DISTRICT COURT, WELD COUNTY, COLORADO Court Address: 901 9th Avenue, Greeley, CO 80631 Mailing Address: P.O. Box 2038, Greeley, CO 80632 Phone Number: (970) 475-2400	DATE FILED: December 21, 2022 4:45 PM CASE NUMBER: 2020CV30620
Plaintiff: Plaintiffs: ANDREW S. BROWN, D.O., and BELMARIE ROMAN-MARADIAGA, M.D., k/n/a BEL REID, M.D., for themselves and on behalf of all others similarly situated, v. Defendants: BANNER HEALTH, an Arizona nonprofit corporation, and BANNER MEDICAL GROUP COLORADO, a Colorado nonprofit corporation. *v.* **Defendants:** BANNER HEALTH, an Arizona nonprofit corporation, and BANNER MEDICAL GROUP COLORADO, a Colorado nonprofit corporation.	**▲ COURT USE ONLY ▲** Case No. 2020CV30620 Div. 5
ORDER GRANTING PLAINTIFFS' MOTION TO CERTIFY CLASS AND DENYING REQUEST TO CERTIFY SUB-CLASS	

THIS MATTER comes before the Court on Plaintiffs' *Motion for Class Certification* filed June 10, 2022. Defendants filed a *Response in Opposition to Class Certification and Request for Oral Argument*. Plaintiffs filed a *Reply in Support of Motion for Class Certification*. Defendants filed a *Sur-Reply in Opposition to Plaintiffs' Motion for Class Certification*. **THE COURT** having reviewed the filings and arguments of counsel hereby **FINDS** as follows:

BACKGROUND

Plaintiffs filed a motion for class certification under Rule 23(a), 23(b)(1), and 23(b)(3). Plaintiffs allege that Banner Health (Banner) and Banner Medical Group Colorado (BMGC)'s software had interface problems between the several information technology systems that Defendants utilized; its coding department errors resulted in inaccurate physician billing and compensation; and Defendants sustained a corporate policy where work relative value units (wRVUs) were credited to lower-level salaried employees instead of the physicians. Banner owns

and operates the hospitals and clinics while BMGC employs the physicians and advanced practice providers (APP). Within the relevant period, January 1, 2016 – January 2, 2019, BMGC estimates that it employed anywhere between 254 and 280 licensed physicians from 40 medical specialties. Plaintiffs seek to certify a class of approximately 200 physicians employed by BMGC at some point between January 1, 2016 and January 2, 2019, who executed a physician employment agreement (PEA) reflecting the ability to earn a wRVU bonus compensation but allegedly did not receive wRVU compensation from the Defendants. Plaintiffs also seek to certify a subclass consisting of an unascertained number of physicians who either accepted an employment offer or continued employment based upon their reliance on Defendants' representations of wRVU bonus compensation.

Plaintiffs put forward Dr. Andrew Brown, D.O. ("Brown") and Dr. Bel Reid, M.D. to be named as class representatives. The firm, Burg Simpson Eldredge Hersh & Jardine, P.C. seeks to be named as proposed class counsel. Defendants argue that Plaintiffs proposed class does not satisfy all the prerequisites under Rule 23(a) or meet the requirements under either Rule 23(b) subsection.

ISSUE

I. **Whether Plaintiffs have satisfied their burden of proof to obtain class certification.**

LEGAL STANDARD

Under Colorado Rule of Civil Procedure Rule 23, plaintiffs seeking class certification must satisfy the four requirements of Rule 23(a) and additionally satisfy one of the subsections of Rule 23(b). Rule 23(a) allows one or more members of a class to sue or be sued as representative parties on behalf of an entire class only if: "(1) [t]he 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; and (4) the representative parties will fairly and adequately protect the interests of the class." C.R.C.P. 23(a).

Rule 23(b) allows an action to be maintained as a class action if subsection (a)'s requirements have been met and in addition one of the following three subsections is satisfied:

"(1) [t]he prosecution of separate actions by or against individual members of the class would create a risk of: (A) Inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class; or (B) Adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interest; or

(2) The party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) The court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) [t]he interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) [t]he extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) [t]he desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) [t]he difficulties likely to be encountered in the management of class action."

C.R.C.P. 23(b).

