STATE OF SOUTH CAROLINA
COUNTY OF SPARTANBURG

IN THE COURT OF COMMON PLEAS
SEVENTH JUDICIAL CIRCUIT

C.A. NO. 2017-CP-42-00219

Jo Ann Blackwell, Michelene Brooks, and Samuel H. Owens, Jr., individually and on behalf of all others similarly-situated,

Plaintiffs,

v.

Mary Black Health System, LLC, d/b/a Mary Black Memorial Hospital; CHSPSC, LLC; and Professional Account Services, Inc.,

Defendants.

ORDER

This case came before the Court for consideration of the Plaintiffs' pending motions to compel discovery and the Defendants' objection to the hearing of such motions pending their appeal from the order denying their motion to compel arbitration as to Plaintiff Owens. The Court, *sua sponte*, raised the issue of whether the Notice of Appeal stayed the Plaintiffs' pending motions to compel discovery in this case and, if the entirety of the motions were not stayed, which parts of the motions were not affected by an automatic stay and could be properly addressed by the Court. A hearing was held on June 23, 2021, with attorney Katon Dawson, Jr., appearing on behalf of the Defendants and Rachel G. Peavy and Marghretta H. Shisko appearing as counsel for the Plaintiffs.

By way of background, this case was designated as complex and assigned to the undersigned in 2019. It is styled as a class action lawsuit pursuant to Rule 23, SCRCP, and the above-captioned Plaintiffs seek to represent other similarly situated individuals who are insured by three (3) different insurance carriers – CIGNA, MedCost, and Medicare. Jo Ann Blackwell, a MedCost insured, and Michelene Brooks, a Medicare beneficiary, assert that they are entitled to

proceed with discovery while the appeal from the order denying the motion to compel arbitration against Mr. Owens, a CIGNA insured, is pending. Defendants contend that the entire case is stayed because they seek appellate review of not just the order denying the motion to compel arbitration as against Mr. Owens but also the denial of their myriad Rule 12 motions (as against all Plaintiffs). There is no dispute that the order denying the motion to compel arbitration is an immediately appealable order under S.C. Code Ann. § 15-48-200.

The parties also agree that an order denying a Rule 12(b)(6) motion is considered interlocutory and is not generally immediately appealable under South Carolina law. However, Defendants contend that the Court of Appeals, in its discretion, may consider its request for review of such interlocutory orders as part of the appeal from the denial of their request to compel arbitration and, accordingly, this Court's continuing jurisdiction over the claims of Ms. Blackwell and Ms. Brooks, and the class members they seek to represent, is improper as those claims constitute matters "affected by the appeal."[1] After careful review of the applicable rules, arguments of counsel, and memoranda of law, the Court respectfully disagrees with Defendants' position. With a view towards the discretion required of the trial court in proceedings such as these, the Court hereby finds that the claims asserted by Plaintiffs Blackwell and Brooks, both

[1] "The denial of a motion to dismiss does not establish the law of the case and the issue raised by the motion can be raised again at a later stage of the proceedings. Therefore, the denial of a motion to dismiss is not directly appealable." *Levi v. N. Anderson Cnty. EMS*, 409 S.C. 374, 382, 762 S.E.2d 44, 48 (Ct. App. 2014) (quoting *McLendon v. S.C. Dep't of Highways & Pub. Transp.*, 313 S.C. 525, 526 n.2, 443 S.E.2d 539, 540 n.2 (1994)). "'The basic policy behind denying immediate review of pretrial motions is avoidance of piecemeal litigation where the rights of the parties have not been substantially impacted.'" *Watson v. Underwood*, 407 S.C. 443, 458, 756 S.E.2d 155, 163 (Ct. App. 2014) (quoting *Breland v. Love Chevrolet Olds, Inc.*, 339 S.C. 89, 94, 529 S.E.2d 11, 13 (2000)).

individually and on behalf of those similarly situated, properly remain within this Court's jurisdiction and hereby ORDERS that the case shall proceed forward on such claims.[2]

APPLICABLE LEGAL STANDARD

Rule 241(a), SCACR, provides, in relevant part:

> As a general rule, the service of a notice of appeal in a civil matter acts to automatically stay matters decided in the order . . . on appeal, and to automatically stay the relief ordered in the appealed order . . . . The lower court or administrative tribunal retains jurisdiction over matters not affected by the appeal including the authority to enforce any matters not stayed by the appeal.

