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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

J. Mark Hayes, II, Circuit Court Judge

Case No. 2017-CP-42-00219
Appellate Case No. 2020-001613

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

Respondents,

v.

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

Appellants,

APPELLANTS' REPLY TO RETURN IN OPPOSITION TO THE PETITION FOR REHEARING

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Appellants Mary Black Health System, LLC, d/b/a Mary Black Memorial Hospital ("Mary Black"); CHSPSC, LLC; and Professional Account Services, Inc. (collectively, "Defendants") submit this Reply to the Plaintiffs' Return to the Petition for Rehearing.

I. The Panel Opinion directly conflicts with, and cannot be reconciled with, *Bennett.*

Both *Bennett* and this case deal with materially similar issues, allegations, and facts about whether plaintiffs should be compelled to arbitration. *See Bennett v. ACS Primary Care Physicians-Se. P.C.*, 444 S.C. 458, 488, 908 S.E.2d 110, 126 (Ct. App. 2024). As explained in Defendants' Petition for Rehearing, these decisions cannot be reconciled and will lead to inequitable results, sow confusion in the law of equitable estoppel and arbitration, and encourage procedural gamesmanship.

In their Return, Plaintiffs concede that the two cases have "similar facts" and, indeed, appear to agree that the cases even have the same "'core allegations.'" [Return at 8]. But they continue to assert that the cases can be distinguished, as suggested by the majority in the Panel Opinion and in the concurrence in *Bennett*, on the basis that compelling arbitration in *Bennett* was required because (1) the plaintiffs in that case expressly asserted that they were third-party beneficiaries of the Provider Agreement at issue; and (2) the plaintiffs' breach of contract or breach of implied contract and unjust enrichment claims in that case arose solely from the Provider Agreement. *Id.* at 7–8. As explained in Defendants' Petition, however, these supposed distinctions fall apart when one reviews the operative allegations in the two cases.

Here, just like in *Bennett*, Plaintiffs sued their healthcare provider because the provider did not bill their health insurers directly and, relatedly, because the provider did not bill the discounted rates as agreed to between the insurers and provider. Thus, the core issues in this case and *Bennett* are the same:

1. From what source does any duty arise for the Defendants to bill the health insurer directly for the medical services rendered to the Plaintiffs?; and

2. From what source does the duty arise for those services to be billed at discounted rates as agreed to between the Defendants and those health insurers?

The answers to those questions are provided by Plaintiffs themselves in the Amended Complaint and in other overt representations made to the courts in this litigation.

A. Plaintiffs' Amended Complaint alleges that Defendants' duty to bill the health insurer directly arises from the Defendants' contracts.

In the Amended Complaint, each of the Plaintiffs allege that they are aggrieved, and are entitled to damages, because Defendants did not directly bill their health insurers for the services rendered by Mary Black Hospital, and thus Plaintiffs allegedly failed to receive the discounted rates agreed to between the Defendants and those insurers. (R. 65 ¶ 9; *see also id.* ¶ 31, 57(a)). In Paragraph 28 of their Amended Complaint, for example, each Plaintiff alleges:

> Defendants are required **by their contracts with patients' health insurance carriers** to submit insurance patients' medical bills directly to the carriers.

(R. 68) (emphasis added). In Paragraph 29 of their Amended Complaint each Plaintiff alleges:

> Defendants are **required to honor a contractual discount with their patients' health insurance carriers and accept discounted payments from those health insurance carriers** in full satisfaction of the patients' debts.

(R.68) (emphasis added). Further, in Paragraph 31 of their Amended Complaint each Plaintiff reiterates the allegation:

> Defendants **have contracts with health insurance providers and health plans for reduced compensation** for treating patients who have health insurance.

(R. 68) (emphasis added).

Aside from these allegations of a *contractual* duty running from Defendants to Plaintiffs' insurers, there are no allegations in the Amended Complaint that the duties to bill the health insurer directly, or to bill and accept discounted rates, arise from any source. There are no allegations that such duties arise from the patients' health insurance policies (between themselves and their respective insurer) or by operation of law.[1]

In short, as in *Bennett*, Plaintiffs' claims here arise solely from the terms of the Agreements between Mary Black Hospital and their health insurers (CIGNA for Owens). Their artful pleading to try to obfuscate the nature of their claims changes nothing.

B. Plaintiffs conceded that their case is premised on the allegation that they are third-party beneficiaries to their insurers' contracts with Defendants.

The concurring opinion in *Bennett* stressed that the plaintiffs there were "required to arbitrate" because they "expressly asserted that they were third-party beneficiaries" of their insurers' agreements with the defendant providers. Notably, Plaintiffs do not discuss this point in their Return. Nor could they, as Plaintiffs admitted—and in fact argued—to the circuit court that they were third-party beneficiaries of the agreements between their insurers and the provider.

As Plaintiffs proposed in their Return, reviews of prior proceedings in the case and prior orders issued by the Circuit Court reveal important truths about this case and the underlying basis and purpose of the Plaintiffs' claims. In fact, in the Plaintiffs' Motion to the Circuit Court to certify the alleged class, the Plaintiffs expressly represented to the Circuit Court:

> **The plaintiffs' contend that they are third-party beneficiaries of the agreements between their insurance companies and Mary Black** . . . .