Colorado's Supreme Court "counsels against a specific burden of proof . . . in favor of the trial court's discretion to determine to its satisfaction that C.R.C.P. 23's requirements are met as the litigation proceeds." *Jackson v. Unocal Corp.*, 262 P.3d 874, 883 (Colo. 2011). When addressing class certification, the decision to certify a class is in the discretion of the Court; this decision can only be overturned if it is found to be clearly erroneous and an abuse of discretion. *Mountain States Tel. & Tel. Co. v. Dist. Ct., City & Cnty. of Denver*, 778 P.2d 667, 672 (Colo. 1989) (citing *Friends of Chamber Music v. City and County of Denver,* 696 P.2d 309, 317 (Colo.1985)). Additionally, Colorado has a policy of liberally construing C.R.C.P. 23 in favor of class certification. *Farmers Ins. Exch. v. Benzing*, 206 P.3d 812, 818 (Colo. 2009); *LaBerenz v. Am. Family Mut. Ins. Co.*, 181 P.3d 328, 333–34 (Colo.App.2007). As a result, plaintiff has the

burden of proof but does not need to establish each C.R.C.P. 23 requirement by a preponderance of the evidence. *Jackson v. Unocal Corp.*, 262 P.3d 874, 884 (Colo. 2011).

In determining class certification, the Court's analysis "may include consideration of the merits of the claims presented, but only to the extent necessary to ensure that the requirements of C.R.C.P. 23 have been met. *Jackson*, 262 P.3d at 885 (citing *Clark v. Farmers Ins. Exch*., 117 P.3d 26, 31 (Colo. App. 2004)).

ANALYSIS

A. Satisfaction of the Rule 23(a) Requirements

The Court is satisfied that Plaintiff's proposed class satisfies the four prerequisites of Rules 23(a) for the following reasons:

1. Numerosity

Colorado Rules of Civil Procedure 23(a)(1) requires that the class be so numerous that joinder of all class members is impracticable. Plaintiffs are permitted to make a reasonable and supported estimate of the size of the class. However, the description of the class must be "sufficiently definite so that it is administratively feasible for the court to determine whether a particular individual is a member." *Cook v. Rockwell Int'l Corp.*, 151 F.R.D. 378, 382 (D.Colo.1993) (citing *Rodriguez v. U.S. Department of the Treasury*, 131 F.R.D. 1, 7 (D.D.C.1990)).

Defendants argue that Plaintiffs cannot satisfy the numerosity requirement because their class is defined in terms of a legal conclusion which would require the Court to first make a determination on the merits of each intended class members' claims before being able to determine the actual class size and membership. Additionally, Defendants assert that Plaintiffs' suggested class definition creates a fail-safe class. A fail-safe class exists when the "proposed class definition is . . . framed as a legal conclusion." *LaBerenz v. Am. Fam. Mut. Ins. Co.*, 181 P.3d at 335. A fail-safe class is unworkable for a court because class membership is only ascertainable if the defendant is found liable thereby making ascertaining the class not possible until after a determination of ultimate liability is made. *Id.* at 335 -36 (citing *Intratex Gas Co. v. Beeson*, 22 S.W.3d 398, 402 (Tex.2000)).

Plaintiffs define their class of approximately 200 as Colorado physicians employed by Defendants during the relevant period, January 1, 2016 to January 2, 2019, who were promised wRVU productivity-based compensation and executed a PEA reflecting promised compensation but were not properly compensated under agreement. Plaintiffs argue that Defendants can easily ascertain the class with physician employment, compensation, and medical records. Further, Plaintiff has suggested a subclass consisting of physicians who took positions and/or stayed on staff after they reasonably relied to their detriment on Defendant's false representations of wRVU bonus compensation.

Plaintiffs contend that during the relevant period approximately 200 physicians were impacted by Defendants' policies and practices such that physicians across the 40 specialties have all been impacted. Plaintiffs have provided minimal evidence for this Court to assess the size and claims of the suggested subclass.

Based on the records provided, the Court finds that the class membership is ascertainable without a decision of ultimate liability and, therefore, is not a fail-safe class. Joinder of potentially 200 physicians is both impractical and an unnecessary use of the Court's resources. This class will consist of physicians employed by BMGC at some point between January 1, 2016 and January 2, 2019, who executed a PEA reflecting the ability to earn wRVU bonus compensation but did not receive wRVU compensation from the Defendants. Personnel records and compensation records from the relevant period are likely readily available to the Defendants because they should have been kept in the normal course of business. At this time, it is unnecessary for the Court to decide whether the physicians were wrongfully denied additional compensation in order to determine that the Plaintiffs have met the required standard for numerosity. The Court finds that the numerosity requirement for class certification has been met. However, the numerosity requirement for the subclass has not been met.

2. Commonality

C.R.C.P. 23(a)(2) requires that there be "questions of law or fact common to the class." However, every issue does not need to be common to the class. *LaBerenz v. Am. Fam. Mut. Ins. Co.,* 181 P.3d at 338. Fact situations may vary among members of a class action, as long as the claims of the class members are based upon the same legal or remedial theory. *Id. (citing Joseph v. Gen. Motors Corp.,* 109 F.R.D. 635, 639 (D.Colo.1986)).

