STATE OF SOUTH CAROLINA
COUNTY OF SPARTANBURG

IN THE COURT OF COMMON PLEAS
SEVENTH JUDICIAL CIRCUIT

CIVIL ACTION 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, et al.,

Defendants.

ORDER GRANTING PLAINTIFFS' MOTION TO COMPEL DISCOVERY

This matter came before the Court for hearing via WebEx on November 3, 2021, on Plaintiffs' pending motions to compel full and complete responses to certain discovery requests served on September 8, 2017. Present at the hearing were counsel for the Plaintiffs, Rachel G. Peavy of the Simmons Law Firm, LLC and Marghretta H. Shisko of Harrison White, P.C. Katon M. Dawson, Jr., Esquire, appeared on behalf of the Defendants.[1]

PRESENT POSTURE OF THE CASE

This is a class action lawsuit that was filed on January 20, 2017. The class definition in the Amended Complaint includes:

> *All individuals who, since January 20, 2014, received any type of healthcare treatment from any entity located in South Carolina that is owned or affiliated with Defendants, while being covered by valid health insurance, and whose medical bills*

[1] This dispute arises out of Plaintiffs' filing of a motion to compel on October 23, 2020, that specifically sought to compel production of certain documents ordered produced by Judge Knie subject to the entry of a protective order. Plaintiffs subsequently filed a second motion to compel responses to the same set of discovery on December 9, 2020, following the requisite Rule 11 consultation. Plaintiffs specifically seek full and complete answers to Interrogatory nos. 8–11 and 17–20, and responses to Request for Production nos. 1, 11–14, and 19–21.

> *resulting from that treatment were not submitted to their health insurance carrier for potential payment.*

(Am. Compl. ¶ 53.)[2]

Plaintiffs contend they are entitled, under Rule 26, SCRCP, to conduct pre-certification discovery on a class-wide basis in order to obtain information relevant to the claims asserted in this lawsuit—namely, the business practices, policies and procedures related to Mary Black's practice of refusing to submit claims to health insurers for certain patients when third party liability may be implicated and any documentation related to the same.[3]

Defendants disagree and assert that "[a]ll class-wide discovery is inappropriate while Defendants' appeal is pending," "[d]iscovery of alleged damages suffered by unnamed non-party patients is premature and improper," and "[d]iscovery of any information related to medical services rendered to unnamed patients who are covered by policies issued by carriers other than . . . MedCost, Cigna, or Medicare is inappropriate, since the three named Plaintiffs . . . were insured by only those three carriers and cannot represent any class involving other carriers." (Defs.' Mem. 1.) Defendants further contend that the discovery sought is irrelevant, overly broad, burdensome, and/or not reasonably tailored to Plaintiffs' claims and that Plaintiffs "lack standing" to pursue such claims. (*See id.* at 2–6.) After careful review, the Court respectfully disagrees and hereby ORDERS that the requested discovery be had, with such conditions and limitations as set forth below.

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[2] No class has been certified as of yet; however, even if an "alleged class has a fluid, changing membership, this feature alone does not make the class action device unsuitable." *McGann v. Mungo*, 287 S.C. 561, 570, 340 S.E.2d 154, 159 (Ct. App. 1986) (noting the circuit court's discretion to require plaintiffs to replead, redefine the class, or designate subclasses).

[3] For ease of reading, the Court's references to "Mary Black" collectively incorporates both Mary Black Hospital and the related collection and billing entities who are named as co-defendants in this lawsuit.

FINDINGS AND REASONING OF THE COURT

This case has been pending for over four (4) years. The Court is cognizant of both its duties under Rule 26 and its responsibilities to unknown class members under Rule 23, SCRCP. The Court is likewise mindful of the longstanding law of 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.'" *Samples v. Mitchell*, 329 S.C 105, 113–14, 495 S.E.2d 213, 217 (Ct. App. 1997) (citations omitted). Given the age of the case, the Court's concerns as to the preservation of evidence, the availability of witnesses, and the possibility that class members will die while the case is pending are not just mere abstractions.[4] To say that time is of the essence is, regrettably, only too true.

As an initial matter, the Court finds Mary Black's assertion that "[a]ll class-wide discovery is inappropriate while Defendants' appeal is pending" to be unavailing and contrary to South Carolina law. [5] To reiterate its prior ruling, the Court finds that "the claims asserted by Plaintiffs Blackwell and Brooks, both individually and on behalf of others similarly situated, properly remain within this Court's jurisdiction." (July 6 Order at 3); *see also Cousar v. New London Eng'g Co.*, 306 S.C. 37, 40, 410 S.E.2d 243 (1991) (stating that "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" and finding no abuse of discretion in the trial court's order retaining jurisdiction over discovery

[4] As defense counsel admitted at the hearing, since the filing of this lawsuit, Mary Black was acquired by Spartanburg Regional and such sale impacts Mary Black's ability to obtain records. Regretfully, this is exactly the type of situation that the Court believes could have been avoided had Mary Black provided full and complete responses to discovery in a timely fashion.

[5] The Court notes that this issue of whether this case—and discovery—could proceed as to non-CIGNA insureds was previously (and extensively) briefed by the parties in advance of a prior hearing on June 23, 2021.

matters in the plaintiffs' case while appeal from the denial of defendant's motion to amend its third party complaint was pending). Further, Mary Black's assertion that the discovery seeks information related to persons—for instance, Medicare beneficiaries—that have "no claim" under the theories advanced by Plaintiffs is similarly unavailing.[6] Finally, Defendants' assertions as to a purported "lack of standing" on the part of the class representatives (on the grounds that a plaintiff insured by one insurance carrier cannot adequately represent a class member patient insured by another carrier) are unpersuasive and not dispositive of the discovery issue at hand. Notwithstanding the fact that the Amended Complaint does not assert a breach of contract claim, the Court disagrees, particularly in light of the fact that evidence to date reveals that the "failure to bill" implicated multiple carriers and the types of damages sustained by patients were consistent across the board.[7]

Accordingly, the Court finds that Mary Black's objections are unfounded and there exists no good faith basis for the hospital to continue to decline to provide information relevant to the claims asserted in this lawsuit. This case is about unidentified patients covered by health insurance policies who sustained injuries implicating third party liability. Whether a patient may have been insured through BlueCross/BlueShield or United Healthcare, for example, instead of CIGNA or

[6] Of course, the issue of whether Mary Black is Medicare-compliant in its billing practices is one of many factual issues in this case. Regardless, this theory was previously raised at the Rule 12 stage and the motion was denied.

[7] In *Grazia v. S.C. State Plastering*, 390 S.C. 562, 703 S.E.2d 197 (2010), the South Carolina Supreme Court noted that the defense's position was "nothing more than a generalized argument against class action litigation, as the named plaintiff in a class action will never have specific standing for *each* individualized claim that comprises the class." *Id.* at 575, 703 S.E.2d at 203. The Supreme Court cited to *Califano v. Yamasaki*, 442 U.S. 682 (1979), in support of the proposition that the "class-action device was designed as an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." *Grazia*, 390 S.C. at 575, 703 S.E.2d at 204 (citing *Califano*, 442 U.S. at 700–01).

MedCost, makes no difference in terms of discovery into the contracts, policies, and/or procedures of Mary Black (or any damages sustained by putative class members as a result of such policies). By way of example, the identity of other insurance carriers with which Mary Black entered into agreements requiring the hospital to submit claims promptly for payment is certainly relevant and properly discoverable. Further, the financial import of Mary Black's business practice is well within the bounds of discoverable information—namely, the total dollar amount associated with Mary Black's policy of refusing to submit certain claims to health insurance carriers for payment (or the number of instances where it refused to do so). These are but two examples cited by this Court; however, they illustrate that the discovery sought by Plaintiffs over four (4) years ago is neither unreasonable, overly broad, nor unduly burdensome, nor is it outside the bounds of relevance as defined by South Carolina courts.[8]

Additionally, and importantly, under Rule 23(d), SCRCP, the Court is vested with the authority to make all appropriate orders in this case, including those to "impose such terms as shall fairly and adequately protect the interest of the persons on whose behalf the action is brought or defended." *See generally Salmonsen v. CGD, Inc.*, 377 S.C. 442, 454, 661 S.E.2d 81, 88 (2008) ("Rules 23(d)(1) and (2) of the South Carolina Rules of Civil Procedure specifically permit the trial court to maintain continual control over class action proceedings . . . ."). The sanctity of the

[8] In addition to the right to discovery enshrined in Rule 26, SCRCP, Plaintiffs may seek discovery that can enable them to attempt to support a forthcoming motion for class certification under Rule 23(a), SCRCP. *See, e.g., Griffin v. Harley Davidson Credit Corp*., C.A. No. 8:08-cv-466-HFF-BHH, 2010 WL 233764, at *1, *5 (D.S.C. Jan. 14, 2010) (concluding pre-certification discovery to be permissible and necessary, and finding that the "strong show of relevance is not something the Court can dismiss lightly," and noting that other district courts in the Fourth Circuit "have concluded that plaintiffs are 'generally entitled to pre-certification discovery to establish the record the court needs to determine whether the requirements for a class action suit have been met'" (citing *Buchanan v. Consol. Stores Corp.*, 217 F.R.D. 17, 185 (D. Md. 2003); *Miller v. Balt. Gas & Elec. Co.*, 202 F.R.D. 195, 201–02 (D. Md. 2001))).

