

FILED

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA 12 PM 3:30
BUSINESS COURT DIVISION

CAROL S. BENTON, CLERK
KANAWHA COUNTY CIRCUIT COURT

CHARLESTON AREA MEDICAL CENTER, INC.,
Plaintiff,

vs.

Civil Action No.: 22-C-359
Presiding: Judge Nines
Resolution: Judge Akers

WEST VIRGINIA UNITED HEALTH SYSTEM,
INC., d/b/a WEST VIRGINIA UNIVERSITY
HEALTH SYSTEM, and WVU HEALTH SYSTEM;
THOMAS HEALTH SYSTEM, INC. d/b/a
THOMAS HEALTH; HERBERT J. THOMAS
MEMORIAL HOSPITAL;
CHARLESTON HOSPITAL, INC. d/b/a SAINT
FRANCIS HOSPITAL; THS PHYSICIAN
PARTNERS, INC.; PULMONARY ASSOCIATES
OF CHARLESTON PLLC, d/b/a CRITICAL
CARE, PLLC, TRAKE, LLC; PHILLIP COX, D.O.,
an individual; KEVIN EGGLESTON, M.D., an
individual; ROBBY KEITH, M.D., an individual;
JAMES D. PERRY, III, D.O., an individual;
TAMEJIRO "TOM" TAKUBO, D.O., an individual;
RYAN WADDELL, D.O., an individual; and W.
ALEX WADE, M.D., an individual,
Defendants.

**ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFF CHARLESTON
AREA MEDICAL CENTER, INC.'S OMNIBUS MOTION TO COMPEL**

This matter came before the Court this 12th day of May 2023 upon Plaintiff

Charleston Area Medical Center, Inc.'s Omnibus Motion to Compel. The parties have fully
briefed the issues necessary. The Court dispenses with oral argument because the facts and legal
contentions are adequately presented in the materials before the court and argument would not
aid the decisional process. So, upon the full consideration of the issues, the record, and the
pertinent legal authorities, the Court rules as follows.

FINDINGS OF FACT

282-284

1. This civil action arises the Complaint filed May 3, 2022, wherein Plaintiff Charleston Area Medical Center, Inc. (hereinafter “Plaintiff” or “CAMC”) filed claims against Defendants West Virginia United Health System d/b/a West Virginia University Health System and WVU Health System (hereinafter “WVUHealth”); Thomas Health System, Inc. d/b/a Thomas Health (hereinafter “Thomas Health”); Herbert J. Thomas Memorial Hospital Association d/b/a Thomas Memorial Hospital (hereinafter “Thomas Memorial”); Charleston Hospital, Inc. d/b/a Saint Francis Hospital (hereinafter “St. Francis”); THS Physician Partners, Inc. (hereinafter “THSPP”) (THSPP, together with Thomas Health, Thomas Memorial and St. Francis, collectively referred to as “the Thomas Parties”); Pulmonary Associates of Charleston PLLC d/b/a Critical Care, PLLC (hereinafter “PAC”); Trake, LLC (hereinafter “Trake”); and individual members of PAC and Trake Phillip Cox, D.O., Kevin Eggleston, M.D., Robby Keith, M.D., James D. Perry, III, D.O., Tamejiro “Tom” Takubo, D.O., Ryan Waddell, D.O., and W. Alex Wade, M.D. (hereinafter “the PAC Physicians”), surrounding a proposed or attempted transaction wherein CAMC was to acquire substantially all the assets of PAC and was to lease, with an option to purchase, the building owned by Trake in which PAC operated its business, and that CAMC was to employ the workforce of PAC and the PAC Physicians. *See* Motion to Refer, p. 2-3.

2. At the heart of this litigation are various contracts and agreements, including an Asset Purchase Agreement of October 11, 2021, employment contracts with each of the PAC Physicians, a Lease Agreement with Trake of October 1, 2021, an Employee Leasing Agreement of November 15, 2021, a Records Asset Agreement on December 16, 2021, and a Letter of Intent dated February 16, 2021. *Id.* at 4.

3. Specifically, on October 11, 2021, PAC and CAMC executed an Asset Purchase Agreement (hereinafter “APA”) the specified a Closing Date, Effective Date, and several conditions precedent. *See* Def’s Mem. in Support of Mot., to Dismiss, p. 4. According to the Complaint, the transaction was set to close on or about December 16, 2021. *Id.* at 6; *see also* Pl’s Resp., p. 6. The APA could be terminated by either party or after December 31, 2021 if the contemplated transactions had not been closed. *See* Pl’s Resp. to Mot. to Dismiss, p. 6. The parties did not close the transaction by December 31, 2021. *Id.* at 7. On February 22, 2022, PAC sent a notice of termination of the APA to CAMC. *See* Def’s Mem. in Support of Mot. to Dismiss, p. 7. Relevant to the instant motion, it is this February 22, 2022 date/letter of termination that Defendants aver is pertinent to the discovery requests at issue.

