IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

JERRY W. RAY, Plaintiff, v. ADAPTHEALTH CORP., FAMILY MEDICAL SUPPLY, LLC, and SIMM ASSOCIATES, INC. Defendants.	)	1:22CV898

MEMORANDUM ORDER

This case is before the court on Plaintiff's Motion for Leave to File Second Amended Complaint. (Doc. 32.) Plaintiff seeks to amend his amended complaint (Doc. 8) to assert a class action against Defendant AdaptHealth Corporation alleging violation of the North Carolina Debt Collection Act ("NCDCA"), N.C. Gen. Stat. § 75-50 et seq., to withdraw all claims against Defendants Family Medical Supply, LLC and SIMM Associates, Inc., and to withdraw Plaintiff's First, Second, and Fourth Causes of Action. Defendant AdaptHealth opposes the motion to amend. (Doc. 34.)[1] For the reasons set out below, the motion to amend will be granted.

I. BACKGROUND

Ray brought this action originally alleging that he received bills and debt collection notices for AdaptHealth equipment that

[1] Ray settled his claims against Defendant SIMM, who has been dismissed from the action. (Doc. 45.)

he had already paid for in full and returned. (Doc. 8 ¶¶ 8-40.) In response to the original complaint, AdaptHealth admitted that its charges for equipment against Ray were incorrect. (Doc. 17 ¶ 20.)

Ray first amended the complaint as a matter of right November 1, 2022, to correct a typographical error (Doc. 8). Then, on April 3, 2023, he filed the present motion to amend his complaint again with the intent of expanding his action against AdaptHealth into a class action for violation of the NCDCA, specifically provisions under North Carolina General Statute § 75-54. Ray seeks to define the class as follows:

> All (1) consumers who purchased, leased, or rented medical equipment, supplies, and/or other products from AdaptHealth or any of AdaptHealth's "family of companies;" (2) who were sent one or more debt collection bills or notices from AdaptHealth and/or an AdaptHealth company demanding payment of a fee, penalty, and/or other charge; (3) which fee, penalty, and/or other charge the individual did not owe based on objective information contained in business records of AdaptHealth and/or an AdaptHealth company; (4) which bills and/or notices were sent between April 3, 2019 until the date of class certification; and (5) which consumers resided in North Carolina when AdaptHealth and/or the AdaptHealth company sent the bill or notice.

(Doc. 32-1 ¶ 124).

II. ANALYSIS

Federal Rule of Civil Procedure 15 provides that a plaintiff may amend a complaint once as a matter of course within 21 days after the earlier of (1) service of a responsive pleading or (2) service of a motion under Federal Rule of Civil Procedure 12(b),

(e), or (f). After that period, a party may amend only with either the opposing party's written consent or leave of court. Fed. R. Civ. P. 15(a)(1)(2); Foman v. Davis, 371 U.S. 178, 182 (1962) (noting that "the grant or denial of an opportunity to amend is within the discretion of the District Court"). While district courts have discretion to grant or deny a motion to amend, the Fourth Circuit has interpreted Rule 15(a) to provide that "leave to amend a pleading should be denied only when the amendment would be prejudicial to the opposing party, there has been bad faith on the part of the moving party, or the amendment would have been futile." Laber v. Harvey, 438 F.3d 404, 426 (4th Cir. 2006) (citation omitted); Foman, 371 U.S. at 182 (same).

A claim may be futile "if the proposed change advances a claim or defense that is legally insufficient on its face," in which case "the court may deny leave to amend." Williams v. Little Rock Municipal Water Works, 21 F.3d 218, 225 (8th Cir. 1994) (citing Charles A. Wright & Arthur Miller, Fed. Prac. & Proc.: Civil, § 1487, at 637 (1991)) (alterations adopted); see Joyner v. Abbott Labs, 674 F. Supp. 185, 190 (E.D.N.C. 1987) (same). "To determine whether a proposed amended complaint would be futile, the Court reviews the revised complaint under the standard used to evaluate a motion to dismiss for failure to state a claim." Amaya v. DGS Construction, LLC, 326 F.R.D. 439, 451 (D. Md. 2018) (citing Katyle

v. Penn National Gaming, Inc., 637 F.3d 462, 471 (4th Cir. 2011)). Thus, "[a] motion to amend a complaint is futile 'if the proposed claim would not survive a motion to dismiss.'" Pugh v. McDonald, 266 F. Supp. 3d 864, 866 (M.D.N.C. 2017) (quoting James Madison Ltd. v. Ludwig, 82 F.3d 1085, 1099 (D.C. Cir. 1996)).

A Rule 12(b)(6) motion to dismiss is meant to "test[] the sufficiency of a complaint" and not to "resolve contests surrounding the facts, the merits of a claim, or the applicability of defenses." Republican Party of North Carolina v. Martin, 980 F.2d 943, 952 (4th Cir. 1992). To survive such a motion, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570 (2007)). In considering a Rule 12(b)(6) motion, a court "must accept as true all of the factual allegations contained in the complaint," Erickson v. Pardus, 551 U.S. 89, 94 (2007) (per curiam), and all reasonable inferences must be drawn in the non-moving party's favor, Ibarra v. United States, 120 F.3d 472, 474 (4th Cir. 1997).

Rule 12(b)(6) and Rule 15 should be balanced against Federal Rule of Civil Procedure 8(a)(2), which provides that a complaint need only contain a "short and plain statement of the claim showing that the pleader is entitled to relief." Rule 12(b)(6), and thus Rule 15, protect against meritless litigation by requiring

sufficient factual allegations "to raise a right to relief above the speculative level" so as to "nudge[] the[] claims across the line from conceivable to plausible." Twombly, 550 U.S. at 545, 570 (2007); see Iqbal, 556 U.S. at 678 (2009). When considering whether a Rule 15 motion to amend is futile, the court "need not accept as true unwarranted inferences, unreasonable conclusions, or arguments." Giarratano v. Johnson, 521 F.3d 298, 302 (4th Cir. 2008).

AdaptHealth contends that the proposed second amended complaint requires the court to determine that "it is clear from the face of the complaint that the plaintiff cannot and could not meet [Federal Rule of Civil Procedure] Rule 23's requirements for certification because the plaintiff has failed to properly allege facts sufficient to make out a class or could establish no facts to make out a class." Bigelow v. Syneos Health, LLC, No. 5:20- 5 CV-28-D, 2020 WL 5078770, at *4, 5 (E.D.N.C. Aug. 27, 2020). AdaptHealth argues that Ray cannot make out a class for two reasons. First, it argues that Ray's class definition creates a "fail-safe" class, where a merits determination has to be made in order for members of the class to qualify, because the court's inquiry about whether each possible class member actually owes a debt merges into the merits determination pursuant to the NCDCA. Second, AdaptHealth argues that Ray cannot meet the ascertainability requirement for class certification, again due in

part to his defining a fail-safe class, because some amount of litigation would have to occur with respect to every class member in order to determine his or her eligibility. Therefore, AdaptHealth contends, the motion to amend is futile and should be dismissed.

As to AdaptHealth's first contention, Ray responds with three principal arguments: first, that AdaptHealth's motion is premature, as courts have held that judgment on class certification issues - which this would be - is rarely appropriate at the pleadings stage; second, that futility is intended to be a very narrow exception not demonstrated here; and third, that the fail-safe provision is not an independent bar to class certification but, even if it is, it is curable by modifying the class definition. As to the second, Ray argues that eligibility can be determined objectively from AdaptHealth's own records and, in any event, his proposed revised class definition[2] narrows the bases of eligibility to those persons for whom AdaptHealth's own records indicate no payment is owed (thus eliminating potential individualized determinations for each customer). (Doc. 41 at

[2] In his response to AdaptHealth's opposition to the motion to amend, Ray offers to narrow his proposed class to those for whom AdaptHealth's own business records show no possible basis for billing or debt collection because of "continued use of equipment the consumers had returned, a type or quantity of equipment the consumers had not received, or equipment the consumers had never leased, rented, or purchased . . . ." (Doc. 41 at 11.)