[1] In fact, such duties do not arise by operation of law. *See Wogan v. Kunze*, 366 S.C. 583, 605, 623 S.E.2d 107, 119 (Ct. App. 2005), *affd as modified*, 379 S.C. 581, 666 S.E.2d 901 (2008); *Beverly v. Grand Strand Reg'l Med. Ctr., LLC*, 429 S.C. 502, 514, 839 S.E.2d 468, 474 (Ct. App. 2020), *aff'd*, 435 S.C. 594, 869 S.E.2d 812 (2022).

(emphasis added). When asked by the Circuit Court to submit a proposed order certifying the class, Plaintiffs submitted a proposed order with the exact same language set forth above. And, the Circuit Court entered the order certifying the class using the exact same language set forth above as proposed by the Plaintiffs.[2]

Thus, the allegations in the Amended Complaint in this case and in those other express representations by Plaintiffs to the Circuit Court, reflect that the distinction attempted in the concurring opinion in *Bennett* is inapplicable. In fact, the total Record reveals that the operative facts in this case and *Bennett* are not distinguishable—they are the same. Just as those facts required an order compelling arbitration in *Bennett*, so to do they require such an order in this case. Plaintiffs claim third-party beneficiary status under the Agreements between Mary Black Hospital and the health insurers, and they plainly sought to enforce provisions of those Agreements to their direct benefit. As such, Owens must be compelled to arbitrate his claims against Defendants.

II. The argument that Owens and the other Plaintiffs received no benefit from the Agreement between the Hospital and their insurers and, therefore, should not be bound to the terms of such Agreement is unavailing.

In their Return, Plaintiffs argue that they received no benefit from the Agreements between Mary Black and their health insurers, and that they did not avail themselves of those Agreements and, therefore, should not be bound by the terms of the Agreements between Mary Black and their health insurers. The question, however, is not whether Plaintiffs already received the benefits

[2] For the Court's convenience, Defendants provide the Circuit Court's order as an exhibit. The Circuit Court's November 1, 2022 order granting Plaintiffs' motion for class certification is one of the orders included in the Notice of Appeals filed by Defendants in Appellate Case No. 2024-001546. The Court can take judicial notice of its own records, files and proceedings for all proper purposes. *Freeman v. McBee*, 280 S.C. 490, 494, 313 S.E.2d 325, 327 (Ct. App. 1984); *see also Sloan v. Greenville Cnty.*, 380 S.C. 528, 537, 670 S.E.2d 663, 668 (Ct. App. 2009) (taking judicial notice of issues pending in related subsequent appeals between the same parties).

under the Agreements between Mary Black Hospital and their health insurers.[3] The relevant inquiry is whether they are suing to secure or obtain such benefits.

In this case, it is plain from their Amended Complaint that Plaintiffs filed this action to obtain benefits from, and to enforce the terms of, the Agreements between the Defendants and the health insurers. The essence of the lawsuit and Plaintiffs' claims is that they are suing to enforce rights or duties arising solely from the Hospital/Insurer Agreements, including the duties to submit the bills for the patients' care directly to the health insurers and to bill and collect for that care at the discounted rates. Therefore, as parties seeking to take benefits they allege not to have received from those agreements, the Plaintiffs (Owens in particular) are bound by all the terms of the Agreements they are attempting to enforce—including the arbitration provision in the CIGNA Agreement.

III. Owens's purported lack of knowledge of the CIGNA Agreement is inconsistent with the allegations of the Amended Complaint and does not change the fact that he brought an action to enforce its terms.

Plaintiffs argue, in Footnote 2 of their Return, that Plaintiff Owens "did not even know of the CIGNA Agreement's existence." This contention directly contradicts Paragraph 28 of his Amended Complaint, in which Owens alleges: "Defendants are required by their contracts with patients' [Owens's] health insurance carriers to submit insurance patients' [Owens's] medical bills directly to the carriers." (R. 68). If Owens did not know of the existence of the CIGNA Agreement, he could not have asserted the allegations, as he did, in Paragraph 28 of his Amended Complaint. Just as the Court recognized in *Bennett,* the insureds knew about the provider agreements when they filed their complaints seeking to enforce them. Plaintiffs' argument to the contrary should be disregarded.

[3] Parties ordinarily do not sue to obtain benefits they already received.

IV. The CIGNA Agreement's bar to class arbitration does not render Owens's claims against Defendants outside the scope of disputes that must be compelled to arbitration pursuant to that Agreement.

The CIGNA Agreement mandates in no uncertain terms that "Arbitration shall be the exclusive remedy for the resolution of disputes arising under this Agreement." The scope of the arbitration obligation is all disputes; an attempt to conclude otherwise would be to impermissibly rewrite the Agreement. Owens claimed a dispute about the duty to bill the insurer directly and to accept discounted charges in accordance with the Agreement and he must arbitrate his dispute.

In other cases where plaintiffs attempted Owens's argument (tried to convert a class action waiver into a limitation on the scope of the arbitration provision), courts have rejected it. Those courts recognized that the individual plaintiff was bound, and must be compelled, to arbitrate his/her claims and he simply could not pursue class claims in that dispute resolution. *See Bouskous v. J.P. Morgan Chase Bank, N.A.*, 2020 WL 8483909, at *5 (E.D. Cal. Dec. 21, 2020); *Holman v. Bath & Body Works, LLC*, 2021 WL 5826468, at *9 (E.D. Cal. Dec. 8, 2021), *report and recommendation adopted*, 2022 WL 463298 (E.D. Cal. Feb. 15, 2022). The courts in *Bouskous* and *Holman* reviewed and rejected the argument that an arbitration provision that bars an arbitrator from hearing class claims limits the scope of his duty to arbitrate and places even his individual claims outside the scope of an arbitration provision. In fact, the court in *Bouskous* concluded that the plaintiff's arguments that the class action wavier placed the plaintiff's claims outside the scope of the arbitration agreement was not plausible and noted that the class action / collective action waiver provision at issue simply prohibited one from bringing claims on behalf of a class in arbitration and, therefore, the plaintiff was required to arbitrate his claims individually. *Bouskous*, at *4.