As to the effect of an appeal on a pending lawsuit, Rule 205, SCACR, states:

> Upon the service of the notice of appeal, the appellate court shall have exclusive jurisdiction over the appeal . . . . Nothing in these Rules shall prohibit the lower court, commission, or tribunal from proceeding with matters not affected by the appeal.

"In cases on appeal, the South Carolina Rules of Court provide for the trial court to retain jurisdiction over matters not affected by the appeal." *Cousar v. New London Eng'g Co.*, 306 S.C. 37, 40, 410 S.E.2d 243, 245 (1991). The Court of Appeals addressed the jurisdiction of the lower court in situations such as these in the case of *Tillman v. Oakes*, 398 S.C. 245, 728 S.E.2d 45 (Ct. App. 2012), wherein it concluded that a petition related to visitation filed in the family court raised an issue that was not a matter "affected by the appeal," and held that the family court retained the power to rule on the petition. *Id.* at 254–56, 728 S.E.2d at 50–51. The *Tillman* court explained that:

> The question of when a lower court may proceed with a case after one of its orders has been appealed can be a difficult one to answer. . . .
>
> When a party appeals an order, two questions may arise as to the effect of the appeal: (1) what is the effect of the appeal on matters decided in the order, particularly the immediate effectiveness of

[2] The claims of Plaintiff Owens, both individually and on behalf of those similarly situated (i.e., the CIGNA insureds), are stayed.

> relief ordered; and (2) what is the effect of the appeal on the power of the lower court to proceed with the action while the appeal is pending. The answer to the first question is governed by the stay and supersedeas provisions of Rule 241. If a stay exists, either automatically under Rule 241(a) or by supersedeas under Rule 241(c), the appealed order may not be carried out or enforced during the pendency of the appeal. This is the purpose of a stay under Rule 241—to determine whether the appealed *order* may be carried out or enforced—not to determine whether the *action* may proceed in the lower court while the appeal is pending. . . .
>
> Under Rule 205, the lower court . . . is specifically allowed to proceed with matters not affected by the appeal.

Id. at 254–55, 728 S.E.2d at 50–51.

FINDINGS AND CONCLUSIONS

Under Rule 23(d), SCRCP, this Court is charged with protecting the interest of the putative class members, including, but not limited to, the following:

> In the conduct of actions to which this rule applies, the court may make appropriate orders: . . . (2) The court may at any time impose such terms as shall fairly and adequately protect the interest of the persons on whose behalf the action is brought or defended.[3]

Mindful of such certain supervisory powers designed to ensure the protection of the putative class members, the Court concludes that while the claims of Mr. Owens—both individually and on behalf of the putative class of CIGNA insureds—are stayed pending the appeal of the denial of

[3] At the hearing, the Defendants raised various arguments as to purported issues with the CIGNA class and, additionally, whether certain persons were proper class members and/or class representatives. While the issue was not before the Court—and no class has been certified—the Court would note that, under South Carolina law, even if an "alleged class has a fluid, changing membership, this feature alone does not make the class action device unsuitable . . . . In any case, the problem of determining initial membership in the class affords no basis for dismissal of the action since the circuit court can either require the plaintiffs to replead, redefine the alleged class itself, or designate subclasses." *McGann v. Mungo*, 287 S.C. 561, 571, 340 S.E.2d 154, 159 (Ct. App. 1986).

Defendants' motion to compel arbitration against him, the claims of Ms. Brooks and Blackwell are not affected by such appeal and may proceed.[4]

Ms. Brooks and Ms. Blackwell are not CIGNA insureds and Defendants have never sought to compel them to arbitration; further, this Court has already determined their claims as contained in the amended complaint are not subject to dismissal at the Rule 12 stage and discovery is therefore warranted. This Court is cognizant of its duties under Rule 12(b)(6), SCRCP. In deciding a motion to dismiss under Rule 12(b)(6), "[t]he question for the court is whether in the light most favorable to the plaintiff, and with every doubt resolved in his behalf, the allegations set forth on the face of the complaint state any valid claim for relief." *Sloan Constr. Co. v. Southco Grassing, Inc.*, 377 S.C. 108, 112–13, 659 S.E.2d 158, 161 (2008) (*citing Plyler v. Burns*, 373 S.C. 637, 645, 647 S.E.2d 188, 192 (2007)). Where "the 'facts alleged and inferences reasonably deducible therefrom would entitle the plaintiff to any relief on any theory of the case,' then dismissal under Rule 12(b)(6) is improper." *Id.* at 113, 659 S.E.2d at 161 (quoting *Stiles v. Onorato*, 318 S.C. 297, 300, 457 S.E.2d 601, 603 (1995)). A "complaint should not be dismissed merely because the court doubts the plaintiff will prevail in the action." *Doe v. Marion*, 373 S.C. 390, 395, 645 S.E.2d 245, 248 (2007) (citing *Toussaint v. Ham*, 292 S.C. 415, 416, 357 S.E.2d 8, 9 (1987)); *see also Kennedy v. Henderson*, 289 S.C. 393, 395, 346 S.E.2d 526, 527 (1986) ("[T]he complaint must be construed liberally in favor of the pleader and sustained if facts alleged, and inferences reasonably deducible therefrom, entitle the plaintiff to relief on any theory of the case." (citing *Blandon v. Coleman*, 285 S.C. 472, 475, 330 S.E.2d 298, 300 (1985))).

[4] The Court is mindful of the age of this case and the real possibility that certain putative class members, who are alleged to have been seriously damaged by Defendants' conduct, could have died or been otherwise compromised.

In the Defendants' view, this court is essentially deprived of jurisdiction at the Rule 12 stage as to any litigant if an issue of arbitration as to a single litigant is before the court as well. Put another way, the Defendants assert that because there exists the possibility that the Court of Appeals could exercise its discretion and consider an appeal as to the denial of the Rule 12(b)(6) motions against Plaintiffs Blackwell and Brooks, this Court lacks jurisdiction over their claims and has no discretion to consider the pending discovery motions, or anything else for that matter.[5] This Court declines to endorse such an approach, as it improperly divests the trial court of its discretion to hear Rule 12 motions and, in fact, is contrary to South Carolina law, which requires trial courts to utilize their discretion in scenarios such as the one presented here. *See, e.g.*, *Cousar*, 306 S.C. at 40, 410 S.E.2d at 245 (retention of jurisdiction by trial court over discovery matters not an abuse of discretion).[6]

[5]The Court takes notice of *Brown v. County of Berkeley*, 366 S.C. 354, 622 S.E.2d 533 (2005), where the Supreme Court declined review of the denial of a motion to dismiss, alongside the denial of a motion for preliminary injunction, finding that the Rule 12 orders lacked a "sufficient nexus or companionship to justify th[e] Court's exercise of immediate appellate review" and observing that "[c]ourts have made a practice of accepting appeals of denials of interlocutory orders not ordinarily immediately appealable when these appeals are companion to issues that are reviewable." *Id.* at 362 n.5, 622 S.E.2d at 538 n.5. The Court here also fails to find a "companion" relationship between the narrow issue of arbitration asserted against Mr. Owens and the numerous issues raised in the myriad Rule 12 motions. Further, none of the cases cited by Defendants mirror the posture of the case at bar (i.e., multiple plaintiffs but only a single plaintiff alleged to be subject to arbitration). *See, e.g.*, *Hite v. Thomas & Howard Co. of Florence*, 305 S.C. 358, 360, 409 S.E.2d 340, 341 (1991) (action by single minority shareholder against majority shareholder), *overruled on other grounds by Huntley v. Young*, 319 S.C. 559, 560, 462 S.E.2d 860, 860 (1995); *Edge v. State Farm*, 366 S.C. 511, 513–17, 623 S.E.2d 387, 389–90 (2005) (agreeing to consider cross-appeal by defendant State Farm of interlocutory order denying motion to dismiss in case involving underlying appeal by Plaintiffs of dismissal of action against a co-defendant); *Roberts v. Recovery Bureau, Inc.*, 316 S.C. 492, 494–95, 450 S.E.2d 616, 618–19 (Ct. App. 1994) (allowing appeal by plaintiff of interlocutory order denying her motion for summary judgment as against one defendant driver alongside her appeal from the granting of summary judgment in favor of another defendant).

[6]The Court finds that the cases cited by Defendants in support of their assertion that a "blanket" automatic stay has attached to the claims of these unaffected Plaintiffs—and that judicial economy is served by a stay of this entire action—are unpersuasive and inapposite to the case at bar. By way of example, the case of *Cox v. Woodmen of the World*, 347 S.C. 460, 556 S.E.2d 397 (Ct. App.

Turning to the pending discovery motions, the Court notes that Judge Grace Knie issued her order related to discovery on December 21, 2017. The Court also notes that the parties consented to a Protective Order related to discovery that was signed by Judge Knie on April 11, 2019.

Due to the length of the arguments related to the issue of the Stay, this Court did not have time to hear additional arguments specific to plaintiff's present Motion to Compel. At the close of the hearing, this Court announced it was aware of Judge Knie's prior rulings and this Court's expectation of compliance with her prior orders.

From subsequent correspondence by the attorneys, they indicated a need for clarity as to the Court's closing arguments. Prior to the case being designated as complex, Judge Knie heard and ruled upon certain discovery issues; included within her rulings was the above referenced Protective Order. Judge Knie's prior rulings and orders have not changed. All of her decisions must be complied with by the parties. To the extent the plaintiff has raised new issues concerning discovery, those new issues will be addressed by this Court, if the parties cannot resolve those new issues among themselves.

Therefore the Court, directs the parties to comply with all of Judge Knie's rulings and to consult as to the new outstanding discovery issues. To the extent, if any, the requested documents

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2001), concerns class plaintiffs who were members of the same fraternal benefits society and subject to the same constitution (which contained an arbitration provision). *See id.* at 462–64, 556 S.E.2d at 398–99. Here, there exist no such commonalities. Defendants' reliance upon *Levin v. Alms*, 634 F.3d 260 (4th Cir. 2011), is likewise misplaced, as *Levin* involved only a single plaintiff asserting multiple claims, some of which were alleged to be subject to an arbitration agreement. *See id.* at 262. As to the argument of judicial economy, the case of *Wellman, Inc. v. Square D Co.*, 366 S.C. 61, 620 S.E.2d 86 (Ct. App. 2005), is instructive. In *Wellman*, the Court of Appeals ruled that it was error for the trial court to refuse to compel arbitration against a signatory defendant simply because a co-defendant, whose claims were not subject to arbitration, wished to continue to pursue litigation in the trial court, noting that it was error to force the resolution of all claims in one forum out of the interest of judicial economy. *Id.* at 75, 620 S.E.2d at 93.

encompass information directly referencing CIGNA insureds such as Mr. Owens or CIGNA itself (e.g., any agreement between CIGNA and Mary Black or any guideline or rule referencing CIGNA), the Defendants shall be deemed in compliance with the discovery request by redacting such information from the responsive document. In the event the parties require further guidance or structure from the Court as it relates to discovery, the parties shall notify the Court of same; and the Court will provide further direction.[7]

Thus, the Court hereby orders that the parties confer within ten (10) days of the date of this Order and determine whether they can reach an agreement on any of the outstanding discovery requests without the Court's intervention and with a view towards the law in South Carolina, which provides that "[t]he entire thrust of the discovery rules involves full and fair disclosure, 'to prevent a trial from becoming a guessing game or one of surprise for either party.' Essentially, the rights of discovery provided by the rules give the trial lawyer the means to prepare for trial . . . ." *Samples v. Mitchell*, 329 S.C. 105, 113–14, 495 S.E.2d 213, 217 (Ct. App. 1997) (citations omitted) (quoting *St. Highway Dep't v. Booker*, 260 S.C. 245, 252, 195 S.E.2d 615, 619 (1973)).

As this Court has stated, and once again stresses to the parties, given the age of this case, the Court urges the Defendants to reconsider, at least in part, any stated objections and to try to

[7]The Court takes notice that at the time of the entry of Judge Knie's order, Ms. Brooks was not yet a plaintiff in this lawsuit (asserting claims on behalf of herself and other Medicare beneficiaries similarly situated) and that the November 2017 discovery responses at issue therefore may have only identified certain documents referencing Ms. Blackwell and/or MedCost insureds; however, to the extent there exist similar documents related to Ms. Brooks (and those putative class members she seeks to represent), the Court would encourage the Defendants to produce such documents at this time as relevant and responsive under the Rules and in keeping with the spirit of "full and fair disclosure."

resolve the outstanding motions without the Court's intervention.[8] In the event the parties are unable to reach an agreement on the discovery sought within the stated ten-day period, they are to promptly notify the Court of the status of the matter.

AND IT IS SO ORDERED.

_____
J. Mark Hayes, II
Presiding Judge

Dated: _____

At: _____

[8] For instance, patient privacy concerns can usually be addressed through the redaction of patient identifiers. As it relates to concerns regarding employee privacy, the existing confidentiality order can be utilized to protect such individuals to the extent necessary.

Spartanburg Common Pleas

Case Caption: Jo Ann Blackwell , plaintiff, et al VS Mary Black Health System, Llc , defendant, et al

Case Number: 2017CP4200219

Type: Order/Other

IT IS SO ORDERED

s/ J. Mark Hayes, II #2132