COURT OF CHANCERY
OF THE
STATE OF DELAWARE

JOHN W. NOBLE
VICE CHANCELLOR

417 SOUTH STATE STREET
DOVER, DELAWARE 19901
TELEPHONE: (302) 739-4397
FACSIMILE: (302) 739-6179

May 29, 2009

Philip A. Rovner, Esquire
Potter Anderson & Corroon LLP
1313 North Market Street
P.O. Box 951
Wilmington, DE 19899-0951

Anne C. Foster, Esquire
Richards, Layton & Finger, P.A.
One Rodney Square
920 North King Street
Wilmington, DE 19801

Re: Omnicare, Inc. v. Mariner Health Care Management Company
C.A. No. 3087-VCN
Date Submitted: December 4, 2008

Dear Counsel:

I. INTRODUCTION

A large nursing home operator contracted with an equally large pharmaceutical supplier. Their affiliates would in turn contract with each other for the provision of the numerous pharmaceutical products and services used each day in the nursing homes. In the aggregate, literally thousands of products were delivered each and every day pursuant to these agreements. A billing dispute has arisen, and the pricing

of every delivery of every product or service at each and every facility is seemingly called into question.

Needless to say, this case is large and complex. It promises to be data-intensive. Both sides have shaped their respective allegations broadly, and depend on discovery to refine their respective positions. Each seeks a massive amount of data from the other. Each complains of the burdens allowing such discovery would visit upon it. The very nature of the relationship between the parties and their respective businesses is complex and voluminous. It is not surprising that the parties seek equally complex and voluminous discovery.

In this regard, almost all of the contested discovery seems burdensome in a general sense. Yet, sometimes, voluminous discovery may be necessary in order for the merits of a given controversy to be addressed fairly. Our rules of discovery are liberal, and are based on the notion that, in the end, fulsome discovery is more likely to result in accurate fact-finding.

II. BACKGROUND

Defendants SavaSeniorCare Administrative Services, LLC ("SSC"), SVCare Holdings LLC ("SVCare") (together, "Sava"), Mariner Health Care Management Company ("HCMC"), National Senior Care, Inc. ("NSC"), and Family Senior Care

("FSC") (collectively, "Mariner," and together with Sava, the "Defendants"), and their affiliates currently (or formerly) own, operate, lease, and/or manage over 250 nursing home facilities. Plaintiff Omnicare, Inc. ("Omnicare") provides pharmaceutical products and services to those facilities and alleges it is to serve as the exclusive provider of pharmaceuticals to those facilities through 2019.[1]

The supply of pharmaceutical products and services to Defendants' facilities is pursuant to a series of contracts, collectively referred to by the parties as the Standard Facility Agreements,[2] (the "SFAs") which the individual facilities each entered into with Omnicare affiliates. The SFA's were entered into pursuant to Master Pharmacy Products and Services Agreements, (the "MPPSAs") executed between the parties.[3]

The MPPSAs allegedly require, among other things, that Defendants (1) guarantee to Omnicare the payment and performance obligations of all affiliate

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[1] Compl. ¶¶ 14-17.

[2] These are defined in Schedule 1 to the Master Pharmacy Products and Services Agreements to include a Pharmacy Products and Services Agreement (the "PPSA"), a Pharmacy Consultant Agreement (the "PCA"), and a Respiratory Therapy Equipment and Supplies Agreement, (the "RTESA") for each facility.

[3] Three MPPSAs are relevant to this controversy. The first was entered into in April 2003 between Omnicare and HCMC. That agreement was replaced with two new master agreements on December 10, 2004. The second is between Omnicare and HCMC, and initially applied to all HCMC facilities and subsequently to those facilities that were retained and not transferred to SSC. Finally, a nearly identical MPPSA was entered into between Omnicare and SSC that applies to the facilities transferred from HCMC to SSC. Compl. ¶¶ 14-16.

facilities; (2) provide Omnicare and/or its pharmacies with 10-days advance written notice of any facility transfers; (3) ensure that any new lessee, manager, transferee or other operator of transferred facilities enters into successor agreements with Omnicare's pharmacies; and (4) provide Omnicare with certain information necessary for Omnicare to render its billing.[4]

Omnicare brought this action to compel Defendants' performance of the alleged contractual obligation to guarantee the payment of approximately $100 million that the Defendants and their affiliates allegedly owe to Omnicare under the guarantees and other provisions (the "Guarantee Provisions") of the relevant agreements between Omnicare and Defendants. Omnicare also seeks injunctive relief and damages to remedy, among other things, Defendants' alleged ongoing breaches of their agreement to provide Omnicare and/or its pharmacies with 10-days advance written notice of any facility transfers and to ensure that any new lessee, manager, transferee or other operator of transferred facilities enters into successor agreements with Omnicare's pharmacies. Finally, Omnicare has asserted causes of action for fraudulent transfer and alter ego/veil piercing in an effort to halt what it characterizes

[4] *Id.* ¶¶ 21-23, 26-27.

as a "shell game" of facility transfers undertaken to hinder Omnicare's efforts to obtain payment.[5]

In response, the Defendants have asserted various defenses and counterclaims against Omnicare. These include allegations that Omnicare overcharged the Defendants by tens of millions of dollars, both knowingly and through billing errors in connection with invoices issued by Omnicare.