class action mechanism as a means for addressing issues impacting large numbers of South Carolinians has been repeatedly recognized by our highest court; the South Carolina Supreme Court "has expressed the viewpoint that class actions are *favored* in this state," noting that the differences between the state class action rule and its federal counterpart reflect that "*Rule 23, SCRCP, endorses a more expansive view of class action availability than its federal counterpart*." *Grazia v. S.C. State Plastering*, 390 S.C. 562, 576, 703 S.E.2d 197, 204 (2010) (emphasis added) (quoting *Littlefield v. S.C. Forestry Comm'n*, 337 S.C. 348, 355, 523 S.E.2d 781, 784 (1999)).[9]

ACCORDINGLY, the Court, in its sole discretion and after careful review, finds that there exists no basis for Mary Black's numerous objections and discovery must therefore proceed as outlined below without further delay.[10] The Court therefore ORDERS that, within fifteen (15) days of the date of this Order, Mary Black SHALL report back to the Court as to <u>when</u> the following information and documents can be gathered and made available to its counsel for possible subsequent production:

1. Information responsive to **Interrogatory nos. 8, 9, 10, 11, and 20 and Requests for Production Nos. 13, 14 and 19**.[11] This discovery collectively seeks what the Court considers

[9] In *Littlefield*, the Supreme Court noted that "[s]ince adoption of Rule 23, SCRCP, this Court has heard many cases that have used the class action procedure to allow adequate representatives to address issues which affect large groups of citizens in our state." 337 S.C. at 355, 523 S.E.2d at 784.

[10] To the extent Mary Black asserts concerns related to disclosure of confidential and/or protected health information on behalf of unknown nonparty patients, the Court notes that concerns related to same can "usually be addressed through the redaction of patient identifiers." Further, as it relates to either confidential institutional documents and/or documents—to include concerns related to financial and/or employee data—the existing confidentiality order can be utilized to protect all such information. (*See* July 6 Order 9, n.8.)

[11] As noted at the hearing, the Court espouses a liberal and broad definition of what is discoverable in this case. The Court further recalls its mandate that the information to be gathered by Mary

"institutional information" from Mary Black that should be available for collection and analysis by Mary Black. The interrogatories generally seek information regarding number of occurrences when Mary Black failed to submit medical bills, number of patients implicated, names of insurance carriers and the identity of all contracts entered into with such carriers and the terms therein, total dollar amounts related to this business practice, and comparisons between amounts received from carriers versus amounts received from collections from patients. Likewise, the RFPs seek documents and communications, either internal or external, related to the failure to submit medical bills to a patient's insurance carrier and, further, documents relating to when and how to submit bills to a patient's insurance carrier. Mary Black shall mark such information/data "confidential" in accordance with the existing protective orders in the case and, further, must redact all PHI, to include patient identifiers, from any such documentation. Any such information produced shall only be used for purposes of this litigation and remain subject to the existing confidentiality order.

The Court further ORDERS that Mary Black SHALL:

1. Prepare a supplemental and amended answer to **Interrogatory No. 17**, which withdraws its stated objections and identifies all individuals or entities responsible for creating or implementing its billing practices from January 2014 through present;

2. Prepare supplemental and amended answers to **Interrogatory Nos. 18 and 19** which both withdraw the objections as stated and clearly identify all written rules, policies, or procedures governing when and how Defendant should submit medical bills to an insurance carrier for the stated time period (along with identifying all training offered by Mary Black to employees

Black is "very, very broad." Additionally, the word "document" should be interpreted broadly to include all writings, correspondence, tangible things, and any items defined in Rule 1001, SCRE.

on when and how to submit medical bills to a patient's insurance carrier, including a list of the employees or staff members who received such training);

3. Prepare supplemental and amended responses **to Request for Production Nos. 1, 11, 20, and 21** which withdraw the objections as stated and provide full and complete responses; and

4. Prepare supplemental and/or amended responses to any other discovery response its counsel, after review, deems necessary in accordance with Rule 26(e), SCRCP.[12]

The Court reiterates that none of the aforementioned discovery shall be served upon Plaintiffs' counsel until such time as the parties meet and confer with the Court. However, while mindful of Defendants' concerns related to the pending appeal, such concerns outweigh the grave consequences of any further delay of this action. Upon completion of the above, Mary Black shall notify the Court and Plaintiffs' counsel of the timeframe in which the ordered discovery will be compiled and ready for production. At that time, the Court shall schedule a conference in order to effectuate the transfer of any of the aforementioned supplemental and amended discovery responses upon such terms and conditions as the Court deems just and appropriate.[13]

AND IT IS SO ORDERED.

J. Mark Hayes, II
Presiding Circuit Court Judge

Dated: _____

[12] Given the age of the case and the fact that Defendants' discovery responses are over four (4) years old, the Court—with a view towards the preservation of evidence and avoidance of future discovery disputes—believes that a review of all discovery to date by the defense will further the Court's goal of ensuring that discovery process move forward without undue delay.

[13] Ideally, the Court hopes to attempt to schedule a hearing with the parties during the December 8–10, 2021 time period.

At: _____

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/Compel

IT IS SO ORDERED

s/ J. Mark Hayes, II #2132