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AUG 19 2021

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' MOTION TO FILE
DOCUMENTS UNDER SEAL**

Appellants Mary Black Health System, LLC, d/b/a Mary Black Memorial Hospital ("Mary Black"); CHSPSC, LLC ("CHSPSC"); Professional Account Services, Inc. ("PASI") (collectively, "Defendants") hereby move the Court for an Order sealing Item 21 (The Hospital Services Agreement between Mary Black and Cigna, Filed Under Seal with the Circuit Court) and Item 22 (The Participating Hospital Agreement Between Mary Black and MedCost, Filed Under Seal with the Circuit Court) in Defendants' Designation of Matter to be Included in the Record on Appeal. Defendants file this motion pursuant to *In re Revised Ord. Concerning Pers. Identifying Info. & Other Sensitive Info. in App. Ct. Filings*, 407 S.C. 607, 757 S.E.2d 421 (2014).

INTRODUCTION

Respondents Jo Ann Blackwell and Samuel H. Owens, Jr. filed this action asserting claims implicating the confidential contracts between a hospital (Mary Black) and certain insurance providers (MedCost and Cigna).¹ The two contracts at issue in this appeal are the Hospital Services Agreement between Mary Black and Cigna (the “CIGNA Agreement”) and the Participating Hospital Agreement between Mary Black and MedCost (the “MedCost Agreement”) (collectively, the “Contracts”).

The CIGNA Agreement contains confidential and proprietary information and trade secrets belonging to Mary Black and Cigna. The CIGNA Agreement contains confidential commercial terms and the public disclosure of this information would be to the detriment of the contracting parties. Similarly, the MedCost Agreement contains confidential and proprietary information and trade secrets belonging to Mary Black and MedCost. The MedCost Agreement contains confidential commercial terms and the public disclosure of this information would be to the detriment of the contracting parties.

In the case below, the parties executed a Consent Protective Order to maintain the confidentiality and non-disclosure of the Contracts and the circuit court issued an order allowing Defendants to file the Contracts under seal on June 9, 2020. By virtue of having agreed to and having executed the Consent Protective Order, Plaintiffs Jo Ann Blackwell, Samuel Owens, and Michelene Brooks’s (collectively, “Plaintiffs”) and the circuit court were provided copies of the Contracts.

For the reasons set forth below, the Court should grant Defendants’ Motion to Seal.

¹ Respondent Michelene Brooks is alleged to be covered by Medicare and a related contract was no filed with the circuit court.

LEGAL STANDARD

The Court must consider the following factors in determining whether to grant a motion to seal:

- (1) ensuring the parties' right to a fair trial or hearing;
- (2) the need for witness cooperation;
- (3) the reliance of the parties upon expectations of confidentiality of the proceeding;
- (4) the public or professional significance of the proceeding;
- (5) the perceived harm to the parties from disclosure;
- (6) why alternatives other than sealing the documents are not available to protect legitimate private interests; and
- (7) why the public interest, including, but not limited to, the public health and safety, is best served by sealing the documents.

Ex parte Capital U-Drive-It, Inc., 369 S.C. 1, 12, 630 S.E.2d 464, 470 (2006); *In re Revised Order Concerning Pers. Identifying Info. & Other Sensitive Info. in Appellate Court Filings*, 407 S.C. 607, 608-09, 757 S.E.2d 421, 422 (2014); Rule 41.1, SCRPC.

The Court may also consider the following factors:

- (8) public interest in the proceeding;
- (9) the private or public status of the litigants and case generally;
- (10) whether release would enhance the public's understanding of an important historical event;
- (11) whether the public already has access to information contained in the records;
- (12) whether a particular decision will sustain or offend the fundamental interests of public access; and
- [(13)] any other relevant factors.

Id.

ARGUMENT

The Court should grant Defendants' Motion to Seal. The Contracts should be filed under seal pursuant to the *U-Drive-It* and Rule 41.1 factors for the following reasons: (1) Plaintiffs' right to a fair trial or hearing will not be impacted, because Plaintiffs and the Court have access to the Contracts; (2) sealing the Contracts will not impact any witness cooperation; (3) Mary Black and Cigna expressly agreed the terms of the CIGNA Agreement would be confidential and relied upon that confidentiality provision in executing the CIGNA Agreement; (4) the public or professional significance of this proceeding is not impacted by whether the public has access to the Contracts; (5) the exposure of legitimate trade secrets and propriety information will harm Defendants, Cigna, and MedCost; (6) there is no alternative to sealing the Contracts; (7) the public interest is best served by sealing the Contracts because when parties agree the terms of a private contract are confidential they should be able to rely on the Court to maintain their privacy; (8) the public interest in the proceeding is not impacted by sealing the Contracts; (9) the private status of the litigants and the nature of this case does not merit the disclosure of the confidential Contracts; (10) release of the Contracts will not enhance the public's understanding of an important historical event; (11) the public does not currently have access to the information in the Contracts; and (12) sealing the Contracts does not offend the fundamental interests of public access.

1. The Contracts are entitled to confidentiality protections.

The Contracts are entitled to confidentiality protections, because disclosure of their terms will harm Defendants, Cigna, and MedCost. The Contracts are one of many such contracts between the various insurers and hospitals that operate in South Carolina. While individual contracts may share certain basic features, such as reimbursement for services rendered, they differ in their specific terms. The contracts are heavily negotiated, often over many months. The concessions made, and won, by the respective parties can have a profound impact on business

performance. Accordingly, knowing the terms of a competitors' contract is of great value. For, example, payment provisions, utilization management requirements, quality assurance provisions, and alternative dispute resolution processes, among others, all constitute competitive information of keen interest to the hospital's and insurer's competitors. For this reason alone, the Court should grant Defendants' Motion.

