditing or EHR data does not exist. RUMC has repeatedly argued this point, and yet the on-site inspection uncovered evidence critical to Prieto's case that were not produced. Its pattern of suddenly having more information to provide long after it is requested—especially after tendering sworn statements to the contrary—leaves this Court doubting the veracity of RUMC's arguments.

With respect to its eventual production of more auditing information, RUMC explains that the reason it had not yet tendered responses to the March 5, 2020, requests (prior to the eventual December 18, 2020, production) is because of the COVID-19 pandemic. (See RUMC's 6/16/20 Response at 2-3, 7-8.) Effective March 17, 2020—two days before RUMC's discovery responses and objections were due—the Circuit Court of Cook County implemented General Administrative Order ("GAO") 20-01 to address emergency measures associated with the COVID-19 pandemic.[8] GAO 20-01 ordered that

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[8] The original version of GAO 20-01, issued on March 13, 2020, is available at https://www.cookcountycourt.org/Manage/Division-Orders/View-Division-Order/ArticleId/2737/General-Administrative-Order-2020-01-COVID-10-EMERGENCY-MEASURES.

all court appearances were suspended at least for thirty days. In Paragraph 9 of that order, the Circuit Court's position on discovery—as opposed to court appearances and case management dates—was made abundantly clear: "*Discovery in civil matters will continue as scheduled.*" To the extent that RUMC needed additional time to respond to the discovery requests because its staff was busy fighting the pandemic, it should have simply asked for more time.[9] As a result of its failure to do so, RUMC disregarded the force of this Court's March 5, 2020, order. RUMC did not produce anything pursuant to this Court's March 5, 2020, order until *9 months later*, only after the parties began briefing the various sanctions motions.

It is also noteworthy that page 2 of RUMC's August 20, 2021, response brief says that "[a]fter the inspection, RUMC produced the voluminous data that was requested during the inspection." First, RUMC downplays how long it took to produce the requested data by saying "after the inspection." The truth, however, is that RUMC produced the data *nine months* after the inspection and in derogation of court orders to produce it earlier. Second, this information was not "requested during the inspection"; all of the auditing information, whether literally observed at the on-site inspection or not, was requested on January 29, 2019—almost 23 months earlier.

On December 18, 2020, when RUMC finally tendered its responses to Prieto's March 5, 2020, discovery requests, RUMC informed Prieto for the first time that any EHR and auditing information spanning from December 7, 2013, and February 4, 2014, "is unavailable due to a failure of data migration during an Epic upgrade." (Prieto's 5/17/21 Memorandum, Ex. 12b, at 2.) However, Narowski testified at the on-site inspection ten months earlier that "all the data that existed during the time that the patient [Prieto and Meherg] was receiving care ***is still available through the system***

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[9] GAO 20-04, which is cited by RUMC as a reason for delayed discovery, states as follows:

> All discovery deadlines . . . currently set by prior case management orders, will be extended to the future case management dates. . . . ***The extension is <u>not</u> a moratorium. The extension is additional time to complete discovery during this crisis. . . . Although difficult, discovery will proceed during this time. . . . Attorneys must advocate for their clients, and, at the same time, work with opposing counsel in a professional manner <u>to move cases forward toward resolution</u>.***

(RUMC's 6/16/20 Response, Ex. T, GAO 20-4, at 2 (emphasis added).)

today." (February 28, 2020, EHR Inspection Transcript, at 31:21-32:7 (emphasis added).) RUMC has therefore supported its discovery mishaps by tendering affidavits that contain seemingly false information. See *Koppel*, 374 Ill. App. 3d at 1007 (affirming default judgment against defendants who "repeatedly ignor[ed] the court's orders" and filed a "'seemingly false affidavit' with the court"). To make matters worse, Prieto specifically requested information about any EHR system upgrades in her first requests in January 2019. (Prieto's 6/4/20 Motion for Sanctions, Ex. 2, at 4-5.) It took RUMC ***23 months*** to answer Prieto's request for evidence of EHR system upgrades, and its eventual answer told Prieto that a system upgrade resulted in permanently losing three months' worth of requested data. RUMC's pattern of fractional, untimely, and unforthcoming discovery responses shows no end in sight.

