

STATE OF NORTH CAROLINA  
COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE  
SUPERIOR COURT DIVISION  
21 CVS 5801

TOTAL MERCHANT SERVICES, LLC,

Plaintiff,

v.

TMS NC, INC. AND CHRISTOPHER  
COLLINS,

Defendants.

**AMENDED ORDER ON PLAINTIFF  
TOTAL MERCHANT SERVICES'  
MOTION TO DISMISS  
COUNTERCLAIMS AND FOR FEES**

**AND**

**AMENDED ORDER TO SHOW CAUSE**

1. **THIS MATTER** is before the Court on Plaintiff Total Merchant Services, LLC's ("Plaintiff" or "TMS") Motion to Dismiss Defendants' Counterclaims and for Fees (the "Sanctions Motion" or the "Motion") pursuant to the Court's inherent authority and under Rule 41(b) of the North Carolina Rules of Civil Procedure ("Rule(s)") filed 13 June 2022 in the above-captioned case.<sup>1</sup>

2. Having considered the Sanctions Motion, the briefs in support of and in opposition to that Motion, the relevant materials associated with the Sanctions Motion, and the arguments of counsel at the 9 August 2022 hearing on the Motion (the "Hearing"), the Court concludes, in the exercise of its discretion, that the proper administration of justice requires that the Motion be granted and that Defendant TMS NC, Inc. ("TMS NC"), Defendant Christopher Collins (together, "Defendants"),

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<sup>1</sup> (Pl.'s Mot. Dismiss Defs.' Countercls. and for Fees and Request for Expedited Briefing [hereinafter "Sanctions Mot.'], ECF No 142.) Plaintiff's request for expedited briefing was denied by an order dated 23 June 2022, (Order on Pl.'s Request for Expedited Briefing and Notice of Hr'g, ECF No. 150.)

and Monica Collins<sup>2</sup> be ordered to appear and show cause why the Court should not enter sanctions up to and including striking Defendants' answer, affirmative defenses, and remaining amended counterclaims for Defendants' conduct in delaying the administration of this case through their improper removal of the action to federal court followed, on remand, by Defendants' stubborn refusal to respond to Defendants' April 2021 discovery requests, stubborn and willful failure to comply with the Court's 6 May 2022 Order granting Plaintiff's motion for preliminary injunction (the "PI Order"),<sup>3</sup> failure to timely comply with the Court's 1 July 2022 Order granting Plaintiff's Motion to Compel (the "Compel Order"),<sup>4</sup> and, if established after full briefing and hearing, systematic and repeated violation of paragraphs 70(a) and 70(b) of the PI Order. Thus, the Court hereby **ENTERS** the following **FINDINGS OF FACT** and **CONCLUSIONS OF LAW** as set forth below.

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<sup>2</sup> Though Monica Collins is not a named party in this action, she is identified as an owner of TMS NC in the signature block of the affidavit she submitted on 27 April 2022, (Monica Collins Aff., ECF No. 89), and as an "appropriate custodian of ESI materials[.]" (Defs.' Certification of Compliance). See *Norburn v. Mackie*, 262 N.C. 16, 24 (1964) ("a principal is chargeable with . . . the knowledge of or notice to his agent received while the agent is acting as such within the scope of his authority and in reference to a matter over which his authority extends").

<sup>3</sup> (Order on Pl. Total Merchant Services' Second Am. Mot. for Prelim. Inj. [hereinafter "PI Order"], ECF No. 98.) The Court subsequently amended the PI Order twice, and the Second Amended PI Order, (Second Am. Order on Pl.'s Second Am. Mot for Prelim. Inj. [hereinafter "Second Am. PI Order"], ECF No. 119), is the operative version of the PI Order that the Court will cite to in the remainder of this Order.

<sup>4</sup> (Order Granting Pl. Total Merchant Services LLC's Am. Mot. Compel Disc. Responses and for Award of Expenses [hereinafter "Compel Order"], ECF No. 152.)

## I.

### FINDINGS OF FACT

3. TMS initiated this action in Wake County Superior Court on 28 April 2021, asserting claims against Defendants TMS NC and TMS NC's owner Christopher Collins for breach of contract, indemnification, specific performance, preliminary and injunctive relief, and declaratory judgment arising out of Defendants' alleged breach of an exclusive sales agreement<sup>5</sup> and TMS's attempts to enforce its inspection rights pursuant to the Agreement.<sup>6</sup> Contemporaneously with the Complaint, TMS filed a Motion for Preliminary Injunction.<sup>7</sup>

4. Before the Motion for Preliminary Injunction was heard, Defendants removed the case to the United States District Court for the Eastern District of North Carolina, Western Division, on 8 June 2021.<sup>8</sup> The case was later remanded to the Superior Court of North Carolina on 16 December 2021 upon the federal court's

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<sup>5</sup> In brief, the parties' predecessors-in-interest entered a Sales Representation Agreement (the "Agreement") in 2008 by which, in exchange for selling and marketing TMS's products and services, TMS NC is paid a "residual share," the difference between certain rates and fees charged to each business customer that TMS NC solicits on behalf of TMS and certain rates and fees that TMS pays to third party credit card associations and other related vendors for those services. (Verified Compl. Ex. A, ECF No. 2; Verified Compl. ¶ 14; TMS NC's Answer with Countercl. and Third-Party Claims ¶ 13, ECF No. 34.) In 2018, the parties entered into an addendum to the Agreement (the "Exclusivity Addendum"), which increased TMS NC's residual share percentage in exchange for TMS NC's promise to exclusively market and sell TMS's products. (Verified Compl. Ex. B, ECF No. 2.)