Moreover, it is perfectly acceptable and enforceable for the Agreement to clarify that Owens may not consolidate his dispute with others and that the arbitration may not be conducted

as a class claim. *See AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 336 (2011). In fact, the United States Supreme Court holds that class arbitration is not permissible unless the arbitration agreement specifically and expressly states that the arbitration may be conducted on a class-wide basis. *Lamps Plus, Inc. v. Varela*, 587 U.S. 176, 187–88 (2019); *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 684 (2010). The arbitration provisions in the CIGNA Agreement do not authorize class claim arbitration.

CONCLUSION

For the foregoing reasons, Defendants respectfully request that this Court rehear this matter by panel or *en banc*.

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December 23, 2024
Columbia, South Carolina

STATE OF SOUTH CAROLINA
COUNTY OF SPARTANBURG

IN THE COURT OF COMMON PLEAS
SEVENTH JUDICIAL CIRCUIT

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.

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

ORDER

CERTIFYING CLASS

This matter came before the Court on motion of Plaintiffs Jo Ann Blackwell and Michelene Brooks, individually and on behalf of all others similarly-situated, to certify a class action pursuant to Rule 23, SCRCP. A hearing was held on September 12, 2022, at the Spartanburg County Courthouse. Present at the hearing were Marghretta H. Shisko and Rachel G. Peavy, appearing as counsel for the Plaintiffs, and attorneys James L. Werner and Katon Dawson appearing for the Defendants. After careful and thorough review of the briefing, argument, and applicable law, the Court hereby finds that this case is suitable for class action treatment and hereby certifies a class consistent with the definition set forth herein.

Factual Background

This lawsuit arises from allegations that the Defendants, a hospital and related billing/collection entities (at times collectively referred to as "the Hospital"), engaged in "unlawful, unfair, and predatory and billing practices." (Am. Compl. ¶ 1.) These practices involved the Defendants' routine refusal to submit medical bills to certain patients' insurance carriers if the Hospital's

screening identified the patients as ones for whom third-party recovery might be available to pay for such treatment—usually, a patient who was treated following a motor vehicle collision. Plaintiffs allege that the Hospital engaged in this wrongful and predatory practice in order to collect more money than what they might have received from the patients' insurance. (*See id.* ¶¶ 4–8.) The plaintiffs, individually and on behalf of the class members, are asserting causes of action for tortious interference with contractual relationships, unjust enrichment, and injunctive relief.

The plaintiffs contend that they are third-party beneficiaries of the agreements between their insurance companies and Mary Black, and that the defendants interfered with the plaintiffs' own relationships with their insurance companies by attempting to collect payments from the plaintiffs at a higher amount than what the Hospital contracted for with the insurance companies. (*See id.* ¶ 57.) Each of the named plaintiffs—Jo Ann Blackwell, Micheline Brooks, and Samuel Owens—is an accident victim who received treatment at Mary Black Hospital, but the defendants impermissibly attempted to collect payment from the plaintiffs directly or from their third-party tort recoveries. (*See id.* ¶¶ 35–52.) These named plaintiffs are seeking to represent a class of patients whose medical bills were not submitted to their health insurance for payment. (*See id.* ¶¶ 21, 53.)

According to the Hospital, it collected an estimated $1,816,454.85 for treatment and services rendered to approximately 1,538 patients at Mary Black Hospital during the relevant period.[1] This amount is for medical bills that the Hospital did not submit to the patient's insurance carrier,

[1] This "approximate" number of 1,538 was provided by Mary Black in its supplemental responses to Plaintiffs' second set of interrogatories. Given the Hospital's ongoing discovery obligations in this case, to the extent that it identifies additional patients treated during the relevant time period at its facilities (i.e., locations in both Spartanburg, South Carolina and Gaffney, South Carolina), the Court directs the Hospital to supplement and amend its discovery responses in accordance with the South Carolina Rules of Civil Procedure and pursuant to the Court's prior orders and directives.

which totaled approximately $7,199,837.54.[2] The amount that the Hospital estimated it would have received if it had properly billed those patients' insurance carriers was $990,349.66. Accordingly, the Hospital received nearly 100% in additional profits from the business practice challenged by the plaintiffs.

Procedural History

Plaintiff Jo Ann Blackwell originally filed this case as the only named plaintiff on January 20, 2017, suing the defendants individually and on behalf of all other individuals who were patients at Mary Black Hospital or any other facility in South Carolina "owned or affiliated with Defendant Community Health Systems" following a motor vehicle accident and who had health insurance at the time of treatment. (Original Compl. ¶ 41.) Plaintiff served discovery on the defendants on September 8, 2017. Later, additional named plaintiffs affected by Mary Black's policy sought to join the lawsuit, and the plaintiffs filed a motion to amend the complaint to add new named plaintiffs to represent the class on October 18, 2019. The Court entered an Order Granting Plaintiffs' Motion for Leave to Amend the Complaint on April 23, 2020, and the plaintiffs filed the amended complaint the following day.