The dispute between the parties centers on the supply of literally thousands of pharmaceutical products and services per day, over a period of several years. This litigation promises to generate staggering amounts of data which must then be evaluated by counsel and experts. It seems to be a large and unenviable task for all involved. Unfortunately, but perhaps as to be expected, discovery disputes have developed between the parties as to the exchange of this information. Both Omnicare and the Defendants have moved to compel discovery. This letter opinion addresses those motions.

[5] Omnicare asserts a claim of fraudulent transfer pursuant to 6 *Del. C.* §§ 1304 & 1305 against Mariner and certain unknown individuals and corporations. Compl. ¶¶ 137-40. Its alter-ego/veil-piercing claims are only against those certain unknown individuals and corporations. *Id.* ¶¶ 141-44.

A. *Omnicare's Motion to Compel*

Omnicare served Defendants with document requests and interrogatories which seek information it claims is relevant to both its own claims and to Defendants' defenses and counterclaims. Despite numerous meet and confer efforts, the Defendants refuse to produce information that Omnicare summarizes as follows:

> (1) the specific billing errors Defendants have identified as of the date of their responses to Omnicare's interrogatories; the basis for disputing the amounts; and the specific billing errors that the Defendants objected to within 60 days of the date of the invoice ("Alleged Billing Errors").
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> (2) information regarding transfers of facilities ("Facility Transfers").
>
> (3) limited financial information regarding Defendants . . . tailored to Omnicare's claims for fraudulent conveyance, alter ego and veil piercing ("Financial Information").
>
> (4) documents sufficient to identify individuals with any direct or indirect ownership interest in any of the Defendants ("Ownership Interests").
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> (5) information or documents containing certifications and other statements made to the government regarding goods and services received from Omnicare and provided to Medicare patients ("Medicare Documents").
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> (6) Defendants have refused to restore and produce [at their expense] email for certain periods for which no email is available due to the automatic deletion program Defendants had in effect prior to September 2007 ("Backup Tapes").

> (7) Omnicare requests that the parties be directed to comply with the Stipulation Regarding Electronic Discovery and Document Production (the "E-Discovery Stipulation") which the parties took months to negotiate. At this time, the only outstanding dispute related to the E-Discovery Stipulation involves the parties' request for use of certain search terms ("E-Discovery Stipulation").

B. *Defendants' Motion to Compel*

Defendants seek to compel the production of information which they describe as: (1) contracts that relate to Omnicare's standing or right to assert its claims in this case ("Contracts Underlying Omnicare's Claims"); (2) "affiliate" level information and documents ("'Affiliate' or Omnicare Pharmacy Discovery"); (3) certain information and documents related to "most favorable pricing" and "Medicaid pending" elements of the billing dispute ("'Most Favorable Pricing' and 'Medicaid Pending' Discovery"); and (4) information and documents showing prior investigations, charges, complaints or lawsuits regarding the billing process utilized by Omnicare or Omnicare pharmacies ("Prior Billing Investigations, Complaints, Charges or Lawsuits").

III. DISCUSSION

A. *Standard of Review*

The proper scope of discovery is framed by Court of Chancery Rule 26(b)(1), which provides in part:

> Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter in the pending action . . . . It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

Thus, "[t]he scope of discovery pursuant to Court of Chancery Rule 26(b) is broad and far-reaching . . . [and] renders discoverable any information that 'appears reasonably calculated to lead to the discovery of admissible evidence.' Consequently, absent injustice or privilege, the Rule instructs the Court to grant discovery liberally."[6] However, the Court is empowered to limit discovery if it is, for example, "unreasonably cumulative or duplicative" or "unduly burdensome and expensive, taking into account the needs of the case, the amount in controversy, limitations on the parties' resources, and the importance of the issues at stake in the litigation."[7] This Court has "recognized that considerations of subject matter, time,

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[6] *Pfizer, Inc. v. Warner-Lambert Co.*, 1999 WL 33236240, at *1 (Del. Ch. Dec. 8, 1999).
[7] Ct. Ch. R. 26(b)(1).

and space are important to confine the scope of discovery to those matters that are truly relevant and to prevent discovery from evolving into a fishing expedition or from furthering purposes ulterior to the litigation."[8] In addition, document discovery must be limited in scope to the production of documents relevant to the subject matter of the litigation between the parties.[9] With these broad principles in mind, the Court turns to the specific discovery disputes at issue.

B. *Omnicare's Motion to Compel*

1. Alleged Billing Errors

Omnicare seeks to compel Defendants to provide adequate responses to Omnicare's interrogatories requesting the identification of: (1) the specific billing errors Defendants have identified as of the date of their responses to Omnicare's interrogatories; (2) the basis for disputing the amounts; (3) the total dollar amount of such errors; (4) the specific billing errors Defendants objected to within 60 days of the date of the invoice; (5) the specific communication (by author, recipient and date) in which any such objection was made within 60 days; and (6) the total of the amounts that were specifically objected to within 60 days.[10]

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[8] *Plaza Sec. Co. v. Office*, 1986 WL 14417, at *5 (Del. Ch. Dec. 15, 1986).
[9] *Frank v. Engle*, 1998 WL 155553, at *1 (Del. Ch. Mar. 30, 1998).
[10] Omnicare Mot. to Compel at 9.

Defendants object to these interrogatories on several bases. First, that such request is overbroad and unduly burdensome. Second, that further investigation and discovery is necessary to ascertain the answers to these interrogatories. Third, that some of the information necessary for a proper response to the interrogatories is in the possession of Omnicare, or the subject of pending discovery requests.[11] Fourth, that Omnicare's fraudulent billing has made it impossible for Defendants to identify the requested information. Finally, Defendants object on the basis that these interrogatories seek information that will be the subject of expert analysis and, because of the "sheer magnitude" of the information, it should be addressed during the expert discovery phase of this case.[12]

In general, a party may take discovery of facts reasonably calculated to lead to admissible evidence. Court of Chancery Rule 33 allows a party to serve interrogatories seeking to discover facts upon which an opposing party bases his allegations.[13] Defendants have alleged certain billing errors on the part of Omnicare. Omnicare is entitled to discover these errors. The fact that the Defendants might, during the course of discovery, become aware of additional errors as a result of

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[11] *See infra* Parts III.C.2 for resolution of this issue.
[12] Mariner Response at 4.
[13] *Levine v. First Western Fin. Corp.*, 1994 WL 728809, at *1-2 (Del. Ch. Dec. 15, 1994).

information discovered from Omnicare should not relieve them of their burden to respond with the facts as presently understood. That an expert will assist in understanding the ultimate nature and amount of the alleged billing errors does not serve to protect presently known facts from discovery.[14] Omnicare's motion to compel discovery of the Alleged Billing Errors is granted.

2. Facility Transfers[15]

Defendants object to Omnicare's discovery requests seeking information regarding alleged transfers of facilities. Specifically, Omnicare requests the production of documents or information sufficient to identify: (1) the person or entities who owned, own (in whole or in part) or manage any Facility;[16] (2) changes

[14] It is likely correct that data of the volume at issue here may be more useful when delivered in the form of expert compilation and analysis. That prediction does not, however, serve to deprive the other side of access to the data. Granting Omnicare's motion to compel discovery of the Alleged Billing Errors does not require Defendants to undertake any additional processing of the data in question, or stipulate in some final form as to the total universe of billing errors. It simply requires Defendants to turn over errors and amounts already discovered.

[15] Part III.B.2 and Part III.B.3 of this memorandum opinion do not apply to Sava. The discovery that is allowed in these parts ultimately depends upon Omnicare's fraudulent transfer claims, and no such allegations against Sava appear in the Complaint. *See* Compl. ¶¶ 137-44. Omnicare's breach of contract claim against NSC, combined with Mariner's representation that it and Sava are commonly controlled (Fini Decl., Ex. 7) does not support further discovery from Sava without a direct allegation against it; Sava has already produced any relevant operation information with respect to Sava facilities. Sava Response at 20 n.18-20.

[16] "Facility" is defined in Omnicare's interrogatories, and generally means any facility that Defendants or their affiliates operate, administer, manage, lease or own (directly or indirectly). *See* Fini Decl., Ex. 9 at 2.

in ownership or management of any Facility; and (3) leases, subleases, agreements or assignments with respect to the real property on which any Facility is situated.

Omnicare claims this information is relevant to obligations found in Section 5.3(a) of the MPPSAs, which provides, in relevant part, that:

> [U]pon the occurrence of any sale or disposition of assets, assignment of a lease, management or other agreement, other transfer, any termination, expiration or non-renewal of any lease, management agreement or other agreement (other than a termination, expiration or non-renewal which is outside of the control of Facility and its Affiliates and not due to the fault of Facility or its Affiliates), or any other event or transaction within the control of Facility or Affiliates (other than due to a closure of the Facility), in each case which results in the Facility entity which is party to this Agreement no longer operating the facility location . . . Facility shall (a) provide Pharmacy at least ten (10) business days advance written notice of such event and (b) prior to the occurrence of such event cause any new lessee, manager, transferee or other operator of the facility location identified in the initial paragraph of this Agreement (a "Successor Operator") to enter into an agreement with Pharmacy, in the form of this Agreement . . . for a term which continues until the scheduled expiration of this Agreement . . . .[17]

Omnicare also argues that its discovery concerning facility transfers is relevant to its claims based on the Guarantee Provisions which allegedly require the Defendants to guarantee the payment and performance obligations of their affiliate facilities.[18]

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[17] Fini Decl., Ex. 1 (PPSA § 5.3(a)).
[18] *See* Fini Decl., Ex. 6 (Schedule 1).

Ultimately, the parties disagree over the types of transactions which would trigger the notice provision of Section 5.3 and what relationships would subject the Defendants to the obligations of the Guarantee Provisions. This disagreement cannot be resolved through a discovery battle. The proper interpretation of a contract is a question of law.[19] The Facility Transfer information requested is relevant to the claims asserted by Omnicare, including its allegations that Defendants conducted improper transfers designed to avoid their payment obligations. Omnicare's motion to compel the Facility Transfers discovery is granted.

3. Financial Information

Omnicare asks the Court to compel Defendants to produce documents and information as follows: (1) audited financial statements (e.g., balance sheets and income statements) for the period of 2003 to the present; (2) the value of all cash and other bank or investment accounts from which Defendants or Defendants' affiliates have drawn or could draw to pay the invoices of suppliers such as Omnicare; (3) monies held in escrow or held in trust for the benefit of Defendants or any affiliate; (4) financial difficulties experienced by Defendants or their affiliates, or the

[19] *See, e.g.*, *Pellaton v. Bank of New York*, 592 A.2d 473, 478 (Del. 1991).

Defendants' or their affiliates' inability to pay their creditors; and (5) accounts payable and the aging of such accounts. Omnicare argues this information is relevant to its claim of fraudulent conveyance against Mariner pursuant to 6 *Del. C.* §§ 1304 & 1305 and its claims for alter ego and veil piercing liability.[20]

To prove liability under the Delaware Fraudulent Transfer Statutes Omnicare must establish the insolvency of certain of the Defendant entities.[21] Financial discovery, however, may be particularly intrusive and, although Omnicare has made a marginally sufficient showing that some transfers may have been made while the transferor was insolvent, its allegations harbor more than a hint of speculation. There is no current basis for in-depth financial discovery. A reasonable limitation on its scope must be established, and the universe of financial data to be produced can reasonably be narrowed. The Defendants can satisfy their discovery obligation regarding insolvency by providing reasonable financial information or compilations of a nature routinely relied upon that were created substantially contemporaneously with the questioned transfers.[22] Audited financial statements presumably would suffice, but the Court will not initially preclude substitution of other reliable sources.

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[20] Compl. ¶¶ 137-44.
[21] *See e.g.*, *Tri-State Vehicle Leasing, Inc. v. Dutton*, 461 A.2d 1007, 1008 (Del. 1983).
[22] Omnicare is willing to accept summaries. Omnicare Mot. to Compel at 18.

Omnicare's motion to compel discovery of certain Financial Information is granted, but only to the limited extent set forth.

4. Ownership Interests

Omnicare seeks information sufficient to identify (1) any direct or indirect ownership interest of any individual in any Defendant; (2) any loans by any individual to any Defendant; and/or (3) any direct or indirect ownership interest of any individual (other than through a publicly traded security) in any entity that has made any loan to any Defendant. Its justifications for this discovery largely mirror those asserted for the Facility Transfer discovery.

Under the Guarantee Provisions of the relevant MPPSAs, each of the Defendants "unconditionally guarantees the full and prompt payment and performance of all of the obligations of Mariner and the Mariner Facilities [or Sava and the Sava Facilities] to Omnicare and Omnicare Pharmacies[.]"[23] Under the Mariner MPPSA, the term "Mariner Facility" includes "any Mariner Affiliate that operates or manages such Mariner Facility, and/or the physical location of such Mariner Facility."[24] In turn, the term "Affiliate" is defined in the MPPSA as "any

[23] Fini Decl., Exs. 1 and 2 (MPPSAs § 9(p)).
[24] Fini Decl., Ex. 6 (Schedule 1 to the Mariner MPPSA). (The Sava MPPSA contains parallel language).

Person, any other Person controlling, controlled by or under common control with such Person."[25] Since the term "Affiliate" includes entities under common control with Mariner and Sava, the identity of individuals who have any direct or indirect ownership interest in any of the Defendants is relevant to the issue of common control, and thus relevant to the scope of Omnicare's rights under the Guarantee Provisions. In attempting to unravel the shell game the Defendants are alleged to have engaged in, Omnicare must determine what obligations (or which entities' obligations) the Defendants are contractually bound to guarantee. The language of these interrelated provisions, particularly the "common control" language, suggests that Ownership Interest discovery is necessary. Again, the scope of the Ownership Interest discovery is too broad under the circumstances. The identity of creditors is of no apparent utility—as long as they have not taken possession. Accordingly, the scope of ownership defined by Omnicare is further limited to only equity holders, as described in the discovery request, and any creditors who have taken possession in the exercise of their rights as creditors. Omnicare's motion to compel the production of the Ownership Interests discovery is granted, subject to the foregoing limitations.

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[25] *See id.*

5. Medicare Documents

Omnicare seeks information or documents sufficient to identify: (1) the bills submitted by or on behalf of the Defendants' facilities to the relevant fiscal intermediary or contractor for Medicare covered Part A patients who received supplies and services provided by an Omnicare pharmacy; (2) payments received by or on behalf of Defendants or their facilities with respect to such bills; (3) the uses to which such payments were put when not used to reimburse suppliers for services rendered or relating to Defendants' responsibility or obligation to utilize the payment to reimburse suppliers; and (4) Medicare cost reports for each Defendant facility.[26]

Defendants argue this discovery is not relevant, as the issue here is not whether Defendants received products and services from Omnicare, but whether the Defendants were properly billed for such products and services. However, the Court concludes that information concerning government reimbursement of funds for products and services allegedly the subject of fraudulent billing is relevant to the issues. These documents, to the extent they are itemized, are reasonably calculated to

[26] Fini Decl., Ex. 8 (Document Requests Nos. 37, 38, 39, and 40 of Omnicare's First Set of Document Requests).

contain pricing and billing information along with the Defendants' representations as to those billings.[27] Omnicare's motion to compel this discovery is granted.