2. Mary Black and Cigna expressly agreed the terms of the CIGNA Agreement would be confidential and they relied upon that confidentiality agreement when they entered into the CIGNA Agreement.

In Section 6.5 of the CIGNA Agreement, Mary Black and Cigna agreed the terms of the agreement are confidential. Mary Black and Cigna relied upon this section when they entered into the CIGNA Agreement and they had an expectation of privacy in the CIGNA Agreement. Moreover, Mary Black had an expectation of confidentiality when it turned the CIGNA Agreement over to Plaintiffs and the circuit court pursuant to a Consent Protective Order. *See U-Drive-It, Inc.*, 369 S.C. at 12, 630 S.E.2d at 470 (stating that a court should consider "the reliance of the parties upon expectations of confidentiality of the proceeding" when determining whether to file a document under seal).

3. There is no alternative to sealing the Contracts.

There is no alternative to filing the Contracts under seal. The contents of the Contracts are either available to the public or they are not. The publication of the Contracts will be detrimental to and will harm Defendants, Cigna, and MedCost. Neither Defendants, Cigna, MedCost, nor Plaintiffs, will suffer any harm if the Contracts are filed under seal.

4. Sealing the Contracts does not offend the fundamental interests of public access.

Defendants are not requesting the entire action be filed under seal. Defendants only request the Court file the Contracts under seal and allow the other filings to be made available to the public. The disputed provisions of the Contracts are quoted in Defendants' and Plaintiffs' briefs. This

case will not be resolved based on information that is kept confidential. The issues in this appeal related to the terms of the Contracts should be resolved based on the Court's interpretation of the MedCost Agreement's third-party beneficiary disclaimer and the CIGNA Agreement's arbitration provision. Those provisions are quoted in the briefs that have been filed with the Court. The fundamental interest of public access is in no way offended by sealing the Contracts. No party to this litigation will be prejudiced by filing the Contracts under seal.

5. Analysis of the remaining *U-Drive-it* and Rule 41.1 factors supports the decision to file the Contracts under seal in this case.

The remaining *U-Drive-it* and Rule 41.1 factors support the decision to file the Contracts under seal in this case for the following reasons:

- (a) Neither Plaintiffs', nor Defendants' right to fair trial or hearing will be impacted by sealing the Contracts, because Plaintiffs, Defendants, and the Court all have access to the Contracts and the controlling language is available to the public in the briefs that have been filed with the Court.
- (b) Sealing the Contracts will not impact any witness cooperation because witness cooperation is not relevant at this stage of the litigation.
- (c) The public and professional significance of this proceeding is not impacted if the Contracts are filed under seal, because the public will still be aware that the Contracts exist and the public will know of the MedCost Agreement's express language disclaiming third-party beneficiaries and the CIGNA Agreement's arbitration provision.
- (d) The disclosure of the Contracts would diminish the value of the confidential and proprietary information contained therein, thereby harming Mary Black, Cigna and MedCost.

- (e) Allowing the publication of a private contract's confidential terms would be detrimental to South Carolina businesses and diminish the public's confidence in any agreement's confidentiality provision. Therefore, the public interest is best served by sealing the Contracts.
- (f) The public interest in an appeal of the circuit court's interpretation and application of the express language of a contract is not impacted if the Contracts are filed under seal. The relevant terms of the Contracts are included in the briefs filed in this appeal and the undisclosed provisions have no impact on this appeal.
- (g) The private status of the litigants and the nature of the case do not merit the disclosure of confidential contracts.
- (h) This litigation does not involve issues of historical importance and, therefore, the disclosure of the Contracts will not impact the public's understanding of an important historical event.
- (i) The public does not have access to the contents of the Contracts, and the public should not have access to the Contracts because the Contracts are private and confidential agreements between private business entities.

CONCLUSION

For the reasons set forth herein, Defendants request the Court grant the Motion to File Under Seal and order a separate volume of the Record on Appeal be created for the Contracts and filed under seal.

Respectfully submitted,

s/Katon E. Dawson Jr.

James Lynn Werner, S.C. Bar No. 6029

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Mary Black Memorial Hospital; CHSPSC, LLC;

Professional Account Services, Inc.

August 19, 2021

Columbia, South Carolina

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APPEAL FROM SPARTANBURG COUNTY
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v.

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Appellants,

PROOF OF SERVICE

The undersigned hereby certifies that on August 19, 2021, Appellants Mary Black Health System, LLC, d/b/a Mary Black Memorial Hospital, CHSPSC, LLC, Professional Account Services, Inc.'s **Motion to File Documents Under Seal** was served on all counsel of record via email containing the above referenced document to counsels' individual AIS email addresses pursuant to SC Supreme Court COVID Order 2020-05-29-02 as follows:

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August 19, 2021
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August 19, 2021

Via E-mail (ctappfilings@sccourts.org) and Hand Delivery

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
1220 Senate Street
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Re: ***Jo Ann Blackwell, Michelene Brooks, and Samuel H. Owens, Jr., individually and on behalf of all others similarly situated, v. Mary Black Health System, LLC, d/b/a Mary Black Memorial Hospital, CHSPSC, LLC, and Professional Account Services, Inc.***
Case Number: 2020-001613

Dear Mrs. Kitchings:

Enclosed please find Appellants' Motion to file Documents Under Seal, Proof of Service, and our firm check in the amount of \$50.00 in the above-referenced appeal.

Thank you for your attention to this request.

Sincerely,

Katon E. Dawson, Jr.

KED

Enclosures

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