On June 8, 2020, the defendants moved to dismiss the amended complaint or, in the alternative, to stay and compel arbitration as to Plaintiff Owens. The Court entered an order denying the defendants' motions on September 4, 2020, and thereafter denied the defendants' motions to alter or amend. The defendants then filed a Notice of Appeal on December 8, 2020, appealing the Court's order denying Defendants Motion to Dismiss or in the Alternative to Stay and Compel

[2] The Hospital has identified in discovery at least 14 insurance carriers (plus related affiliates and/or subsidiaries) with whom it had agreements to promptly submit claims for payment.

Arbitration. During this time period, Plaintiffs also filed motions to compel responses to the discovery served in 2017.

After filing the notice of appeal, the defendants asserted that the entire case was stayed during the pendency of the appeal, and they opposed the plaintiffs' efforts to conduct discovery with respect to the class as a whole. The Court entered an Order, dated July 6, 2021, finding 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 Defendants' motion to compel arbitration against him, the claims of Ms. Brooks and Blackwell are not affected by such appeal and may proceed." (Order 4–5.) On November 23, 2021, the Court entered an Order on Plaintiffs' Motion to Compel, finding that the plaintiffs were entitled to conduct class-wide discovery in the case and that the discovery sought concerning the potential class of affected patients and the defendants' billing policy was not unreasonable, overly broad, or unduly burdensome, nor was it outside the bounds of relevance under South Carolina law. (Order, Nov. 23, 2021.)[3]

Legal Standard

The South Carolina Supreme Court "has expressed the viewpoint that class actions are favored in this state." *Grazia v. S.C. State Plastering, LLC*, 390 S.C. 562, 576, 703 S.E.2d 197, 204 (2010). This is because "[t]he class-action device saves the resources of both the courts and the parties by permitting an issue potentially affecting every [class member] to be litigated in an

[3] The Court believes that the history of discovery in this case—and issues related to the Hospital's conduct regarding same—has been fully addressed in both the November 23 order referenced herein, as well as the Court's recent order of August 2, 2022. As to the Hospital's argument that the certification of a class is somehow premature in light of the Hospital's decision not to pursue discovery pending its appeal of the denial of its motion to compel arbitration as against Mr. Owens, the Court disagrees. *See* July 6, 2021 Order.

economical fashion under Rule 23." *Id.* (second alteration in original) (quoting *Califano v. Yamasaki*, 442 U.S. 682, 701(1979)).

Rule 23 of the South Carolina Rules of Civil Procedure sets forth the following requirements with respect to class actions in state court:

> One or more members of a class may sue or be sued as representative parties on behalf of all only if the court finds (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, (4) the representative parties will fairly and adequately protect the interests of the class, and (5) in cases in which the relief primarily sought is not injunctive or declaratory with respect to the class as a whole, the amount in controversy exceeds one hundred dollars for each member of the class.

Rule 23(a), SCRCP. "The first four criteria are often referred to as the requirements for numerosity, commonality, typicality and adequacy of representation." *Gardner v. S.C. Dep't of Revenue*, 353 S.C. 1, 21, 577 S.E.2d 190, 200 (2003). The proponents of maintaining a case as a class action "have the burden of proving these prerequisites of class certification have been met." *Waller v. Seabrook Island Prop. Owners Ass'n*, 300 S.C. 465, 467, 388 S.E.2d 799, 801 (1990) (citing *Windham v. Am. Brands, Inc.*, 565 F.2d 59 (4th Cir. 1977)). However, "Rule 23, SCRCP, endorses a more expansive view of class action availability than its federal counterpart." *Grazia*, 390 S.C. at 576, 703 S.E.2d at 204 (quoting *Littlefield v. S.C. Forestry Comm'n*, 337 S.C. 348, 354–55, 523 S.E.2d 781, 784 (1999)).

"It is within a trial court's discretion whether a class should be certified." *Pope v. Heritage Cmtys., Inc.*, 395 S.C. 404, 421, 717 S.E.2d 765, 774 (Ct. App. 2011) (citing *Tilley v. Pacessetter Corp.*, 333 S.C. 33, 42, 508 S.E.2d 16, 21 (1991)); *see also King v. Am. Gen. Fin., Inc.*, 386 S.C. 82, 88, 687 S.E.2d 321, 324 (2009) (same). However, in determining whether to certify a class, a court should "not look to the merits." *King*, 386 S.C. at 88, 508 S.E.2d at 324 (quoting *Tilley*, 333 S.C. at 43, 508 S.E.2d at 21); *see also Knowles v. Standard Sav. & Loan Ass'n*, 274 S.C. 58, 59,

261 S.E.2d 49, 49 (1979) ("Neither does certification reach the 'merits' of the underlying cause of action . . . .").

Moreover, as this Court has recognized on numerous occasions, during hearings and in its written orders, Rule 23 imposes a special duty on the trial courts in this State to protect the interests of putative class members and provides the courts with authority to protect those interests. For example, "[t]he 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." Rule 23(d)(2), SCRCP. Additionally, an order certifying a class "may be conditional, and may be altered or amended before the decision on the merits." Rule 23(d)(1), SCRCP; *see also McGann v. Mungo*, 287 S.C. 561, 570–71, 340 S.E.2d 154, 159 (Ct. App. 1986) ("[T]he circuit court can either require the plaintiffs to plead, redefine the alleged class itself, or designate subclasses.").