6. Backup Tapes

Pursuant to an internal data retention policy, all of Defendants' email for approximately three years (the "electronically stored information" or "ESI"), from 2003 to 2005 has been automatically deleted. In order to obtain the emails from periods during which all email was automatically deleted, the Defendants would need to restore their 2004 and 2005 backup tapes (the "Backup Tapes"). The parties disagree as to who should bear the cost of restoring the Backup Tapes, estimated to be between $22,000 and $40,000.[28] Omnicare seeks to compel the production of these emails at Defendants' expense.

Generally, the responding party bears the expenses associated with complying with a discovery request.[29] This Court, in the exercise of both its inherent equitable powers and the wide discretion to manage discovery under Court of Chancery

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[27] Defendants argue that the Medicare documents Omnicare seeks are not itemized, and that the individual product and service information is not readily ascertainable from them. Sava Response to Pl.'s Mot. to Compel at 28. Omnicare has indicated a willingness to accept only those Medicare documents, if any, which are itemized. Omnicare Reply to Sava Response to Pl.'s Mot. to Compel at 24.

[28] Omnicare Mot. to Compel at 28.

[29] *See, e.g.*, *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 358 (1978).

Rule 26, may act to alter this norm when appropriate. Neither party cites Delaware case law directly addressing the issue of when ESI should be deemed not reasonably accessible such that shifting the costs of production to the requesting party may be reasonable. The Federal Rules of Civil Procedure were amended in 2006 to address the discovery of data that is "not reasonably accessible because of undue burden or cost."[30] The parties each cite cases applying the federal rule, and both rely on a multi-factor approach employed in the Southern District of New York in *Zubulake v. UBS Warburg LLC*.[31] There is wisdom in the *Zubulake* approach as it considers the wide range of issues informing both the production of ESI discovery and the cost-shifting decision.[32]

The Court will not shift costs at this time. In reaching that decision it is unnecessary to endorse any particular approach to the cost-shifting analysis.[33] Defendants have not adequately demonstrated that the ESI in question is not reasonably accessible. Simply because the ESI is now contained on Backup Tapes

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[30] FED. R. CIV. P. 26(b)(2)(B).
[31] 216 F.R.D. 280, 284-91 (S.D.N.Y. 2003).
[32] *But see* Patricia Groot, *Electronically Stored Information: Balancing Free Discovery With Limits on Use*, 2009 DUKE L. & TECH. REV. 2 (2009) (discussing various tests created by the courts for cost-shifting of ESI discovery expenses and arguing against excepting ESI from the norm, and in favor of an approach aimed a curbing discovery abuses).
[33] It should be noted that Court of Chancery Rule 26 has not been amended in the same manner as Federal Rule of Civil Procedure 26.

instead of in active stores does not necessarily render it not reasonably accessible.[34] Yet, the Court is not convinced as to the likelihood of retrieving relevant data from the Backup Tapes. Additionally, Omnicare's attempt to demonstrate impropriety in Defendants' data retention policy and its implementation is unpersuasive. The better approach is proposed by the Defendants. Production should first be from Defendants' active stores in order to assess the likelihood of finding relevant and discoverable data on the Backup Tapes. If that is productive, then it becomes more likely that recovery from the Backup Tapes would be fruitful and processing of the Backup Tapes at Defendants' expense would be appropriate.

7. E-Discovery Stipulation

A second ESI issue remains between the parties. Before the filing of these motions the parties negotiated toward a stipulation governing ESI discovery issues. It seems those negotiations stalled just short of completion. Each party represents that

[34] The estimated cost burden Defendants face does not, standing alone, render the ESI not reasonably accessible. This is particularly true given its relation to the amount in controversy between the parties. Indeed, even if the Court applied the *Zubulake* test, this ratio, embodied in *Zubulake*'s factor three, which compares "the total cost of production, compared to the amount in controversy" might prove dispositive. The Court expresses no opinion as to what recovery costs might be sufficient to carry the burden of demonstrating ESI as not reasonably accessible or to justify cost-shifting.

the vast majority of the ESI issues have been agreed upon, yet their joint E-Discovery Stipulation has not been executed.

Omnicare asks the Court to compel the Defendants to comply with the terms of the E-Discovery Stipulation, despite the Defendants' refusal to finalize and sign the stipulation. Both in briefing and at oral argument the Defendants represent that the E-Discovery Stipulation will be finalized and signed in the very near term, and that its completion is merely a "ministerial" matter to be executed. Nevertheless, the parties have yet to reach agreement and execute the stipulation.

It appears that disagreement centers on a final negotiation of the search term protocol to be employed by the parties. The Court has not been informed of the scope of the debate over search terms and, thus, lacks a sufficient basis for even attempting to resolve this impasse at this time. Indeed, this may be the type of debate best resolved by a neutral third party with recognized expertise in searching complex databases. Those issues already resolved should be dealt with as agreed by the parties.