<sup>6</sup> (*See generally* Verified Compl., ECF No. 2.)

<sup>7</sup> (Mot. Prelim. Inj., ECF No. 4.)

<sup>8</sup> (Notice of Removal, ECF No. 29.)

conclusion that the case had been improperly removed and the federal court's resulting imposition of sanctions against Defendants.<sup>9</sup>

5. After remand, on 18 January 2022, TMS filed an Amended Motion for Preliminary Injunction.<sup>10</sup> The Amended Motion for Preliminary Injunction was heard by the Honorable John W. Smith on 17 March 2022.<sup>11</sup> Judge Smith did not resolve the Amended Motion for Preliminary Injunction and, at Judge Smith's recommendation, on 21 March 2022, the Chief Justice of the Supreme Court of North Carolina designated this action as a complex business case under Rules 2.1 and 2.2 of the General Rules of Practice for the Superior and District Courts and assigned the case to the undersigned.<sup>12</sup>

6. On 4 April 2022, TMS filed a Second Amended Motion for Preliminary Injunction (the "PI Motion"), which was fully briefed and argued at a hearing held on 22 April 2022.<sup>13</sup> The Court granted the PI Motion in part in the PI Order.<sup>14</sup> Among other things, the PI Order (i) enjoined Defendants from offering services that compete with TMS's services to customers and (ii) required TMS NC to allow TMS to exercise

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<sup>9</sup> (Order, ECF No. 56.)

<sup>10</sup> (Am. Mot. Prelim. Inj., ECF No. 17.)

<sup>11</sup> (*See* Notice of Hr'g, ECF No. 20.)

<sup>12</sup> (Designation Order, ECF No. 1; Order Staying Case Until Bus. Ct. Accepts or Rejects, ECF No. 24.)

<sup>13</sup> (Second Am. Mot. for Prelim. Inj., ECF No. 72; Scheduling Order and Notice of Hr'g, ECF No. 65.)

<sup>14</sup> (Second Am. PI Order.)

certain inspection rights within seven days from entry of the order, i.e., by 13 May 2022.<sup>15</sup>

7. On 9 May 2022, Plaintiff's counsel emailed Defendants' counsel twice seeking to arrange access to TMS NC's premises and receipt of the material the Court ordered TMS NC to produce to Plaintiff.<sup>16</sup>

8. Plaintiff's counsel emailed Defendants a third time the following day, 10 May 2022.<sup>17</sup> Defendants' counsel responded that same day by email stating: "Your request will need to wait as I am in hearings. I have not had an opportunity to review your request nor speak with my clients. I will respond once my schedule permits. It's unprofessional to assume."<sup>18</sup> Plaintiff's counsel persisted, emailing Defendants' counsel three more times on 11 May and 12 May 2022.<sup>19</sup>

9. Defendants' counsel did not respond to Plaintiff's counsel's further emails but filed a Notice of Appeal on 12 May 2022 that purported to appeal the PI Order.<sup>20</sup> The interlocutory appeal was made to the North Carolina Court of Appeals, however, rather than the Supreme Court of North Carolina and was therefore

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<sup>15</sup> (Second Am. PI Order ¶ 70.)

<sup>16</sup> (Aff. of Joshua P. Gunnemann ¶ 4 [hereinafter "Gunnemann Aff."], ECF No. 122; Gunnemann Aff. Ex. A, ECF No. 122.1.)

<sup>17</sup> (Gunnemann Aff Ex. A.)

<sup>18</sup> (Gunnemann Aff. ¶ 4; Gunnemann Aff. Ex. B, ECF No. 122.2.)

<sup>19</sup> (Gunnemann Aff. Ex. B.)

<sup>20</sup> (Gunnemann Aff. ¶ 5; Notice of Appeal, ECF No. 101.)

without legal effect because it was made to the wrong appellate court. *See* N.C.G.S. § 7A-27(a)(2).

10. On 13 May 2022, the deadline for Defendants to permit inspection under the PI Order, Plaintiff's counsel copied Defendants' counsel in an email to the Court advising that Defendants had not yet complied with the PI Order.<sup>21</sup> Later that same day, Plaintiff's counsel emailed Defendants' counsel stating that the purported appeal had not stayed the injunction and included authority in support.<sup>22</sup> That evening, Defendants filed a Motion for Temporary Stay Pending Appeal,<sup>23</sup> which Defendants amended<sup>24</sup> approximately an hour later. The Court summarily denied Defendants' motion without prejudice on 16 May 2022 because Defendants failed to comply with the Business Court Rules in presenting the motion.<sup>25</sup>

11. During a hearing on other motions in this action on 18 May 2022, Plaintiff's counsel offered not to file a motion for contempt for Defendants' failure to comply with the PI Order if Defendants would agree to comply with the terms of the PI Order. Defendants did not agree to comply at the hearing.

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<sup>21</sup> (Gunnemann Aff. Ex. C, ECF No. 122.3.)

<sup>22</sup> (Gunnemann Aff. Ex. C.)

<sup>23</sup> (Defs. TMS NC's and Christopher Collins' Mot. for Temp. Stay Pending Appeal, ECF No. 102.)

<sup>24</sup> (Defs. TMS NC's and Christopher Collins' Am. Mot. for Temp. Stay Pending Appeal, ECF No. 105.)