Legal Conclusions and Factual Findings

The Court is mindful of the South Carolina Supreme Court's mandate that, upon the filing of a motion for class certification, it is "**incumbent** on the circuit court to determine whether or not the action meets each of the five prerequisites proponents of class certification are required to prove." *Grazia*, 703 S.E.2d at 204 (2010) (emphasis added). "In determining whether the plaintiff has met the requirements of Rule 23, the court is limited to assessing the sufficiency of the allegations within the complaint." *Walbeck v. I'On Company, LLC*, 426 S.C. 494, 511, 827 S.E.2d 348, 357 (Ct. App. 2019), *cert. granted* Mar. 15, 2022.

When examining information presented by plaintiffs seeking to satisfy the requirements of Rule 23(a), the court must apply a "rigorous analysis" to determine whether each prerequisite is satisfied. *Gardner*, 353 S.C. at 21, 577 S.E.2d at 200 (*citing Waller*, 300 S.C. at 467, 388 S.E.2d at 801). The "rigorous analysis" standard cited in *Gardner* and *Waller* derives from a United States

Supreme Court case, *General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147 (1982). In that case, the Supreme Court noted that "sometimes the issues are plain enough from the pleadings to determine whether the interests of the absent parties are fairly encompassed within the named plaintiff's claim, and sometimes it may be necessary for the court to probe behind the pleadings before coming to rest on the certification question." *Id.* at 160. While *General Telephone* focused on a Title VII class action under federal law, the Court stated that "a Title VII class action, like any other class action, may only be certified if the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied." *Id.* at 161.

Having conducted the requisite "rigorous analysis," the Court hereby concludes that this case meets all elements required for class certification under Rule 23, SCRCP, and thereby certifies the class as:

> All individuals who, since January 1, 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 other than Cigna, and whose medical bills resulting from that treatment were not submitted to their health insurance carrier for potential payment.

As further explained in detail below, this class[4] satisfies each of the required elements of Rule 23(a), SCRCP, and proceeding with the class mechanism in this case will serve the Rule's goals of finality, efficiency, and economy.

[4] The class definition proposed by the Plaintiffs in their Motion differed slightly from that contained within their amended complaint and prior pleadings. However, the Court, in its discretion, may modify the class definition as required and necessary under the Rules. *See, e.g., McGann, supra*. In this case, given the pending appeal as to Mr. Owens (a CIGNA insured), the Court finds it appropriate to carve out the claims of Mr. Owens until such time as a final decision has been rendered by the appellate courts. If the appeal of Plaintiff Owens's claims ends while this case is still pending, the Court can revise the class definition in an amended class certification order consistent with Rule 23(d), SCRCP. The Court respectfully rejects the Defendants' argument that the class is a "moving target" simply because the definition may change over time.

1. The proposed class satisfies the numerosity requirement.

Rule 23 permits class certification only if "the class is so numerous that joinder of all members is impracticable." Rule 23(a)(1), SCRCP; *see also Salmonsen v. CGD, Inc.*, 377 S.C. 442, 459, 661 S.E.2d 81, 91 (2008) ("Rule 20 joinder and Rule 23 class actions should not co-exist."). "[T]he rationale for allowing a class action is 'to manage litigation involving numerous class members *who would otherwise all have access to court via individual lawsuits*.'" *Farmer v. Monsanto Corp.*, 353 S.C. 553, 558, 579 S.E.2d 325, 328 (2003) (quoting *Worth v. City of Rogers*, 89 S.W.3d 875, 879 (Ark. 2002)); *cf. Arthur v. SunTrust Bank (in re LandAmerica § 1031 Exch. Servs. Inc. IRS § 1031 Tax Deferred Exch. Litig.)*, C.A. No.: 8:09-cv-00415, 2012 WL 13124593, 2012 U.S. Dist. LEXIS 97933, at *16 (D.S.C. July 12, 2012) ("The Court may find the numerosity factor satisfied if the Court concludes it would be difficult, inconvenient, and wasteful to attempt to join more than 400 plaintiffs into one case, using permissive joinder."). A proposed class with 30 members or more will usually satisfy the numerosity requirement. *See Williams v. Henderson*, 129 F. App'x 806, 811 (4th Cir. 2005).

The plaintiffs brought this action alleging, prior to discovery, that "[t]he Class consists of hundreds and perhaps thousands of individual members and is, therefore, so numerous that individual joinder of all members is impractical." (Am. Compl. ¶ 55.) Discovery in this case to date has borne out this allegation— according to the defendants, there are approximately 1,538 patients affected by the defendants' refusal to bill their insurance carriers. These patients are all members of the class who would have otherwise been able to file individual cases against the defendants. Permitting class treatment of these numerous claims is desirable because it permits the claims to be litigated together without burdening the courts and creating the possibility of inconsistent results. Because the proposed class is so numerous that it would be impracticable to join all the

members in a single lawsuit, the Court finds that class treatment here satisfies Rule 23(a)(1), SCRCP.

2. There are common questions of law and fact.

Rule 23 does not impose a stringent commonality requirement. "When the party opposing the class has engaged in some course of conduct that affects a group of persons and gives rise to a cause of action, one or more of the elements of that cause of action will be common to all parties affected." *Newberg on Class Actions* § 3:20 (5th ed.). The South Carolina Court of Appeals has explained that:

> The essence of a class action is common questions of law and fact and Rule 23(a)(2) reflects this. It is important to note that the subsection does not demand that all questions of law and fact be common, only that there be common issues among the class. In fact, a single common issue will suffice if it is important enough. It also follows that the mere existence of individual issues does not defeat class action status.
>
> There is no qualitative or quantitative test in the Rule. Ultimately, commonality is a judgment that the issues are sufficiently similar so that the class action will be a more efficient means of resolving the problem, even though some individual issues may be litigated in any event.