C. *Defendants' Cross Motion to Compel*

As discussed, Defendants seek to compel discovery as to four categories of information: (1) contracts that relate to Omnicare's standing or right to assert its

claims in this case "(Contracts Underlying Omnicare's Claims"); (2) "affiliate" level information and documents ("'Affiliate' or Omnicare Pharmacy Discovery"); (3) certain information and documents related to "most favorable pricing" and "Medicaid pending" elements of the billing dispute ("'Most Favorable Pricing' and 'Medicaid Pending' Discovery"); and (4) information and documents showing prior investigations, charges, complaints or lawsuits regarding the billing process utilized by Omnicare or the Omnicare pharmacies ("Prior Billing Investigations, Complaints, Charges or Lawsuits"). Each is addressed in turn.

1. Contracts Underlying Omnicare's Claims

In Document Request No. 3 of Sava's First Request for Production of Documents, dated September 11, 2007, Sava requested Omnicare to produce: "All contracts or other operating agreements between Omnicare and each Omnicare Pharmacy to which you contend Sava or any Sava Facility owes money." Defendants argue this request is reasonably calculated to lead to the discovery of admissible evidence because it relates to Sava's Fifteenth Affirmative Defense, which states: "Certain or all of the claims in the Complaint fail, in whole or in part, for lack of privity of contract, lack of standing, because Omnicare is not the real party in interest

under the Standard Facility Agreements, and/or for failure to join indispensable parties."[35]

Omnicare opposes this request by arguing that its recovery depends not on any relationship between itself and its affiliates, but rather on the Guarantee Provisions of the MPPSAs which the parties concede were executed.[36] Omnicare is correct that recovery under the Guarantee Provisions does not require proof of privity between Omnicare and its pharmacies or affiliates.[37]

However, Omnicare has also asserted claims seeking quantum meruit recovery against the Defendants. Arguably, these claims may be defeated by a showing that Omnicare lacks the power to assert the rights of its affiliates. The supply of products and services between the parties is made not pursuant to the Guarantee Provisions of the MPPSAs, but pursuant to the SFAs executed between the parties' individual facilities. In other words, the benefits allegedly supporting quantum meruit recovery were provided by the individual facilities. Defendants' motion to compel discovery as to the Contracts Underlying Omnicare's Claims is therefore granted.

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[35] Sava Answer and Countercl. at 28.
[36] *E.g.*, Compl. ¶¶ 21-22; Sava Answer and Countercl. ¶¶ 7, 16; Mariner Answer and Countercl. ¶¶ 4-6.
[37] Omnicare alleges its compliance with the Guarantee Provisions by having first made demand upon each Defendant facility individually. Compl. ¶ 35.

2. "Affiliate" or Omnicare Pharmacy Discovery

Omnicare objects to Defendants' requests for discovery directly from Omnicare's "affiliates, subsidiaries and/or individual pharmacies." Defendants seek to compel responses to the following identified document requests and interrogatories:[38]

Sava's First Document Request No. 11

> All handbooks, manuals, guidelines, policies, procedures or other Documents or Communications that describe Omnicare's or Omnicare Pharmacies' billing processes, procedures or methodologies.

Sava's First Interrogatory 1

> Identify each person who participates in or who is responsible for compiling or generating the invoices (including prices reflected therein) that are issued by Omnicare to Sava and describe the role of each.

Sava's First Interrogatory 2

> Describe in detail, for each Omnicare affiliate pharmacy and for Omnicare, each process and each step of each process by which Pharmacy Products and Services provided to a Sava Facility are ordered, prescriptions are filled, priced, and billed, and identify all such Omnicare manuals, protocols, or other documents that memorialize such business processes.

[38] Sava Mem. in Supp. of Mot. to Compel at 7-8.

Sava's First Interrogatory 3

For each internal or external audit, examination or analysis prepared by or on behalf of Omnicare of (i) billings issued by Omnicare to Sava or (ii) any process that is the subject of Interrogatory 2 above, identify the persons who conducted the audit, examination or analysis and identify all related documents and communications.

Sava's First Interrogatory 6

Identify each person with knowledge of facts relating to any of your claims or defenses in this action, and generally describe the knowledge possessed by each such person.

Sava's First Interrogatory 7

Separately with respect to each of the claims in the Complaint, itemize and describe all damages, including liquidated damages, that you seek; state the manner in which you have calculated such damages; identify the person who has computed such damages and each person with knowledge of such damages; state the legal basis for the claim, including, if the claim is contractual, the contract or agreement and also the term and specific language thereof upon which the claim is based; and identify all documents upon which you rely in support of your damages claim and/or damages calculation.

Sava's Second Document Request No. 13

All documents containing, referring or relating to any assessments, reports, or analyses of any deficiencies, errors or problems with the systems utilized by Omnicare or its affiliated pharmacies to track and bill for the Pharmacy Products and Services provided to Sava.

Sava's Second Document Request No. 14

Documents identifying or explaining the process used by Omnicare for administration and billing for medications reimbursable under the Medicare Part D drug coverage program.

Sava's Second Document Request No. 15

Documents containing assessments or analyses of the impact of the Medicare Part D drug program as it relates to any Facility.

Sava's Second Document Request No. 16

Documents sufficient to reflect each process used by Omnicare for calculation and application of Actual Medicaid Remittance Advice Pricing.

Omnicare objects to this discovery on the grounds that it is unduly burdensome given the number of affiliate pharmacies involved, and would be duplicative of the centralized billing system information Omnicare holds at the parent level. However, Omnicare's recovery on its failure to pay claims, and thus Defendants' defense, depends on the nature of the various product and service sales conducted by Omnicare's affiliate pharmacies pursuant to the SFAs each Omnicare affiliate entered into with each Defendant facility. Defendants' counterclaims and defenses claiming widespread over-billing and billing errors equally depend on this information. The Court recognizes the burden this discovery would impose. However, the Defendants

allege that Omnicare's centralized billing system is both incomplete and inaccurate. Because the parties debate the accuracy of, seemingly, all invoices, and because Omnicare brings certain claims based solely on the delivery of products and services by its affiliates,[39] the Defendants are entitled to this discovery.

Defendants' motion to compel the "Affiliate" or Omnicare Pharmacy Discovery is granted.

3. "Most Favorable Pricing" and "Medicaid Pending" Discovery

a. *"Most Favorable Pricing"*

Pricing for pharmacy products and services provided to the Defendants' facilities by the Omnicare pharmacies under the relevant Agreements is to be as good as, or better than, pricing offered to other Omnicare customers ("Most Favorable Pricing" or "MFP").[40] Defendants contend that Omnicare is not complying with this provision.[41]

Specifically, Defendants have alleged that Omnicare pharmacies have failed to provide to Sava Facilities the best pricing offered to other customers and have engaged in certain billing practices, such as a practice of routinely overcharging

[39] Compl. Counts VIII-XIX.
[40] Fini Decl., Ex. 1 (Sava Master PPSA, § 4(b)(i)).
[41] Sava Answer and Countercl. ¶¶ 40-44.

customers and then writing down invoices and accepting discounted payments, that "effectively discount and reduce Omnicare's net prices to its customers."[42]

Sava's Second Document Request No. 7 addresses the MFP obligation and asks Omnicare to produce the following:

> For purposes of verification of Most Favorable Pricing:
>
> > a. All contracts or agreements with any Third Party Facility, including without limitation related price lists or price schedules.
> >
> > b. With respect to any contract or agreement with any Third Party Facility, all documents or communications related to rebates or other price adjustments of any kind that are not reflected in the contract; including any negotiated or mandated settlements that resulted in any form of discount, rebate or credit against amounts invoiced by Omnicare for Pharmacy Products and Services.
> >
> > c. Documents and communications related to Omnicare's efforts to test or ensure compliance with its obligations under Section 4(b) of the SSC Master PPSA.
> >
> > d. All per diem contracts, Agreements or arrangements for the provision of Pharmacy Products and Services in each state where there is a Facility; and for each such customer relationship subject to a per diem contract, documents reflecting any periodic reconciliations or adjustments of the per diem billed amounts.
> >
> > e. All split billing contracts, Agreements or arrangements for Pharmacy Products and Services in each state where there is a Facility.

[42] *Id.* ¶¶ 50-52.

> f. All documents and communications related to any price complaints or disputes, audits, or demands for credit, or to any true-up, offset, write-off or write down of billing statements, or to any reserves for bad debt related to amounts invoiced by Omnicare or its affiliate pharmacies for Pharmacy Products And Services, related to any of the following facilities that are serviced by Omnicare: Millennium (FL), Haven Healthcare (CT), THI, Shoreline, Xavier /White Oak (MD), HCR / ManorCare, Family Senior Care, Life Care Centers, Broswell Group, Ensign Group (CA and TX), Country Villas, Ken Shay, North America (CA and TX), Riverside Healthcare, Stebbin (TX), Paramount (TX), Harborside, SUN Health, and Five Star.

Defendants are entitled to discovery into whether Omnicare has breached its MFP obligations.

Disagreement as to the meaning of contractual language drives this discovery issue. The MFP provision qualifies the most favorable pricing obligation by "taking into account the relative volume" of products and services provided to other customers, and by guaranteeing best pricing "in the aggregate."[43] The parties disagree as to what discovery is relevant to this contractual language. Implicit in limiting Defendants' discovery request would be a determination of the meaning of this language. Although Omnicare objects to such broad discovery into, for example,

[43] Fini Decl., Ex. 1 (Sava Master PPSA §4(b)(i)).

per diem billing instead of fee-for-service pricing for each individual medication, excluding certain items risks a premature contractual interpretation.

Omnicare offers no method of limiting discovery other than the extreme position of denying all but subsection (c) of the request.[44] This the Court cannot do. Where there is a legitimate question whether the MFP provision has been breached, and where reasonable disagreement exists as to the meaning of its qualifying language, the Defendants must be granted discovery sufficient to address both issues. Without a reasonable suggestion from the parties as to how to limit the burden involved in granting this discovery while still allowing the Defendants their right to discovery into the pricing provided to other customers, which is relevant and reasonably calculated to lead to admissible evidence, this Court is left with little choice. It is not possible for the Court to recraft document requests more narrowly tailored to the needs of the Defendants, with one minor exception. In responding to the foregoing requests, Omnicare may redact portions of the requested contracts and agreements that do not speak to pricing.