<sup>25</sup> (Order Summarily Denying Without Prejudice Defendants TMS NC, Inc.'s and Christopher Collins' Am. Mot. for Temp. Stay Pending Appeal, ECF No. 108.)

12. The Court subsequently amended the PI Order (“Order Amending PI Order”) on 19 May 2022 to more accurately reflect Plaintiff’s interpretation of the Agreement and to indicate that Plaintiff had paid the required bond. The Court did not otherwise modify the order at that time.<sup>26</sup>

13. Later that same day, Defendants filed an Amended Notice of Appeal, this time properly addressed to the Supreme Court of North Carolina,<sup>27</sup> and the Court issued an order expressly clarifying that its Order Amending the PI Order did not change the dates for compliance with the PI Order and that the deadline for Defendants to comply with the PI Order remained 13 May 2022 (the “Clarifying Order”).<sup>28</sup> The Court noted in the Clarifying Order, and again in the Second Amended Order on Plaintiff’s Second Amended Motion for Preliminary Injunction that same day, that:

The Court believes it has the authority to enter this Order and the Second Amended PI Order because it does not appear to the Court that the PI Order or Amended PI Order affects a substantial right of Defendants and because North Carolina law is clear that “a litigant cannot deprive the trial court of jurisdiction to determine a case on its merits by appealing from a nonappealable interlocutory order of the trial court.” *Velez v. Dick Keffer Pontiac GMC Truck, Inc.*, 144 N.C. App. 589, 591 (2001). In any event, neither the Amended PI Order nor this Order

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<sup>26</sup> (Verified Compl. Ex. A, ECF No. 2; Order Amending Order on Pl. Total Merchant Services’ Second Am. Mot. for Prelim. Inj., ECF No. 115; *see also* Am. Order on Pl. Total Merchant Services’ Second Am. Mot. for Prelim. Inj., ECF No. 115.1; Pl. Total Merchant Services’ Second Am. Mot. for Prelim. Inj., ECF No. 116.)

<sup>27</sup> (Am. Notice of Appeal, ECF No. 117.)

<sup>28</sup> (Order Clarifying Order Amending Order on Pl. Total Merchant Services’ Second Am. Mot. for Prelim. Inj. [hereinafter “Clarifying Order”], ECF No. 118; *see also* Second Am. Order on Pl.’s Second Am. Mot for Prelim. Inj., ECF No. 118.1; Second Am. PI Order.)

affects the subject matter of Defendants' appeal. *See, e.g.*, N.C.G.S. § 1-294.<sup>[29]</sup>

14. Less than an hour later, Plaintiff filed a Motion for Civil Contempt, For an Award of Attorneys' Fees, and for Expedited Briefing (the "Contempt Motion") with supporting brief and materials.<sup>30</sup>

15. On 23 May 2022, Defendants filed yet another amended motion to stay the case pending appeal.<sup>31</sup> That same day, the Court granted Plaintiff's request for expedited briefing on the Contempt Motion, and the parties timely submitted briefing in accordance with the order.<sup>32</sup>

16. A hearing on the Contempt Motion was held on 7 June 2022, at which all represented parties were represented by counsel.<sup>33</sup> On 2 August 2022, the Court entered its Order granting the Contempt Motion and holding Defendants in civil contempt for their willful violation of the inspection requirements of the PI Order (the "Contempt Order").<sup>34</sup> Even though the Court issued the PI Order on 6 May 2022 and

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<sup>29</sup> (Clarifying Order n.1; Second Am. PI Order n.1.)

<sup>30</sup> (Pl.'s Mot. for Civil Contempt, for Award of Atty's' Fees, and for Expedited Briefing, ECF No. 120; Mem. Supp. Pl.'s Mot. for Civil Contempt, for an Award of Att'ys' Fees, And for Expedited Briefing, ECF No. 123; Gunnemann Aff.; [Proposed] Order on Pl.'s Mot. for Expedited Briefing, ECF No. 121; Gunnemann Aff. Exs. A–C.)

<sup>31</sup> (Am. Mot. for Temp. Stay of Case and Enft of All Orders Pending Appeal [hereinafter "Defs.' Am. Mot. for Stay Pending Appeal"], ECF No. 129.)

<sup>32</sup> (Order on Pl.'s Mot. for Expedited Briefing, ECF No. 128.)

<sup>33</sup> (*See* Notice of Hr'g, ECF 131.)

<sup>34</sup> (Order on Pl. Total Merchant Services' Mot. for Contempt [hereinafter "Contempt Order."], ECF No. 175.)



filed the Contempt Order nearly three months later on 2 August 2022, Defendants failed to even offer a date for the ordered inspection until 8 August 2022. Even then, Defendants offered an inspection date that fell one day after the deadline that the Court established for Defendant Christopher Collins to comply to avoid imprisonment. Until Defendants' offer on 8 August 2022, Defendants had refused to comply with the inspection requirements of the PI Order in any respect.<sup>35</sup>

17. The Sanctions Motion was filed on 13 June 2022, seeking the dismissal of Defendants' counterclaims with prejudice and an award of attorneys' fees as sanctions under the Court's inherent authority and Rule 41(b) for "Defendants' disregard of the Court's [PI Order], Defendants' frivolous attempt to deprive this Court of jurisdiction to enforce the [PI] Order, and their continued and unnecessary enlargement of these proceedings."<sup>36</sup>

18. On 14 June 2022, Erik P. Lindberg filed a notice of appearance as counsel for Defendants. Mr. Lindberg had no prior involvement with this action prior to the filing of his notice of appearance.<sup>37</sup>

19. On 27 June 2022, the Court entered its Order Denying Defendants' Motion to Stay Discovery and Defendants' Amended Motion for Temporary Stay of

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<sup>35</sup> Nevertheless, based on Plaintiff's agreement to the inspection date and the convenience of that date to Plaintiff, the Court agreed at the Hearing to delay Christopher Collins' imprisonment to permit Defendants an opportunity to fully comply with the inspection requirements of the PI Order on 18 August 2022.