McCann, 287 S.C. at 568, 340 S.E.2d at 157–58. "Though our Rule 23 does not specifically require [that] the common issues 'predominate,' there must be a proper balance between common and individualized issues in order to achieve the efficiencies the class procedure was designed to promote." *Hensley v. S.C. Dep't of Soc. Servs.*, 429 S.C. 144, 152, 838 S.E.2d 510, 514 (2020).

In demonstrating commonality, a movant is not required to prove that "every issue in the case [is] common to all class members." *Gardner*, 353 S.C. at 21, 577 S.E.2d at 200 (quoting *O'Connor v. Boeing N. Am., Inc.*, 184 F.R.D. 311, 329 (C.D. Cal. 1998)). Instead, the proposed class meets the commonality requirement "where the class shares a determinative issue." *Id.* at 21, 577 S.E.2d at 200–01. The presence of "minor factual differences" among the individual class

members' cases should not prevent class certification where the class members' claims turn on a common dispositive question. *Id.* at 23, 577 S.E.2d at 201; *see also* Newberg § 3.20 ("Because not all questions need be common, the fact that class members must individually demonstrate their right to recover, or that they may suffer varying degrees of injury, will not bar a finding of commonality.").

Here, the Court finds that the Defendants' policy and practice of refusing to bill health insurance impacted every member of the proposed class in a similar manner, such that the Plaintiffs' allegations arise from a common set of facts. The claims of the proposed class members all share significant, common issues, both legal and factual, which bind the proposed class together, and those issues are sufficiently similar in this Court's view such that the class action device is the most efficient means of resolving those claims. The Plaintiffs have alleged claims for tortious interference and unjust enrichment, and the facts needed to establish liability as among all class members will be the same. The Court finds that all of these claims turn on the hospital's knowledge or belief that these patients presented for treatment while covered by health insurance, thereby requiring the hospital to submit the patients' medical bills to insurance—and the Hospital's willful refusal to do so. (*See* Am. Compl. ¶¶ 64–66.)

Although the individual plaintiffs had different insurance and will have suffered different amounts of damages based on the treatment they received at the Hospital and their insurance coverage, the Court concludes that those are "minor factual differences" compared to the overarching, determinative issue of the Hospital's conduct in enacting and implementing this billing policy. Additionally, the Amended Complaint seeks injunctive and declaratory relief that is common to all putative class members. (*See* Am. Compl. ¶¶ 76–83.) Indeed, this Court has previously found that the "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*." (Order, Nov. 23, 2021, at 4 (emphasis added).) The Court thereby finds that the proposed class action satisfies the commonality requirement of Rule 23(a)(2).[5]

3. The claims of the named plaintiffs and the asserted defenses are typical of the class.

To establish typicality, the moving party must demonstrate that "the 'claims or defenses of the representative parties [are] typical of the claims or defenses of the class.'" *Pope,* 395 S.C. at 422, 717 S.E.2d at 774 (quoting Rule 23(a)(3), SCRCP). The requirement of typicality is similar to the commonality requirement. *See Gen. Tel. Co.*, 457 U.S. at 157 n.13 ("The commonality and typicality requirements of Rule 23(a) tend to merge."); *see also Broussard v. Meineke Disc. Muffler Shops*, 155 F.3d 331, 340 (4th Cir. 1998) ("The typicality and commonality requirements . . . ensure that only those plaintiffs or defendants who can advance the same factual and legal arguments may be grouped together as a class." (quoting *Mace v. Van Ru Credit Corp.*, 109 F.3d 338, 341 (7th Cir. 1997)). While commonality focuses on whether the case arises from a common set of facts, the typicality requirement looks at whether those facts present similar claims or defenses across the proposed class. *See Pope,* 395 S.C. at 422, 717 S.E.2d at 774–75.

Here, the Court finds that the claims of the proposed class members and the named plaintiffs all arise from the same practices of the defendants and are based on the same legal theories. The proposed class thus satisfies Rule 23(a)(3)'s typicality requirement. *See generally Gen. Tel.*

[5] The Defendants, in urging the Court to deny the motion for class certification, rely upon the cases of *Wal-Mart Stores, Inc. v. Dukes, et al.*, 564 U.S. 338 (2011), and *MCG Health, Inc. v. Perry, et al.*, 755 S.E.2d 341 (Ga. App. 2014). After careful review of these cases, the Court declines to adopt the Defendants' position. As noted herein, South Carolina's Rule 23 embraces a far more expansive view of the class action mechanism than that provided for under the federal rule applicable in *Wal-Mart*; furthermore, the Court finds the opinion of the Georgia court, applying Georgia law, to be unpersuasive and inapplicable to the instant case.

Co. v. EEOC, 446 U.S. 318, 330 (1980) ("The typicality requirement is said to limit the class claims to those fairly encompassed by the named plaintiff's claims.").

4. The named plaintiffs and class counsel will provide adequate representation.

The class action mechanism is intended to allow a large number of claims to be litigated through a representative party or parties. *See Salmonsen*, 377 S.C. at 458–59, 661 S.E.2d at 90–91; *see also O'Quinn v. Beach Assocs.*, 272 S.C. 95, 104, 249 S.E.2d 734, 738 (1978) ("The very purpose of a class action is to avoid the necessity of requiring each member of the class to prove the elements of the cause of action."). Accordingly, Rule 23 requires that the representative parties must "fairly and adequately protect the interests of the class." Rule 23(a)(4), SCRCP. In considering this requirement, the trial court should evaluate "(1) whether class counsel are qualified, experienced, and generally able to conduct the proposed litigation; and (2) whether Plaintiffs' claims are sufficiently interrelated with and not antagonistic to the class claims as to ensure fair and adequate representation." *Lott v. Westinghouse Savannah River Co.*, 200 F.R.D. 539, 561 (D.S.C. 2000). The adequacy of representation requirement "is a question of fact which depends upon the circumstances of each case." *Waller*, 300 S.C. at 468, 388 S.E.2d at 801 (citing *McGowan v. Faulkner Concrete Pipe Co.*, 659 F.2d 554 (5th Cir. 1981)).

Here, with respect to the adequacy of representation requirement, the Plaintiffs alleged in their pleading that:

> Plaintiff and her counsel will fairly and adequately represent and protect the interests of the members of the Class. Plaintiff has no claims antagonistic to those of the Class. Plaintiff has retained competent and experienced counsel who have prosecuted numerous complex actions within the State of South Carolina and across the nation. Undersigned counsel is committed to the vigorous prosecution of the action.

(Am. Compl. ¶ 59.) Although the Defendants have denied these allegations, the Court can identify no facts to support a finding that the named plaintiffs and their counsel are unable to provide adequate representation and protect the interests of all proposed class members. The Court further finds that Defendants' argument on the adequacy of class representation impermissibly goes to the merits of the claims in this case and therefore must respectfully be disregarded.

a. The class representatives will adequately represent the class members.

The South Carolina Supreme Court has explained that "the named plaintiff [must] at all times adequately represent the interests of the absent class members" to satisfy the Due Process Clause. *Hosp. Mgmt. Assocs. v. Shell Oil Co.*, 356 S.C. 644, 654, 591 S.E.2d 611, 616 (2004) (quoting *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985)). "In determining whether a particular named plaintiff will adequately represent a proposed class pursuant to Rule 23(a)(4) one factor [the trial court] must consider is whether the named plaintiff has interests that are antagonistic or adverse to those of the rest of the class." *Waller*, 300 S.C. at 468, 388 S.E.2d at 801 (citing *Runion v. U.S. Shelter*, 98 F.R.D. 313 (D.S.C. 1983)). "The kind of antagonism that will defeat the maintenance of a class action is the kind which relates to the subject matter in controversy, as when the named representative has a claim which conflicts with the economic interests of the class." *Id.* (citing *Sperry Rand Corp. v. Lawson*, 554 F.2d 868 (8th Cir. 1977)). "For a conflict of interest to prevent plaintiffs from meeting [the adequacy of representation requirement], that conflict 'must be fundamental. It must go to the heart of the litigation.'" *Gunnells v. Healthplan Servs.*, 348 F.3d 417, 430–31 (4th Cir. 2003) (quoting 6 Alba Conte & Herbert B. Newberg, *Newberg on Class Actions* § 18:14 (4th ed. 2002)). Additionally, this rule "does not require either that the proposed class representatives have legal knowledge or a complete understanding of the representative's role in the class litigation." *Thorpe v. D.C.*, 303 F.R.D. 120, 151 (D.D.C. 2014).

After careful review, the Court finds that the proposed class members in this case share a common objective of establishing Defendants' liability, and the named plaintiffs do not have interests antagonistic to those of the other class members. The two named plaintiffs are indeed "part of the class and possess the same interests and [have] suffer[ed] the same injury as the class members." *Hosp. Mgmt. Assocs.*, 356 S.C. at 664, 591 S.E.2d at 622 (quoting *Amchem Prods. v. Windsor*, 521 U.S. 591, 625–26 (1997)). There is also no indication that either of the named plaintiffs has any conflict of interest that would render her unfit to serve as a class representative. While the Defendants have previously argued that Ms. Blackwell and Ms. Brooks should not be permitted to represent the proposed class, the Court finds that those arguments go to the merits and should not be considered at the certification stage. *See King*, 386 S.C. at 88, 508 S.E.2d at 324 (quoting *Tilley*, 333 S.C. at 43, 508 S.E.2d at 21); *Knowles*, 274 S.C. at 59, 261 S.E.2d at 49.

b. The plaintiffs' attorneys are qualified and competent to represent the entire class.

The adequacy of representation requirement also considers the qualifications, competency, and any conflicts of class counsel.[6] *See Hosp. Mgmt. Assocs.*, 356 S.C. at 665–66, 591 S.E.2d at 622. Class counsel should serve the interests of the entire class and "adequately represent that absent class plaintiffs at all times." *Hege*, 780 F. Supp. 2d at 432. "In the absence of proof to the contrary, courts presume that class counsel is competent and sufficiently experienced to vigorously prosecute the class action." *Morgan v. United Parcel Serv. of Am., Inc.*, 169 F.R.D. 349, 357 (E.D. Mo. 1996) (citing *Zapata v. IBP, Inc.*, 167 F.R.D. 147, 161 (D. Kan. 1996)).

[6] In the class action settlement context, courts have recognized that the prospect of an attorney's fee award may create a conflict of interest, but "the conflict of interest created by attorney['s] fees in a class action does not render the attorneys' representation inadequate *per se*." *Hege v. Aegon USA, LLC*, 780 F. Supp. 2d 416, 432 (D.S.C. 2011). Moreover, Rule 23 mitigates any potential conflict by requiring the trial court to approve any such settlements. *See* Rule 23(c), SCRCP.