It is also telling that that RUMC's eventual production on December 18, 2020, included production of information that was generated on June 17, 2020. (See Prieto's 5/17/21 Memorandum, Ex. 12d.) This information was not only generated four months after RUMC was ordered again to produce it or otherwise state its objections, but was generated six months before it was ultimately produced. RUMC's lack of attention to the timeliness of its production only further supports sanctions be leveled against it.

RUMC's briefs on the various pending motions have complained that there is a pattern of "one-sided discovery" in this case. RUMC specifically takes issue with the fact that Prieto has not been deposed, that Prieto has not answered certain written discovery, and that it was not allowed to depose Prieto's affiant.[10] But RUMC's concerns are largely self-generated. This Court has had ongoing involvement in primarily one matter in this case: RUMC's failure to respond sufficiently to Prieto's EHR requests. The parties and this Court have spent substantial resources designed to secure RUMC's compliance with court orders and the discovery rules, but to no avail. It is disingenuous at best for RUMC to seek enforcement of its own requests while, at the same time, unreasonably causing the expenditure of substantial resources to compel its own

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[10] To the extent that RUMC argues that the Court should have permitted it to depose Prieto's affiant, Andrew Garrett, the Court found that such a deposition was not necessary to secure RUMC's compliance with the existing audit trail dispute. RUMC also had every opportunity to question Garrett, whether under oath or not, to clarify the information that Prieto sought at the on-site EHR inspection.

compliance. Certainly, RUMC is entitled to discovery. But it is not entitled to simultaneously ignore efforts designed to secure its own compliance.

With respect to its obligations under federal law, RUMC has demonstrated a critical misunderstanding of the regulations that govern its use of health information technology. Reeder testified that the HITECH Act does not grant the right of access to auditing information because "that particular portion of the HITECH Act has not been enforced or created into a rule at this point." (February 28, 2020, EHR Inspection Transcript, at 112:1-113:6.) This is wrong, as explained *supra* section I. Nevertheless, a misunderstanding of the applicable regulations is no excuse for failing to produce discoverable information pursuant to this Court's orders. See *Boettcher*, 243 Ill. App. 3d at 948 ("Whether omissions in discovery are intentional or inadvertent, [courts] will neither condone nor tolerate false, incomplete, or inaccurate discovery.").

The importance of the information that Prieto has asked for cannot be understated. HHS regulations instruct this Court that Prieto has a right to see everything related to her and her son's medical records. Even assuming there are genuine disputes over whether a patient has a right to obtain auditing and other EHR data, it is no defense to Illinois' broad litigation discovery rules. The Court has issued its rulings on these issues and has made its position on the scope of discovery eminently clear. RUMC's conduct has shown nothing other than unjustifiable non-compliance with this Court's orders, as well as a complete abandonment of adhering to the Supreme Court's discovery rules, and, in the process, RUMC has subjected itself to scrutiny under federal information blocking regulations. See 45 C.F.R. § 171.103(a).

Prieto filed this case in April 2018. After years of litigating written discovery related to audit trails and RUMC's EHR systems, the case remains at a very early stage. After considering all of the *Shimanovsky* factors, the Court finds that the repeated discovery delays are the result of RUMC's contumacious disregard for this Court's orders and the Supreme Court's discovery rules. For the foregoing reasons, RUMC's conduct justifies imposition of a severe sanction: RUMC's answer is stricken, and judgment is entered against RUMC and in favor of Prieto on the issue of liability.

It is hereby ordered:

1. Prieto's various motions for sanctions against RUMC are GRANTED.

2. RUMC's opposing motions for sanctions against Prieto are DENIED.

3. Pursuant to Supreme Court Rule 219(c), RUMC's answer to Prieto's complaint is STRICKEN and judgment is hereby GRANTED against RUMC on the issue of liability.

4. This case shall proceed as to damages only.

5. The parties shall confer about, prepare, and submit a case management order to govern the remainder of discovery no later than February 4, 2022.

Hon. Judge James N. O'Hara