<sup>36</sup> (Sanctions Mot. at 1.)

<sup>37</sup> (Notice of Appearance, ECF No. 148.) The Court notes that Mr. Lindberg's participation in the case appears to have prompted Defendants' first efforts at compliance with the PI Order and their discovery obligations under Rule 26 and the Compel Order.

Case and Enforcement of All Orders Pending Appeal (the “Order Denying Stay”).<sup>38</sup> The latter stay motion had been filed on 23 May 2022, four days after the Court issued its Clarifying Order indicating its belief that the PI Order did not affect a substantial right of Defendants and thus was not properly appealable. In the Order Denying Stay, the Court ruled that Defendants’ primary contention—that the PI Order denied them the right “to earn a living and practice their livelihood”—was “wholly refuted by the undisputed factual record,” that “rejection of Defendants’ substantial right analysis on this basis [was not] a ‘close call,’” and that “Defendants’ effort to stay this action pending appeal on this ground [was] wholly without merit.”<sup>39</sup>

20. The Court also found in the Order Denying Stay that Defendants “advance[d] no evidence to substantiate their forecast that complying with the PI Order [would] be unduly expensive” and that “[t]he rest of Defendants’ argument on this point amount[ed] to a disagreement with the Court’s finding that Plaintiff has a present contractual right to access the information identified in the PI Order.”<sup>40</sup> The Court further concluded that Defendants had “blind[ed] themselves” to various conclusions in the PI Order and denied Defendants’ request for a discretionary stay pending appeal because that request was based “on grounds that the Court [had]

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<sup>38</sup> (Order Denying Defs.’ Mot. Stay Disc. and Defs.’ Am. Mot. Temporary Stay of Case and Enf’t of All Orders Pending Appeal [hereinafter “Order Denying Stay”], ECF No. 151 (denying (Defs.’ Mot. Stay Disc., ECF No. 76) and (Defs.’ Am. Mot. for Stay Pending Appeal)).)

<sup>39</sup> (Order Denying Stay ¶¶ 28–29.)

<sup>40</sup> (Order Denying Stay ¶ 31.)

already rejected in [the Order Denying Stay] and the PI Order.”<sup>41</sup> Finally, the Court denied Defendants’ request for a discretionary stay of discovery, concluding that such a stay “would be highly prejudicial and grossly unfair because Defendants [had] appended documents to their Motion to Dismiss or for Summary Judgment that [had] never been produced to Plaintiff while at the same time requesting to stay discovery on those very same issues.”<sup>42</sup> The Court noted that it “refuse[d] to indulge Defendants’ further delay in answering discovery requests that [had] been pending for over a year without Defendants producing a single document in response.”<sup>43</sup>

21. Four days later, on 1 July 2022, the Court entered the Compel Order granting TMS’s Amended Motion to Compel Discovery Responses and for Award of Expenses. In that order, the Court ordered Defendants to produce numerous categories of documents no later than 18 July 2022 and awarded Plaintiff’s its attorneys’ fees incurred in connection with the motion, finding that

Defendants’ refusal to comply with their discovery obligations was not substantially justified under Rule 37(a)(4) and under Rule 37(d). Defendants have not offered anything approaching a valid reason or excuse for failing to produce full and complete responses to the Discovery Requests within the time periods provided by the North Carolina Rules of Civil Procedure or as otherwise agreed by the parties. Nor have they offered a substantial justification for maintaining their opposition to the Amended Motion.<sup>[44]</sup>

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<sup>41</sup> (Order Denying Stay ¶ 36.)

<sup>42</sup> (Order Denying Stay ¶ 42.)

<sup>43</sup> (Order Denying Stay ¶ 43.)

<sup>44</sup> (Compel Order ¶ 23.)

22. In particular, the Court found that Defendants’ principal contention—that “Plaintiff’s failure to timely reply to Defendants’ counterclaims excused Defendants’ duty to make a timely response to the Discovery Requests”—was “specious”<sup>45</sup> and further that “Defendants have consistently and obstinately refused to comply with their discovery obligations under the North Carolina Rules of Civil Procedure without any legal justification to delay providing full and complete responses to the Discovery Requests—and the production of any documents to Plaintiff—for over a year since the Requests were served.”<sup>46</sup>

23. On 15 July 2022, Defendants served on Plaintiff supplemental interrogatory answers and produced to Plaintiff 2,907 pages of documents responsive to Plaintiff’s discovery requests.<sup>47</sup> Plaintiff subsequently identified deficiencies in Defendants’ production, and Defendants agreed to make a supplemental production of all outstanding material no later than 3 August 2022 to comply with paragraph 28(a) of the Compel Order.<sup>48</sup>

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<sup>45</sup> (Compel Order ¶ 24.)

<sup>46</sup> (Compel Order ¶ 25.)

<sup>47</sup> (Defs.’ Certification of Compliance ¶ 3, ECF No. 170.)

<sup>48</sup> Defendants’ counsel represented in the parties’ Joint Status Report Concerning Compliance with Paragraph 28(b) of the Compel Order (the “Joint Status Report”), (ECF No. 172), that Defendants’ supplemental production would occur during “the first half of [the week of August 1, 2022].” (Joint Status Report 3.) At the status conference held in this case on 2 August 2022, the Court ordered, with Defendants’ consent, that this supplemental production must be made no later than 3 August 2022. The Court further ordered Plaintiff to file a supplemental brief no later than 5 August 2022 to indicate the extent to which Defendants’ production of documents had satisfied Defendants’ obligations under the PI Order and the Compel Order.

24. On 5 August 2022, Plaintiff submitted a Supplemental Brief Concerning Defendants' Compliance with Court Orders<sup>49</sup> reporting that Defendants made a supplemental production, as promised, on 3 August 2022 but that the production still failed to fully comply with the requirements of the PI Order and the Compel Order. As to the PI Order, Plaintiff contended that the production failed to sufficiently identify Defendants' current ownership;<sup>50</sup> failed to show the complete financial compensation paid by TMS NC to TMS NC's directors, officers, shareholders, partners, members, or principals for certain periods; and failed to include Defendants' financial statements, books, accounts, and records.<sup>51</sup> As to Defendants' effort to comply with the Compel Order, Plaintiff stated that "*many* items the Court ordered to be produced in the Compel Order still have not been produced."<sup>52</sup> Plaintiff forecasted that it would file a Business Court Rule ("BCR") 10.9 dispute with the Court if the deficiencies were not remedied by 10 August 2022.<sup>53</sup>

25. The Court held a hearing on the Sanctions Motion on 9 August 2022, at which all parties were represented by counsel. Counsel for the parties represented at the Hearing that, although Defendants had made an initial production, Defendants

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<sup>49</sup> (Pl.'s Supplemental Br. Concerning Defs.' Compliance with Ct. Orders, ECF No. 176.)

<sup>50</sup> Plaintiff indicated that it was satisfied with this portion of the production and "is not pursuing contempt sanctions with respect to [this portion of] Defendants' production[.]" (Pl.'s Supplemental Br. Concerning Defs.' Compliance with Ct. Orders 3.)

<sup>51</sup> (Pl.'s Supplemental Br. Concerning Defs.' Compliance with Ct. Orders.)

<sup>52</sup> (Pl.'s Supplemental Br. Concerning Defs.' Compliance with Ct. Orders 4.)

<sup>53</sup> (Pl.'s Supplemental Br. Concerning Defs.' Compliance with Ct. Orders 4–5.)

had not made a full and timely production of the documents the Court ordered Defendants to produce in its Compel Order. To the contrary, Defendants' counsel acknowledged at the Hearing that there remained at least eight categories of documents that Defendants had still not produced that were required to be produced by the Compel Order. These records include bank records for over three years, 1099 forms for non-NAB credit card processors, and other financial records.

26. On 10 August 2022, Defendants filed their response to Plaintiff's 5 August 2022 supplemental brief, contending that they have fully complied with the production requirements of the PI Order, except to the extent documents exist reflecting compensation paid to Defendants' "directors, officers, shareholders, partners, members, or principals" for the first two quarters of 2022, which Defendants promised to produce no later than 15 August 2022.<sup>54</sup>

27. Defendants also acknowledged in their response that they had not yet fully complied with the Compel Order but assured the Court that Defendants "will make an additional supplemental production of documents consistent with Plaintiff's [4 August 2022] deficiency letter on 15 August 2022."<sup>55</sup> On 11 August 2022, Plaintiff emailed the Court a BCR 10.9 dispute summary that documented in greater detail the substantial extent to which Plaintiff contends Defendants have failed to comply with the production requirements of the Compel Order. Those deficiencies are

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<sup>54</sup> (Defs.' Resp. to Pl.'s Supplemental Br. Concerning Defs.' Compliance with Ct.'s Orders 2–3, ECF No. 178 (containing scrivener's error that production will be by "Monday, May 15, 2022").)

<sup>55</sup> (Defs.' Resp. to Pl.'s Supplemental Br. Concerning Defs.' Compliance with Ct.'s Orders 3.)

consistent with Plaintiff's August 4 deficiency letter referenced in Defendants' response and in response to which Defendants promise a supplemental production no later than 15 August 2022. Defendants followed through on their promise to make this supplemental production on 15 August 2022.<sup>56</sup>

28. On 18 August 2022, Defendants finally permitted the inspection.<sup>57</sup> The next day, the Court held a BCR 10.9 conference (the "10.9 Conference"), at which all parties were represented. At the 10.9 Conference, Plaintiff represented that, through Defendants' 15 August 2022 document production and the 18 August 2022 inspection, Defendants had substantially complied with paragraph 41 of the Contempt Order and with paragraphs 70(c) and 70(d) of the PI Order.<sup>58</sup> Plaintiff represented, however, that it still needed time to confirm whether the materials that Defendants tendered to Plaintiff during the inspection satisfied the requirements of the Compel Order. On 26 August 2022, Plaintiff filed a Notice of Deficiency identifying three categories of information that Defendants had failed to provide and represented that Defendants had agreed to provide the remaining information no later than 31 August 2022.

29. Plaintiff also represented at the 10.9 Conference that, through the inspection, it had obtained evidence showing that Defendants breached paragraphs

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<sup>56</sup> (Defs.' Certification of Compliance, ECF No. 185.)

<sup>57</sup> Defs.' Notice of Inspection, ECF No. 186.)