11.)

Ray is correct that the procedural posture of this case generally favors his motion to amend. Motions to amend are liberally construed, and motions directed at class certification issues are largely heard at the certification stage. See, e.g., Fed. R. Civ. Pro. 23(c), Advisory Committee Notes to 2003 Amendments (noting that the rule was changed because "[t]he 'as soon as practicable' exaction neither reflects prevailing practice nor captures the many valid reasons that may justify deferring the initial certification decision"). However, this is also Ray's second effort at amending the complaint (albeit the first substantive attempt), and he seeks to substantially enlarge his claims for class treatment.

Ray's proposed second amended complaint seeks to include a class whose membership is persons who are or were customers of AdaptHealth who were sent bills or notices for fees, penalties, or other charges the individual did not owe "based on objective information contained in the business records of AdaptHealth and/or an AdaptHealth company." (Doc. 32-1 ¶ 5.) As AdaptHealth contends, this definition might present a "fail-safe" class to the extent that it encompasses persons whose obligation to AdaptHealth is disputed or otherwise predicated on some individualized, prior determination of whether AdaptHealth's billing of their accounts is appropriate. In such cases, class membership would turn on

whether each customer had a valid NCDCA claim, thus embodying a fail-safe class. Bigelow, 2020 WL 5078770, at *5 (finding fail-safe class whose membership depended on whether they had a valid claim under the Family Medical Leave Act); McCaster v. Darden Rests., Inc., 845 F.3d 794, 799 (7th Cir. 2017) (finding a "classic fail-safe class" where "class membership plainly turn[ed] on whether the former employee has a valid claim" pursuant to the Illinois Wage Payment and Collection Act). However, if, on the other hand, such "objective information" demonstrates liability based on unequivocal information in AdaptHealth's own records, it may well be that a class which does not require individualized merits determinations – and meets Rule 23's class standards without being fail-safe - may be possible depending on the facts developed.

Here, the "objective information" is not specified. Because the record is not developed on what AdaptHealth's own records show, the court cannot say at this point that the proposed class offered by Ray is necessarily a fail-safe class or that Ray cannot establish facts to make out his class claims. The extensive factual allegations of the proposed amended complaint reflect a continued effort by AdaptHealth to seek to collect a debt that Ray repeatedly advised was not owed. If AdaptHealth's own records demonstrate the absence of any ground for billing and sending collection notices, AdaptHealth has not explained how there would be a need for each customer to present individualized

demonstrations of entitlement to recovery. Therefore, the court cannot say that amendment is futile.

For many of the same reasons, AdaptHealth's contention that Ray cannot meet Rule 23's ascertainability prong is premature. AdaptHealth argues that determining class eligibility requires mini-litigation as to each class member. Again, ascertainability will be problematic for Ray if class eligibility turns on individual issues specific to each customer. It would be less so if the nature of the alleged wrongful billing is systemic. But until the alleged basis for liability is determined – an issue best resolved at the class certification stage - the court cannot say that Ray is incapable of pleading a class to satisfy Rule 23. Whether he can do so remains to be determined at a later stage.[3]

III. CONCLUSION

For the reasons stated,

IT IS ORDERED that Ray's motion to file the proposed second amended complaint is GRANTED, and Ray shall file the proposed second amended complaint as a separate pleading within five (5) days.

Nothing in this order shall be construed to have determined any issue as to class certification, the propriety of which shall

[3] Because Ray's proposed alternative class definition depends on the facts supporting the alleged basis for determining liability, it is subject to the court's same comments above. The court therefore declines to opine on the adequacy of such a class at this pleading stage.

be addressed at a later date.

/s/ Thomas D. Schroeder
United States District Judge

October 16, 2023