4. As mentioned, the Complaint was filed May 3, 2022. On May 17, 2022 and May 20, 2022, Plaintiff served its first set of discovery to each of the PAC Defendants and to WVU Health. *See* Pl’s Mot., p. 7. On June 30, 2022, WVU Health produced its Responses. *Id.* at 9. Also on June 30, 2022, each of the PAC Defendants produced their Responses. *Id.* at 11. Subsequent to this date, Plaintiff averred the parties met and conferred regarding the subject discovery requests and the subject objections. *Id.* at 12-13.

5. This civil action was referred to the Business Court Division and assigned to the undersigned as Presiding Judge. On or about December 7, 2022, Plaintiff filed the instant omnibus motion to compel, seeking this Court to overrule certain objections to the temporal scope of CAMC’s discovery requests, and to overrule certain objections to the relevance of CAMC’s discovery requests. *See* Pl’s Mot., p. 2. Further, the motion sought the production of a certain non-disclosure agreement and sought the expenses Plaintiff incurred in bringing this motion. *Id.*

6. On December 16, 2022, an initial case management hearing was held. At the time, the underlying discovery dispute was discussed and the undersigned instructed the parties to continue their efforts to resolve the disagreements and to alert the Court of the progress/success of these endeavors by January 6, 2023. *See* WVUHealth's Resp., p. 4; *see also* Order Regarding December 16, 2022 Case Management Conference.

7. On January 6, 2023, CAMC wrote a letter to the Court alerting the undersigned that the efforts to resolve the discovery disputes at the heart of the instant omnibus motion to compel were not resolved. *See* WVUHealth's Resp., p. 4; *see also* court file. Subsequently, the Court entered a briefing order. WVUHealth averred in its response that between the January 6, 2023 letter and the issuance of the briefing order, "significant progress" was made regarding the underlying discovery requests. *See* WVUHealth's Resp., p. 4.

8. On March 27, 2023, WVUHealth filed its Response, averring the issues remaining are the temporal scope of production of materials after February 22, 2022, and the production of deal documents and financial information related to the Affiliation Agreement between WVUHealth and the Thomas Defendants, and urging the Court to deny the motion to compel on grounds that the requested timeframe is not relevant to the claims in the Complaint. *See* Pl's Resp., p. 5-11. Further, WVUHealth opposed Plaintiff's requests for attorney's fees. *Id.* at 12.

9. Also on or about March 27, 2023, Defendants PAC, Trake, and the PAC Physicians, collectively referred to as the PAC Defendants, filed their Response to the instant motion, arguing production of materials post-dating February 22, 2022 would be inappropriate. *See* PAC's Resp., p. 10. Further, it opposes Plaintiff's request for attorney's fees and expenses but argues the PAC parties are entitled to such an award and requests the same. *Id.* at 11-13.

10. On or about March 31, 2023, Plaintiff filed its Reply Brief, reiterating its position that documents created after February 22, 2022 are relevant to the claims in this civil action and should be produced. *See* Reply, p. 1-4. Plaintiff also reiterated its request for fees. *Id.* at 6.

11. The Court now finds the instant Motion is ripe for adjudication.

CONCLUSIONS OF LAW

In the instant motion, CAMC seeks this Court to overrule certain objections to the temporal scope of CAMC's discovery requests, and to overrule certain objections to the relevance of CAMC's discovery requests. *See* Pl's Mot., p. 2. Further, the motion sought the production of a certain non-disclosure agreement and sought the expenses Plaintiff incurred in bringing this motion. *Id.* The Court will take up the issues in turn.

The West Virginia Supreme Court of Appeals has recognized that the West Virginia Rules of Civil Procedure generally provide for broad discovery "to ferret out evidence which is in some degree relevant to the contested issue." *State ex rel. Wausau Bus. Ins. Co. v. Madden*, 613 S.E.2d 924, 928 (2005); *see* W. Va. R. Civ. P. 26(b)(1) ("Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action."). However, the broad nature of discovery has "never been a license to engage in an unwieldy, burdensome, and speculative fishing expedition." Louis J. Palmer, Jr. & Robin Jean Davis, *Litigation Handbook on West Virginia Rules of Civil Procedure*, § 26(b)[1], at 744 (5th ed. 2017) (hereinafter, *Litigation Handbook*). As such, a court may limit otherwise permissible discovery where the information requested is privileged, cumulative, previously obtainable, or burdensome. W. Va. R. Civ P. 26(b).