[44] At oral argument, Omnicare suggested limiting the MFP discovery to the past year. Doing so would be inappropriate as the MFP obligation is ongoing. Alternatively, both parties point to a contractually agreed audit process as an alternative to broad discovery, yet agreement to the conduct of an audit has proven equally elusive.

Defendants' motion to compel the MFP discovery is granted, subject to the foregoing limitations.

b. *"Medicaid Pending"*

Defendants contend that they are being billed improperly for pharmacy products and services that are the responsibility of others to pay.[45] Sava seeks the production of documents related to "[a]ll Omnicare notices or communications and all Sava communications related to the administration of Section 3.3 of each Pharmacy Products and Services Agreement (a form of which was attached as Exhibit A-1 to the SSC Master PPSA)."[46] Omnicare has objected to this request and refused to provide any responsive documents, claiming that Defendants already possess the information they seek. The Court agrees. Sava is clearly in possession of all communications it made concerning Medicaid Pending billings as well as any communications Omnicare made to Sava. As for the balance of the information, Defendants are equally capable of reading their own patient records as to Medicaid

[45] Sava Answer and Countercl. ¶ 13.
[46] Sava Mem. in Supp. of Mot. to Compel at Ex. E (Sava's Second Document Request No. 10).

status against the relevant invoices. To the extent that Defendants request information already within their possession, their request is denied.[47]

4. Prior Billing Investigations, Complaints, Charges or Lawsuits

Sava contends that its facilities have been overcharged by tens of millions of dollars, and also that Omnicare (or its affiliated pharmacies) has knowingly overcharged Sava's facilities. Sava also alleges that Omnicare's actions amount to fraud and negligent misrepresentation.[48] Sava has served discovery to determine whether Omnicare previously has been put on notice of problems, errors, or deficiencies in the billing processes or in the billing systems used to generate the invoices delivered on a monthly basis by the Omnicare pharmacies to the Sava Facilities. Specifically, Sava's Second Document Request No. 20 asked Omnicare to produce the following:

> Documents reflecting the full substance of, and the disposition or resolution of, any and all complaints, charges, indictments, investigations or inquiries (civil or criminal) concerning any of Omnicare's billing statements, invoices or billing practices for Pharmacy Products and Services since January 1, 2000, including without limitation the following matters:

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[47] *See ACLI Int'l Comm. Serv., Inc. v. Banque Populaire Suisse*, 110 F.R.D. 278, 288 (S.D.N.Y. 1986).

[48] Sava Answer and Countercl. ¶¶ 39-49 and Counts II, III.

> a. any of the following cases: *Life Care Centers of America, Inc., et al. v. Omnicare, Inc.*, U.S. District Court, Eastern Dist. of Tennessee (Chattanooga), 1:06-cv-00177; *United States of America ex rel. William St. John LaCorte v. Omnicare, Inc.*, Civ. Action No. 2:00-cv-03733 (E.D. La. 2000); *Lisitza v. Omnicare, Inc.*, Civ. Action No. 1:01-cv-7433 (N.D. Ill. 2001); *Irwin v. Gemunder*, Civ. Action No. 2:06-cv-00062-WOB (E.D. Ky. 2006); *Indiana State District Council of Laborers v. Omnicare, Inc.*, 2:06-cv-0026-WOB (E.D. Ky. 2006); and *Chi v. Omnicare, Inc.*, Civ. Action No. 2:06-cv-00031-WOB (E.D. Ky. 2006);
>
> b. such complaints, charges, indictments, investigations or inquiries into Omnicare billing practices in Maine, Michigan, and Ohio; and
>
> c. any federal inquiry into Omnicare invoices or billing practices.

Defendants concede that they do not seek every *actual* complaint made by an Omnicare customer, but rather seek only legal complaints.[49] This clarification adequately addresses Omnicare's objections based on undue burden. The protections of privilege address any remaining concern. Defendants' fraud claims will require proof that untrue representations made by Omnicare were knowingly made.[50] The issue of whether Omnicare was on notice of possible billing system problems, or has engaged in a larger plan or scheme of over-billing is relevant to the Defendants' over-billing accusations.

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[49] Sava Reply in Supp. of its Mot. to Compel at 11.
[50] *See, e.g.*, *State ex rel. Brady v. Publishers Clearing House*, 787 A.2d 111, 116 (Del. Ch. 2001).

In addition, the Court is sensitive to the possibility that some information normally otherwise available in the public record may be protected by confidentiality orders. The Court grants Defendants' request for Prior Billing Investigations, Complaints Charges or Lawsuits discovery.

IV. CONCLUSION

Accordingly, the cross-motions to compel are resolved as set forth above.

IT IS SO ORDERED.

Very truly yours,

/s/ John W. Noble

JWN/cap
cc: Register in Chancery-K