<sup>58</sup> (*See also* Certification of Substantial Compliance, ECF No. 187 (Plaintiffs certifying that Defendants have substantially complied with the inspection requirements of the PI Order and the Contempt Order and the document production requirements of the PI Order).)

70(a) and 70(b) of the PI Order between entry of the PI Order on 6 May 2022 and 5 July 2022 by marketing, promoting, and/or selling processing programs that compete (or would reasonably be expected to compete) with TMS's processing program and by causing or inducing customers of TMS to do business with competitors of TMS and/or doing business with, or diverting business from TMS. Plaintiff set forth this evidence in detail in its supplemental memorandum filed on 24 August 2022, suggesting that Defendants have systematically and continually violated paragraph 70(a) and 70(b) of the PI Order by repeatedly placing new customers with competitors and successfully soliciting Plaintiff's existing customers to do business with Plaintiff's competitors rather than Plaintiff, resulting in substantial damages to Plaintiff. This evidence also suggests that Defendants have made false representations to Plaintiff and the Court about their compliance with the PI Order's terms.<sup>59</sup>

30. On 29 July 2022, the Court entered its Order and Opinion granting in part and denying in part Plaintiff's Motion to Dismiss Defendant TMS NC, Inc.'s Counterclaims and Defendants' Motion for Leave to Amend Counterclaims and Add Additional Parties.<sup>60</sup> In that Order and Opinion, the Court granted Defendants leave

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<sup>59</sup> (Pl.'s Supplemental Mem. In Supp. of Pl.'s Mot. To Dismiss Defs.' Countercls. and for Fees, ECF No. 142.) By Order dated 19 August 2022, (ECF No. 188), the Court has ordered Defendants to file a response brief and supporting materials no later than 2 September 2022.

<sup>60</sup> (Order and Op. on Pl.'s Mot. Dismiss Defs.' Countercls. and Defs.' Mot. for Leave to Amend [hereinafter "July 29 Order and Op."], ECF No. 171.)



to file amended counterclaims for breach of contract and declaratory judgment and otherwise denied Defendants' Motion and granted Plaintiff's motion.<sup>61</sup>

31. At the Hearing, Defendants' counsel indicated that Defendants intended to file the permitted amended counterclaims, and Plaintiff's counsel stated that the Sanctions Motion seeks the Court's dismissal of those amended counterclaims as a sanction for Defendants' misconduct. The Court ordered Defendants to file the permitted amended counterclaims no later than 19 August 2022, but Defendants have yet to do so.

## II.

### CONCLUSIONS OF LAW

32. This Court has previously summarized the standards our appellate courts have directed trial courts to consider in exercising their inherent authority to impose sanctions for a party's misconduct as follows:

Trial courts retain the inherent authority "to do all things that are reasonably necessary for the proper administration of justice." *Beard v. N.C. State Bar*, 320 N.C. 126, 129 (1987). "[T]he power to sanction disobedient parties, even to the point of dismissing their actions or striking their defenses, . . . is longstanding and inherent." *Minor v. Minor*, 62 N.C. App. 750, 752 (1983); see *Chambers v. NASCO, Inc.*, 501 U.S. 32, 46 (1991) (holding that statutory schemes and court rules do not "displace[] the inherent power to impose sanctions for . . . bad-faith conduct," for statutory schemes and court rules, even when considered together, "are not substitutes for . . . inherent power"); *Daniels v. Montgomery Mut. Ins. Co.*, 320 N.C. 669, 674 (1987) ("[W]e hold it to be within the inherent power of the trial court to order plaintiff to pay defendant's reasonable costs including attorney's fees for failure to comply with a court order."); *Cloer v. Smith*, 132 N.C. App. 569, 573 (1999) ("The trial court . . . retains inherent authority to impose sanctions for discovery abuses beyond those enumerated in Rule 37.");

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<sup>61</sup> (July 29 Order and Op. ¶ 43)

*Few v. Hammack Enters., Inc.*, 132 N.C. App. 291, 298–99 (1999) (finding it was within the trial court’s inherent authority to strike a party’s answer for willful failure to comply with the rules of court); *Lomax v. Shaw*, 101 N.C. App. 560, 563 (1991) (concluding trial court “was well within the bounds of the court’s inherent authority to manage the case docket when he struck the defendants’ answer” for failing to execute a consent judgment).

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The imposition of sanctions is left to the sound discretion of the trial judge and “will not be overturned absent a showing of abuse of discretion.” *Cloer*, 132 N.C. App. at 573. A trial court will be held to have abused its discretion only “where the court’s ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision.” *E. Brooks Wilkins Family Med., P.A. v. WakeMed*, 244 N.C. App. 567, 578 (2016) (quoting *Couch v. Private Diagnostic Clinic*, 146 N.C. App. 658, 667–68 (2001)).

“North Carolina courts do not presently require the party requesting sanctions to demonstrate, as a part of its burden, that it suffered prejudice as a result of the opposing party’s discovery failures or that the opposing party acted willfully.” *Tumlin v. Tuggle Duggins P.A.*, 2018 NCBC LEXIS 51, at \*31 (N.C. Super. Ct. May 22, 2018); see *Henderson v. Wachovia Bank of N.C., N.A.*, 145 N.C. App. 621, 629 (2001). That said, “[w]illfulness, bad faith, or prejudice to another party” may influence the court’s discretion “in determining the appropriate sanction.” *Out of the Box Developers, LLC*, 2014 NCBC LEXIS 7, at \*9.