Throughout this litigation, the Court has repeatedly noted that all attorney involved are experienced and competent litigators whose briefing and argument are consistently of the highest quality. No conflicts of interest have been raised that would prevent Plaintiffs' counsel from adequately representing the interests of the class as a whole, and the firms of Simmons Law Firm, LLC and John B. White, Jr., P.A. employ able attorneys who have litigated numerous class actions and complex cases. For example, both firms are currently representing political subdivisions in the *In re: South Carolina Opioid Litigation* proceedings, and lawyers in both firms have represented the State of South Carolina as lead counsel in numerous cases against pharmaceutical companies and other large corporate defendants. *See, e.g., State ex rel. Wilson v. Ortho-Mcneil-Janssen Pharms.*, 414 S.C. 33, 44–45, 777 S.E.2d 176, 181–82 (2015) (representing the Attorney General in suing Janssen Pharmaceuticals, Inc. for violations of the South Carolina Unfair Trade Practices Act). The Court accordingly finds that the adequacy of class counsel has been established.

5. The Plaintiffs are seeking class-wide declaratory and injunctive relief, and the amount in controversy exceeds $100 for each class member.

Rule 23 requires that the amount in controversy exceed $100 for each class member "in cases in which the relief primarily sought is not injunctive or declaratory with respect to the class as a whole." Rule 23(a)(5), SCRCP. The South Carolina Supreme Court has adopted the rule that, "unless the law gives a different rule, *the sum claimed by the plaintiff controls* if the claim is apparently made in good faith." *Gardner v. Newsome Chevrolet-Buick*, 304 S.C. 328, 331, 404 S.E.2d 200, 201 (1991). In cases where the primary relief sought is injunctive or declaratory in nature, the plaintiffs need not satisfy the $100 minimum for each class member, *see* Rule 23(a)(5), SCRCP, but here the Court finds that Rule 23(a)(5) is nonetheless satisfied because the plaintiffs are asserting claims for declaratory and injunctive relief, and the amount in controversy exceeds $100 for each of the class members.

The Amended Complaint seeks "final injunctive relief or corresponding declaratory relief with respect to the Class as a whole," in addition to monetary damages. (Am. Compl. ¶¶ 60, 62.) The plaintiffs assert a separate claim for injunctive relief in Count III of the Amended Complaint, seeking a declaration that the defendants violated the plaintiffs' rights through their billing policy and an injunction prohibiting them from engaging in such conduct in the future. (*Id.* at ¶ 83.) The Amended Complaint's prayer for relief also confirms that the primary relief sought is injunctive and declaratory in nature. (*See id.* at ¶¶ 16–17.) Additionally, discovery has revealed that the Hospital attempted to collect an estimated $7,199,837.54 in medical bills from approximately 1,538 patients instead of seeking payment from the patients' insurers. Even in cases where the Hospital did not actually collect from a class member, the Court finds it reasonable to conclude that the class member will have suffered more than $100 in damages associated with time and efforts spent communicating with both the defendants and their own insurance plan about the medical bills. Thus, the Court finds that Rule 23(a)(5), SCRCP, has been satisfied.

Conclusion

Having conducted the required "rigorous review"—and charged with the duty of protecting the rights of absent putative class members—the Court concludes that this matter is appropriate for class action status. Accordingly, the Court certifies the following class:

> All individuals who, since January 1, 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 other than Cigna, and whose medical bills resulting from that treatment were not submitted to their health insurance carrier for potential payment.

The Court appoints the following attorneys as class counsel: John B. White, Jr.; Marghretta H. Shisko; and Griffin L. Lynch of John B. White, Jr., P.A.; and John S. Simmons and Rachel G. Peavy of Simmons Law Firm, LLC. The Court directs class counsel to take all steps necessary to

publish and/or provide notice to the potential class members and to take such other and further action as they deem reasonable and necessary for the prosecution of this action. Further to this point, Defendants are hereby ordered to provide to class counsel within seven (7) days of the filing of this Order all contact information for those patients identified by the Hospital as having been affected by the aforementioned business practice, to include names, last known addresses, telephone numbers, and e-mail addresses for such individuals (or, in the event the Hospital is on notice that such patient is deceased, then such available contact information for the next of kin and/or personal representative as may be contained in the Hospital's records).[7]

AND IT IS SO ORDERED.

_____

J. Mark Hayes, II
Circuit Court Judge, 7th Judicial Circuit

Dated: _____

At: _____

[7] The parties in this case are subject to a Consent Protective Order, filed April 11, 2019, and, as such, the Court is confident that the provided information will be appropriately safeguarded by all involved. The Court specifically finds that, pursuant to Paragraph 5(b.)(v.) of such Order, Class Counsel may share this information with any entity engaged or retained by them for purposes of providing notice to class members.

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/Class Certification

IT IS SO ORDERED

s/ J. Mark Hayes, II #2132

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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

J. Mark Hayes, II, Circuit Court Judge

Case No. 2017-CP-42-00219
Appellate Case No. 2020-001613

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

Respondents,

v.

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

Appellants,

PROOF OF SERVICE

The undersigned hereby certifies that on December 23, 2024, a copy of **Appellants' Reply to Return in Opposition to the Petition for Rehearing** was served on all counsel of record via email containing the above referenced document to counsels' individual AIS email addresses as follows:

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December 23, 2024
Columbia, South Carolina