Defendants argue that Plaintiffs' claims of policies and practices that resulted in class wide injury lack a description of the policies and are not supported by evidence. To support their claim of policies and practices that resulted in class wide injury, Plaintiffs submit the testimonies of Drs. Brown, Pearson, Tullis, Loecke, Quenzer, Heaston, and Albert. Each report: alterations in their coding without their knowledge or further explanation from Banner representatives; the need to double check past submissions to ensure correctness after review by Defendants staff; and a lack of transparency and trust in Defendants' billing practices. Plaintiffs support these allegations with exhibits of several email chains reflecting specific instances where physicians had noticed alterations, made a record of the frequency of these changes or missed charges, and exemplified the perceived irregularity of requiring nuanced review of past records to ensure record accuracy. Plaintiffs' submissions indicate that it is atypical for this level of supervision to be required for medical billing.

Defendants' *Response* indicates that they have utilized used at least three different EMR software programs and four separate billing platforms within the Relevant Period. Defendants' *Response* indicates that they perceive the errors in billing and coding reported by Plaintiffs as human errors. Defendants also assert that the overwhelming majority of "dropping the charge" errors were corrected. Further, Defendants indicate that when charges were reviewed by their coding team, if a coder determined that the documentation submitted for a specific visit was inadequate for the assigned charge, they would place the charge "on hold" and inform the physician. At that point the physician could amend the EMR to support the original charge and wRVU credit earned, but Defendants state that the coder could not instruct the physician what specific elements or documents were needed to support that code. Defendants' coding guidelines required that Banner either withhold the charge from billing or "down-code" the encounter by changing the CPT code to a lower level. Down-coding accredited fewer wRVUs for the physician, which could result in reduced compensation for the physician.

Defendants additionally assert that there are two separate sets of contracts for each physician specialty during the relevant period. Defendants' Sur-Reply, 5-6. Defendants allege that the initial contracts were active until April 2018 at which point the new contracts took effect. Defendants claim that the April 2018 contracts impacted almost all BMGC-employed physicians by changing their base salaries and altering productivity and value-based incentives. However, Defendants' Response states, "even though the new contracts signed by the hospitalists in April

2018 specifically stated that a hospitalist would receive 70 percent of the wRVUs for split-share services, Banner did not start following this practice in Colorado until 2019." Defendants' Response, 4. Plaintiffs argue that because the WRUs portion of the contracts did not go into effect until Jan 1, 2019, only the original contract is applicable in this litigation. At this stage, there is little evidence to support the argument that the second set of employment contracts remedied the alleged interface problems, coding department errors, or the Defendants' corporate policy of crediting wRVUs to lower-level salaried employees instead of physicians; therefore, this contract issue is a valid dispute of fact and may be relevant to both liability and any calculation of damages but does not invalidate Plaintiffs' motion for class certification.

Lastly, Defendants assert that there are not issues common to all class members and that there is no basis for concluding that Banner had any policies or practices that resulted in Plaintiffs' alleged class-wide injury. The Plaintiffs' submissions indicate otherwise, regardless of the effective contract. The Plaintiffs assert that physician class contracts are materially identical but vary with different wRVU amounts and thresholds based on specialties. The Defense submissions provide support to the Plaintiffs allegations of policies and practices that caused the class-wide alleged harm. The underlying issue is whether the physicians were being appropriately compensated based on the contracts specific to their specialties. The likelihood of different specialties being compensated differently and requiring varied damages awards from this Court does not negatively impact the commonality requirement. Plaintiffs have shown that multiple physicians employed by Banner had consistent problems ensuring accurate accounting for wRVU credits within the relevant period. As a result of problems in accounting for wRVUs, Plaintiffs' submissions indicate that physicians were potentially being underpaid. The Court finds that Plaintiffs' submissions met their burden of proof and indicate that there are questions of law and fact common to this proposed physician class.

3. Typicality

The third prerequisite for class certification is that "the claims or defenses of the representative parties are typical of the claims or defenses of the class." C.R.C.P. 23(a)(3). This requirement is usually met "[w]hen it is alleged that the same unlawful conduct was directed at or affected both the named plaintiff and the class sought to be represented . . ." *LaBerenz v. Am. Fam. Mut. Ins.*

Co., 181 P.3d at 338 (citing *Ammons v. Am. Family Mut. Ins. Co., supra*, 897 P.2d 860, 863 (Colo. App. 1995).

Defendants assert that Brown and Reid, the named Plaintiffs, have made claims specific to their specialty as hospitalists that are inapplicable to other specialties. The Plaintiffs argue that wRVU productivity bonus compensation, use of software systems, coding involving APPs, and candidate interviews are all claims that arise from the same operative facts and legal theories as those of the class. Further, the Plaintiffs assert that Defendants directed the same conduct at the class representatives and the supposed class members. Evidence indicates the Defendants' conduct likely impacted physicians regardless of their specialty. The Court finds the Plaintiffs assertions indicate that the class representative claims are typical of the class, thereby satisfying the typicality requirement.

4. Fair and Adequate Representation of the Class

The final requirement of Rule 23(a) is that "the representative parties will fairly and adequately protect the interests of the class." C.R.C.P. 23(a)(4). The intention of this requirement is to "uncover conflicts of interest between named parties and the class they seek to represent." *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 625 (1997). Adequate representation has two parts: (1) the class representative should not have an interest conflicting with the interests of the class, and (2) the class counsel should be qualified, experienced, and able to conduct the litigation. *Kuhn v. Colo. Dept. of Rev.*, 817 P.2d 101, 106 (Colo. 1991).

Defendants assert that Plaintiffs cannot meet this standard because Plaintiffs' declaration cites Dr. Marcus Reinhardt, Dr. Barbara Emerson, and Dr. Edward Norman as having provided inaccurate information relating to wRVU productivity bonuses while recruiting Dr. Brown to participate in Defendants' practice.

Plaintiffs argue that Drs. Brown and Reid do not have a conflict of interest with physicians who attended recruitment dinners and participated in discussions about wRVU bonus compensation because the physicians' attendance and participation did not give them power over Defendants' contracts, policies, or practices. Further, Plaintiffs' submissions indicate that these three physicians were subjected to the same allegedly incorrect compensation, coding practices, and interface problems that the class and class representatives were subjected to regardless of their

specialty or participation in Defendants' recruitment activities. This Court finds that the class representatives do not have interests conflicting with those of the class.

Next, Plaintiffs must also show that plaintiffs' counsel can fairly and adequately protect the interests of the class. Adequate representation requires class counsel to be qualified, experienced, and able to conduct the litigation. *Kuhn v. Colo. Dept. of Rev.*, 817 P.2d 101, 106 (Colo. 1991). Plaintiffs' Motion for Class Certification establishes that they have retained Burg Simpson Eldredge Hersh & Jardine, P.C. (Burg Simpson) as proposed class counsel. Submissions by the Plaintiffs' hold out Burg Simpson as having experience handling complex class action, mass tort, and commercial litigation. Additionally, Burg Simpson's Declaration indicates personnel resources and prior casework on cases of a similar nature. Defendants do not challenge the qualifications or competency of Plaintiffs' chosen counsel. This Court considers the Plaintiffs' submission and finds the firm of Burg Simpson Eldredge Hersh & Jardine, P.C. to be competent and qualified counsel capable of fairly and adequately protecting the interests of the class.

B. Certification Under Rule 23(b)(3)

Under C.R.C.P 23, plaintiffs seeking class certification must satisfy both the four requirements of Rule 23(a) and one of the subsections of Rule 23(b). Plaintiffs assert that this class could be certified under Rule 23(b)(1) and 23(b)(3). The determination of the appropriate subsection under which a class should be certified depends largely upon the type of relief sought by the putative class. *State v. Buckley Powder Co.*, 945 P.2d 841, 844 (Colo. 1997). Rule 23(b)(3) class actions are appropriate for classes seeking monetary damages. *Id. at* 844–45. This categorization is supported by the Supreme Court's ruling in *Walmart Stores, Inc. v. Dukes*, in which the Court states, "we think it clear that individualized monetary claims belong in Rule 23(b)(3)" rather than in 23(b)(1) or 23(b)(2). *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 362(2011). This Court is guided by this interpretation of Rule 23 and will analyze the possibility of class certification under subsection C.R.C.P 23(b)(3).