In assessing appropriate sanctions, North Carolina law is clear that a court may consider the entire record before it. See *Ray v. Greer*, 212 N.C. App. 358, 363 (2011) (noting that trial court may “view of the totality of the circumstances of the case” in assessing appropriate sanctions (quoting *Badillo v. Cunningham*, 177 N.C. App. 732, 734–35, (2006))); *Battle v. Sabates*, 198 N.C. App. 407, 420 (2009) (affirming trial court’s dismissal of plaintiff’s complaint as a sanction where trial court considered “the totality of the circumstances of the case in determining the appropriate sanction” (internal quotation marks omitted)). Indeed, “[w]hen sanctioning a party under its inherent authority, the court must weigh the circumstances of each case and choose a sanction that, in the court’s judgment, ‘properly takes into account the severity of the party’s disobedience.’” *Out of the Box Developers, LLC*, 2014 NCBC LEXIS 7, at \*10 (quoting *Patterson v. Sweatt*, 146 N.C. App. 351, 357 (2001)).

Finally, in determining whether the issuance of serious sanctions pursuant to a court's inherent authority is proper, the North Carolina Supreme Court has looked to guidance from federal courts. *See Daniels*, 320 N.C. at 674. The United States Court of Appeals for the Fourth Circuit, in a panel joined by former North Carolina Business Court Judge Albert Diaz, has held that serious sanctions, including the dismissal of an action, "are appropriate when a party deceives a court or abuses the process at a level that is utterly inconsistent with the orderly administration of justice or undermines the integrity of the process." *Projects Mgmt. Co. v. Dyncorp Int'l LLC*, 734 F.3d 366, 373 (4th Cir. 2013) (citations and quotation marks omitted).

*Red Valve, Inc. v. Titan Valve, Inc.*, 2019 NCBC LEXIS 57, at \*39–43 (N.C. Super. Ct. Sept. 3, 2019), *aff'd*, 376 N.C. 798 (2021).

33. Further, "[w]hen imposing sanctions, 'the trial court has discretion to pursue a wide range of actions both for the purpose of leveling the evidentiary playing field and for sanctioning the improper conduct.'" *Clark v. Alan Vester Auto Grp., Inc.*, 2009 NCBC LEXIS 13, at \*27 (N.C. Super. Ct. July 17, 2009) (quoting *Vodusek v. Bayliner Marine Corp.*, 71 F.3d 148, 156 (4th Cir. 1995)). As such, the Court is free "to fashion an appropriate sanction for conduct which abuses the judicial process." *Id.* (quoting *Silvestri v. Gen. Motors Corp.*, 271 F.3d 583, 593 (4th Cir. 2001)); *see Turner v. Duke Univ.*, 101 N.C. App. 276, 280 (1991) ("the selection of sanctions remains within the discretion of the trial court").

34. Based on the evidence and findings recited above, the Court concludes, as it did in its Contempt Order, that Defendants stubbornly and willfully refused to comply with the PI Order's inspection and production requirements in any respect after it was issued on 6 May 2022 until Defendants produced some documents on 15 July 2022 pursuant to the Compel Order that were also responsive to the PI Order.

Though Defendants finally permitted the Court-ordered inspection to proceed on 18 August 2022, this substantial compliance comes over three months after the inspection deadline established in the PI Order.<sup>62</sup>

35. As the Court found in its Contempt Order, Defendants’ reasons for refusing to comply with the PI Order are meritless.

36. First, Defendants repeated in numerous briefs—including in opposition to the Contempt Motion—the same arguments that the Court rejected in its PI Order in an apparent attempt to relitigate the merits of Plaintiff’s preliminary injunction motion.<sup>63</sup>

37. Next, after the Court issued the Clarifying Order and Second Amended PI Order, which stated the Court’s conclusion that the matter is not stayed pending appeal, Defendants chose not to comply with their inspection duties under the PI Order and instead “improperly [sought] to reargue the merits of [Plaintiff’s preliminary injunction motion] . . . and the Court’s conclusion that the matter is not stayed pending appeal.” *Plasman v. Decca Furniture (USA), Inc.*, 2016 NCBC LEXIS 20, at \*12 (N.C. Super. Ct Feb. 26, 2016).

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<sup>62</sup> (See Certification of Substantial Compliance.)

<sup>63</sup> (See e.g., Reply Mem. Supp. Defs.’ Mot. Stay Disc. 2–3, ECF No. 110 (“[T]his Court should . . . find that the Plaintiffs breach of contract [sic] is invalid and unenforceable, since the ‘Agreement’ was already terminated on June 15, 2020[.]”); Defs.’ Opp’n to Pl.’s Mot. for Civil Contempt 9, ECF No. 135 (stating that enforcing the PI Order would be “a further violation of the Defendants’ substantial rights” because Defendants “terminated the exclusivity agreement on June 15, 2020”); Defs.’ Am. Mot. for Stay Pending Appeal 3 (requesting a discretionary stay and asserting that Plaintiff’s claim for breach of contract is invalid because it “relie[s] on emails [from] 2021, during a time period after the Defendants’ [sic] terminated” the Exclusivity Addendum).)

38. Further, Defendants failed to cite to any record evidence from any source in opposition to the Contempt Motion or in support of its amended motion to stay the case pending appeal and instead sought to challenge the accuracy of existing record evidence, acknowledged to be true in paragraphs 14 and 15 of TMS NC's own Answer, concerning the source of the residual share that TMS pays to Defendants.