Non Disclosure Agreement and Evidence Related to Affiliation Agreement

12. As an initial matter, this Court discusses the motion's request for Defendants to produce a certain non-disclosure agreement that it relied upon in some of its responses/objections to the subject discovery requests, as well as certain evidence related to the Affiliation Agreement. The Court finds the instant motion is now moot as to both of these subjects.

13. First, as to the evidence related to the Affiliation Agreement, the Reply indicated this information was now produced. *See Reply*, p. 5. Second, with regard to the non-disclosure agreement, the issue seems to have been resolved.

14. In its Response to the instant motion, WVUHealth averred it has offered this document for Plaintiff's review. In the Reply, CAMC indicated it is amenable to this resolution, and asked the Court to hold the motion in abeyance as to this issue, stating that in "light of these developments and with the hope that remaining issues may be resolved amicably between the parties without unnecessary intervention by the Court, CAMC requests that determination of its Motion to Compel with certain information related to the Affiliation Agreement and Non-Disclosure Agreement be held in abeyance to afford the parties an opportunity to resolve the dispute" and stating that "CAMC expressly reserves the right to renew its motion to compel related to these requests". *See Reply*, p. 6.

15. In light of this, the Court will deny the motion as to these items without prejudice. In the event that the parties do not resolve any remaining issues related to the evidence related to the Affiliation Agreement and the Non-Disclosure Agreement, CAMC may file a renewed motion to compel.

Temporal Scope/Relevance

16. Next, CAMC seeks this Court to overrule certain objections to the temporal scope of CAMC's discovery requests, and to overrule certain objections to the relevance of CAMC's

discovery requests. *See* Pl's Mot., p. 2. Specifically, both WVUHealth and the PAC Defendants take the position that, on relevance grounds, no responsive documents to the instant discovery requests should be produced after February 22, 2022, which is the date that PAC sent a notice of termination of the Asset Purchase Agreement (hereinafter "APA") to CAMC. *See* Pl's Mot., p. 3, 11.

17. The Court considers that Plaintiff's claims in this matter include breach and bad faith termination of the Asset Purchase Agreement by the PAC Defendants. *See* Pl's Mot., p. 2. Further, CAMC alleges WVUHealth tortiously interfered with the consummation of the Asset Purchase Agreement. *Id.* at 3. There are allegations that Defendant WVUHealth had been taking steps to acquire PAC while CAMC was negotiating the proposed transaction at the heart of this litigation. *Id.* at 4. Further, Plaintiff alleges that the reason the PAC Defendants allegedly terminated the proposed transaction/APA in bad faith became clear on April 20, 2022, a date that is subsequent to the termination date, when WVUHealth announced it had entered into a new management and clinical affiliation agreement with the Thomas Defendants. *Id.* at 4.

18. The Court also considers that Defendants did not claim producing discovery past any certain date range would be unduly burdensome or overly voluminous. The Court also notes that the PAC Defendants have relied on a letter post dating February 22, 2022 in their own motion to dismiss. *See* Pl's Mot., p. 15.

19. Given the foregoing, the Court does not see any reason to impose a February 22, 2022 date limit to the scope of discovery in this matter. The Court is not persuaded by Defendants' relevancy arguments, given the nature of claims in this matter. Due to the nature of the allegations in this matter of breach of contract, conspiracy, bad faith termination, and tortious interference, the Court cannot conclude there could not possibly be materials that are reasonably

calculated to lead the discovery of admissible evidence. There simply is no basis in law for this Court to impose a temporal limitation of February 22, 2022. Instead, the Court notes there are procedural safeguards in place to prevent any matters which should not be produced or disclosed from being unprotected, via the Rules of Civil Procedure and by the availability of an Agreed Protective Order. Discovery must only be “reasonably calculated” to lead to the discovery of admissible evidence, and given the allegations in this case surrounding the alleged interference, that burden is met here. It cannot be said that material post-dating February 22, 2022 could not possibly relate to an alleged bad faith termination which occurred by letter/notice dated February 22, 2022.

20. For all of these reasons, the Court finds the motion to compel is GRANTED as to matters post-dating February 22, 2022. Defendants’ objections are hereby overruled, and Defendants are directed to produce and serve responsive documents within thirty (30) days of the entry of this Order.