Under Rule 23(b)(3), class certification is endorsed where the court finds:

> "[1] that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and [2] that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters

pertinent to the findings include: (A) The interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) The extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) The desirability or undesirability of concentrating the litigation of the claims in the particular forum; [and] (D) The difficulties likely to be encountered in the management of a class action." C.R.C.P. 23(b)(3)

1. Predominance

Predominance under Rule 23(b)(3) is satisfied when "the plaintiff advances a theory by which to prove or disprove 'an element on a simultaneous, class-wide basis, since such proof obviates the need to examine each class member's individual position.'" *Farmers Ins. Exch. v. Benzing*, 206 P.3d at 820 (citing *Lockwood Motors, Inc. v. Gen. Motors Corp.*, 162 F.R.D. 569, 580 (D.Minn.1995)). Additionally, the Supreme Court of Colorado has established that "the predominance inquiry usually involves liability, not damages, and the need for some proof on individual damages does not preclude certification under C.R.C.P. 23(b)(3)."). *Jackson v. Unocal*, 262 P.3d 874, 889 (Colo. 2011) (citing to *Buckley Powder Co. v. State*, 70 P.3d 547, 554 (Colo. App. 2002)). Put simply, "[t]he predominance inquiry focuses on whether the proof at trial will be predominantly common to the class or primarily individualized." *Jackson*, 262 P.3d at 889.

Plaintiffs assert that the proposed physician class members each share systemic problems with charge discrepancies, software interface issues, perceived changes in coding and billing, and receiving less than anticipated wRVU credit and bonus compensation. Plaintiffs allege that these issues stem from the conduct of Banner and BMGC and in turn impact every physician in a way that predominates over questions affecting only individual class members.

Defendants argue that a class action is not the best way to a fair and efficient resolution of this controversy. Additionally, Defendants allege that there is no direct evidence of a systematic problem involving lost charges, and instead indicate that Plaintiffs' complaints stem from human error and arise from differing aspects of the billing process rather than the same part of the billing process; therefore, Defendants perceive the problem can only be individualized.

The Court finds that Plaintiffs' allegations and the exhibits submitted point to a potential class-wide cause of action. It appears that Plaintiffs' allegations all stem from the same conduct

of Banner and BMGC such that Plaintiffs may prove liability for the entire class. Additionally, the exhibits and evidence submitted indicate that the underlying cause may be the same, but damages may vary. The likely individualized amounts of damages do not prevent class certification. The Court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members.

2. Superiority

Lastly, C.R.C.P. 23(b)(3) requires a finding that "a class action is superior to other available methods for the fair and efficient adjudication of the controversy." When considering whether the superiority requirement is met, the court, among other factors, considers: "(A) [t]he interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) [t]he extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) [t]he desirability or undesirability of concentrating the litigation of the claims in the particular forum; [and] (D) [t]he difficulties likely to be encountered in the management of a class action." C.R.C.P 23(b)(3). Additionally, SCOTUS has stressed the importance of "achiev[ing] economies of time, effort, and expense, and promot[ing] uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results" as rational for class certification. *Amchem Prod., Inc. v. Windsor*, 521 U.S. 591 (1997).

In support of the superiority element, Plaintiffs argue that the size of the class, the overlap in evidence, and the expense for individual members to prosecute all provide support in favor of certifying this class. Further, the risk of individual adjudication of even a few of these cases could give rise to conflicting results, would be repetitive, and ultimately not in the interest of judicial economy. Defendants argue that there remain other ways to resolve the controversy, including administrative avenues for relief; regulatory actions or settlements; or whether individual suits may better serve the class members.

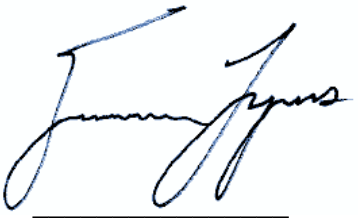
The Court after considering the submissions of the parties, exhibits, and evidence presented finds that certifying this class under Rule 23(b)(3) is the superior method of adjudication. Even if only one in ten members of this supposed 200-person class were required to individually adjudicate or engage in settlement discussions with Defendants, the expense, repetition of evidence, and risk of differing results indicates the necessity of certification. Based on the information already

presented to this Court, it is likely that many of the class members' injuries stemmed from the same conduct of the Defendants and therefore should be mutually adjudicated. The Court finds that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

CONCLUSION

FOR THE FOREGOING REASONS, Plaintiffs' *Motion for Class Certification* under C.R.C.P. 23(a) and 23(b)(3) is **GRANTED** for the class consisting of physicians employed by BMGC within the relevant period, January 1, 2016 – January 2, 2019, who executed a PEA reflecting the ability to earn wRVU bonus compensation but did not receive wRVU compensation from the Defendants. Plaintiff's *Motion for Class Certification* of the proposed subclass is **DENIED**. The Court approves Dr. Andrew Brown and Dr. Bel Reid as class representatives and approves the appointment of the firm, Burg Simpson Eldredge Hersh & Jardine, P.C. as class counsel.

Dated: December 21, 2022 **By Order of the Court:**



SHANNON D. LYONS
DISTRICT COURT JUDGE