39. Moreover, Defendants' interlocutory appeal of the PI Order<sup>64</sup> and corresponding Amended Motion for Temporary Stay of Case and Enforcement of All Orders Pending Appeal,<sup>65</sup> purportedly because the PI Order affected a substantial right, were, as the Court found, "wholly without merit"<sup>66</sup> and only served to increase Plaintiff's costs and enlarge and delay this litigation.

40. In addition, the record evidence establishes that Defendants failed to fully comply with the Compel Order by the Court-ordered deadline. As noted above, Defendants acknowledged that at least eight categories of documents—including bank records, 1099 forms, and financial records of various types—that were required to be produced on 18 July 2022—documents that are central to Plaintiff's claims and concerns—were still not completely produced nearly a month after the deadline passed.

41. As Plaintiff contends and as the evidence shows, the most egregious aspect of Defendants' conduct is that "Defendants' refusal to comply with the PI Order

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<sup>64</sup> (Am. Notice of Appeal.)

<sup>65</sup> (Defs.' Am. Mot. for Stay Pending Appeal.)

<sup>66</sup> (Order Denying Stay ¶ 29.)

is part of a now-established pattern of enlargement of these proceedings” and that Defendants have “taken a series of unsupportable actions to try and avoid the production that is clearly called for by the parties’ contract, is required in discovery, and that has now been ordered by the Court,”<sup>67</sup> including by (i) improperly removing this case to federal court, for which Defendants were sanctioned, which delayed consideration of Plaintiff’s motion for preliminary injunction for a year; (ii) stubbornly refusing to respond to discovery served in April 2021 for nearly fifteen months without producing a single page of material until July 2022 and then, after the Compel Order was issued, not making the full production required by the Compel Order; and (iii) taking an improper interlocutory appeal of the PI Order, and despite the Court’s rulings that the appeal did not affect a substantial right, relying on that appeal to continue to stubbornly and willfully refuse to comply with the PI Order.

42. Based on Defendants’ conduct as set forth above, the Court concludes, in the exercise of its discretion, that the Sanctions Motion should be granted and that sanctions should be awarded against Defendants for their conduct in this litigation.

43. However, based on Defendants’ counsel’s representations at the Hearing and in subsequent submissions that Defendants failed to timely comply with the Compel Order, which required full compliance no later than 18 July 2022, Defendants’ failure to even attempt to comply with the inspection requirements of the PI Order until Defendants’ proposed date of 18 August 2022, Defendant’s alleged

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<sup>67</sup> (Mem. Supp. Pl.’s Mot. Dismiss Defs.’ Countercls. and for Fees and Request for Expedited Briefing 12 [hereinafter “Pl. Br.”], ECF No. 144.)

systematic and repeated violation of paragraphs 70(a) and 70(b) of the PI Order, Defendants' alleged false representations to the Court about their compliance with the PI Order, and considering the totality of Defendants' conduct in its litigation of this case to date as outlined extensively above, the Court concludes, in the exercise of its discretion and for good cause shown, that an award of sanctions should not be entered until Defendants and Monica Collins appear and show cause why the Court should not enter sanctions, in addition to attorneys' fees and costs, up to and including striking Defendants' answer, affirmative defenses, and remaining amended counterclaims for Defendants' conduct in delaying the administration of this case through their improper removal of the action to federal court followed on remand by Defendants' stubborn refusal to respond to Defendants' April 2021 discovery requests, their filing of an improper interlocutory appeal of the PI Order after notice that it did not affect a substantial right, their stubborn and willful failure to fully comply with the PI Order, their failure to comply with the Compel Order within the compliance deadlines set by the Court, and, if established, their alleged violation of paragraphs 70(a) and 70(b) of the PI Order and their alleged false statements to the Court about their compliance with PI Order.

44. **WHEREFORE**, the Court, in the exercise of its discretion and for good cause shown, hereby **GRANTS** Plaintiff's Sanctions Motion, **CONCLUDES** that sanctions should be entered against Defendants for their conduct, **DEFERS** the entry of an award of sanctions, and **ORDERS** Defendant TMS NC, Defendant Christopher Collins, and Monica Collins to **APPEAR** at 10:00 AM on 7 September 2022 in

Courtroom 3B of the Wake County Courthouse, 316 Fayetteville Street, Raleigh, North Carolina, 27601 (the “Show Cause Hearing”) **and SHOW CAUSE** why the Court should not enter sanctions, in addition to attorneys’ fees and costs, up to and including striking Defendants’ answer, affirmative defenses, and remaining amended counterclaims for Defendants’ conduct in delaying the administration of this case through their improper removal of the action to federal court followed, on remand, by Defendants’ stubborn refusal to respond to Defendants’ April 2021 discovery requests, their filing of an improper interlocutory appeal of the PI Order after notice that it did not affect a substantial right, their stubborn and willful failure to fully comply with the PI Order, their failure to comply with the Compel Order within the compliance deadlines set by the Court, and, if established, their alleged violation of paragraphs 70(a) and 70(b) of the PI Order and their alleged false statements to the Court about their compliance with PI Order.

45. In the event the parties agree at any time that Defendants have fully satisfied their obligations under the Compel Order, the parties shall immediately notify the Court.

46. The Court has previously established a briefing schedule on the matters on for hearing at the Show Cause Hearing by separate order.<sup>68</sup>

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<sup>68</sup> (ECF No. 188.)



It is **SO ORDERED**, this the 30th day of August, 2022.

/s/ Louis A. Bledsoe, III

Louis A. Bledsoe, III  
Chief Business Court Judge