Request for Expenses

21. Finally, CAMC requests this Court to “award CAMC the reasonable expenses it incurred in bringing this Motion, including its attorney’s fees, pursuant to Rule 37(a)(4) of the West Virginia Rules of Civil Procedure”. See Pl’s Mot., p. 20.

22. “As a general rule each litigant bears his or her own attorney’s fees absent a contrary rule of court or express statutory or contractual authority for reimbursement.” Syl. Pt. 2, *Sally-Mike Properties v. Yokum*, 179 W.Va. 48, 365 S.E.2d 246 (1986).

23. Rule 37(a)(4)(A) provides, in pertinent part:

If the motion is granted, the court shall, after affording an opportunity to be heard, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the

reasonable expenses incurred in obtaining the order, including attorney's fees, unless the court finds that the motion was filed without the movant's first making a good faith effort to obtain the discovery without court action, or that the opposing party's answer, response, or objection was substantially justified, or that other circumstances make an award of expenses unjust.

W. Va. R. Civ. P. 37.

24. Rule 37 enables the party subject to a motion to compel to avoid the sanctions of paying expenses by showing that his conduct was substantially justified or that the award would be unjust. *Goldstein v. Peacemaker Properties, LLC*, 241 W. Va. 720, 733, 828 S.E.2d 276, 289 (2019).

25. A motion under Rule 37 of the West Virginia Rules of Civil Procedure, or opposition to a Rule 37 motion, is substantially justified if the motion or opposition raises an issue about which reasonable people could differ as to the appropriateness of the contested action. Syl. Pt. 6, *Goldstein v. Peacemaker Properties, LLC*, 241 W. Va. 720, 828 S.E.2d 276, 277 (2019).

26. Here, there existed a legitimate discovery dispute regarding the temporal time limit. The Court considers Defendants and Plaintiff met and conferred multiple times in an effort to resolve their discovery disputes, and did partially resolve their differences. The February 22, 2022 time limitation to production was a sticking point between both PAC Defendants and WVUHealth and Plaintiff. The Court it finds this was a legitimate dispute between the parties, and as such Defendants were substantially justified in opposing the motion to compel and arguing their position on why matters post-dating February 22, 2022 were, in their opinion, irrelevant to the facts of this case, particularly where it involves an agreement that terminated on that date. Defendants' averred arguments on this time limit based on law (relevancy) and on

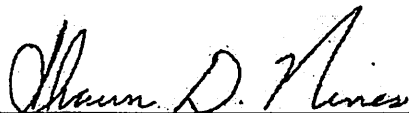
fact. Ultimately, after review of the relevant law and facts, the Court did not agree with this position, but the Court finds a legitimate discovery dispute existed, and that the issue presented a question upon which reasonable people could differ. For this reason, the Court denies Plaintiff's request for expenses, including attorney's fees. The motion is DENIED as to this request. Likewise, there existing a legitimate dispute between the parties on this issue, the Court also denies PAC's request for its own award of expenses. See PAC's Resp., p. 12-13.

CONCLUSION

WHEREFORE, it is hereby **ORDERED** and **ADJUDGED** that upon Plaintiff Charleston Area Medical Center, Inc.'s Omnibus Motion to Compel is hereby **GRANTED IN PART AND DENIED IN PART**. Defendants are further **ORDERED** to produce and serve responsive documents to the discovery requests described in this Order within thirty (30) days of the entry of this Order.

The Court notes the objections of the parties to any adverse ruling herein. The Clerk shall enter the foregoing and forward attested copies hereof to all counsel, and to the Business Court Central Office at Business Court Division, 380 West South Street, Suite 2100, Martinsburg, West Virginia, 25401.

05-12-2023
date of entry


JUDGE SHAWN D. NINES
JUDGE OF THE WEST VIRGINIA
BUSINESS COURT DIVISION

Date: 5/15/23
Certified copies sent to:
☒ counsel of record
☐ parties
☐ other Bus. Ct.
(please indicate)
By: ☒ certified/1st class mail
☐ fax
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Other directives accomplished:
D. Cavender
Deputy Circuit Clerk

STATE OF WEST VIRGINIA
COUNTY OF KANAWHA, SS
I, CATHY S. GATSON, CLERK OF CIRCUIT COURT OF SAID COUNTY
AND IN SAID STATE, DO HEREBY CERTIFY THAT THE FOREGOING
IS A TRUE COPY FROM THE RECORDS OF SAID COURT.
GIVEN UNDER MY HAND AND SEAL OF SAID COURT THIS 15th
DAY OF MAY 2023
Cathy S. Gatson CLERK
CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA