

FILED

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA  
BUSINESS COURT DIVISION

2023 SEP 27 PM 3:36

CATHY S. GATSON, 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.

**DISCOVERY COMMISSIONER REFERENCE ORDER**

This matter came on this 27<sup>th</sup> day of September 2023. On a prior day, the Court has discussed the use of a Discovery Commissioner with the parties. Having considered the relevant discovery issues, the Court hereby appoints G. Nicholas Casey, Esq. to serve as Discovery Commissioner in the instant litigation, pursuant to Rule 53 of the West Virginia Rules of Civil Procedure and the inherent authority of the Court. Rule 53 provides:

Commissioners in Chancery shall henceforth be known as "Commissioners". The practice respecting the appointment of such commissioners and references to them, and respecting their powers and duties, and the powers and duties of courts to hold hearings upon their

SCANNED



reports, shall be in accordance with the practice heretofore followed in this State. In all other respects, the action in which a commissioner is appointed, is governed by these rules.

W. Va. R. Civ. P. 53.

The Court ORDERS the Discovery Commissioner to proceed with all reasonable diligence.

***The Discovery Commissioner's Duties***

The Discovery Commissioner shall have the authority to: 1) resolve discovery conflicts; 2) assist with issues raised by electronically stored information, native formats, and meta data; 3) monitor depositions; and 4) resolve privilege issues. *The following pending motions shall be referred to the Discovery Commissioner, as shall future motions filed with the Court: 1) West Virginia United Health System, Inc.'s Motion to Compel; 2) The PAC Defendants' Motion to Quash Subpoenas to Wireless Service Providers or for a Protective Order; 3) The PAC Defendants' Motion for a Protective Order and to Quash Subpoena to Gray, Griffith & Mays, A.C.; 4) CAMC's Motion for Sanctions and for Order to Show Cause Why WVU Health Should Not Be Held in Contempt; 5) Defendants' Joint Motion for Protective Order; and 6) Defendant West Virginia United Health System, Inc.'s Motion for Protective Order From Plaintiff's Pursuit of Discovery Materials Via the Freedom of Information Act.*

***Communications with the Parties and the Court***

The Discovery Commissioner may communicate *ex parte* with the Court at his discretion, without providing notice to the parties, regarding logistics, the nature of his activities, management of the litigation, and other appropriate procedural matters.

***The Discovery Commissioner's Record***

The Discovery Commissioner shall maintain normal billing records of his time spent on this matter, with reasonably detailed descriptions of the activities and matters upon which the Discovery Commissioner has worked. If the Court asks the Discovery Commissioner to submit a formal report or



recommendation regarding any matter, the Discovery Commissioner shall submit such report or recommendation in writing for filing on the case docket. The Discovery Commissioner need not preserve for the record any documents created by the Discovery Commissioner that are docketed in this or any other court, nor any documents received by the Discovery Commissioner from counsel or parties in this case.

### ***Review of the Discovery Commissioner's Rulings***

The Discovery Commissioner shall either: 1) reduce any formal order, finding, report, ruling, or recommendations to writing and file it with the Circuit Clerk; or 2) issue any formal order, finding, report, ruling, or recommendation orally on the record before a court reporter. Any party may file an objection to an order, finding, report, ruling, or recommendation by the Discovery Commissioner within ten (10) business days of the date it was filed or issued orally on the record. Failure to meet this deadline results in permanent waiver of any objection to the Discovery Commissioner's orders, findings, reports, rulings, or recommendations. Absent timely objection, the orders, findings, reports, rulings, or recommendations of the Discovery Commissioner shall be deemed approved, accepted, and ordered by the Court, unless the Court expressly provides otherwise.

If the Discovery Commissioner issues an informal ruling or order that is not on the record (such as resolution of a discovery dispute) either orally, via email, or through other writing, and a party wishes to object to that ruling or order, the party shall ask the Discovery Commissioner to formalize the ruling or order by filing it on the docket or appearing to issue it orally on the record before a court reporter. Such request shall be made within three (3) business days of issuance of the informal order or ruling or the opportunity to object shall be waived. The procedures and deadlines outlined in this section shall then apply.

The Court shall decide *de novo* all objections to conclusions of law made or recommended by the Discovery Commissioner. The Court shall set aside a ruling by the Discovery Commissioner on a procedural matter only for an abuse of discretion. The Court shall retain sole authority to issue final rulings on matters formally submitted for adjudication, unless otherwise agreed by the parties, and subject to waiver of objection to written orders or recommendations as noted above. To the extent the Discovery Commissioner enters an order, finding, report, ruling, or recommendation regarding an issue of fact, the Court shall review such issue *de novo*, if any party timely objects pursuant to the Rules and within the ten (10) business day time period set forth herein. Failure to meet this deadline results in permanent waiver of any objection to the Discovery Commissioner's findings of fact.

***Compensation of the Discovery Commissioner***

The Discovery Commissioner shall be compensated at the rate of \$300.00 per hour, with defendants bearing 50% of this cost and the plaintiff bearing 50% of this cost. The Discovery Commissioner shall incur only such fees and expenses as may be reasonably necessary to fulfill his duties under this Order, or such other orders as this Court may enter. The Court has considered the fairness of imposing the likely expenses on the parties and has taken steps to protect against unreasonable expense or delay.

This Court also notes that some discovery disputes may involve only one or only certain defendants. For instance, there could be a motion to compel discovery filed by Plaintiff directed at only one Defendant. In this instance, the plaintiff would bear 50% of the cost, and the involved defendant(s) would bear the other 50% of the cost. The parties are instructed to confer and follow this instruction, but in the event that there is a dispute as to which parties are involved in a particular discovery dispute, counsel shall file a motion with the undersigned.



From time to time, on approximately a monthly basis, the Discovery Commissioner shall file an Itemized Statement of fees and expenses (not to include overhead). The Discovery Commissioner shall file with his Itemized Statement a Summary Statement, which shall list only the total amount billed and shall contain a signature line for the Court, accompanied by the statement "approved for disbursement". If the Court determines the Itemized Statement is regular and reasonable, the Court will sign the corresponding Summary Statement and transmit it to the parties. Plaintiff and Defendants shall each then remit to the Discovery Commissioner their respective 50% share of any court-approved amount, within thirty (30) calendar days of Court approval.

### ***Cooperation***

The parties and their counsel, including their successors in office, agents, and employees, shall provide full cooperation to the Discovery Commissioner, and any staff or consultant employed by the Discovery Commissioner, and observe faithfully the requirements of any orders of the Court and rulings of the Discovery Commissioner. The parties shall timely comply with rulings of the Discovery Commissioner issued pursuant to this Order. The Discovery Commissioner may, if appropriate, impose on a party any non-contempt sanction provided by Rule 37 or 47 of the West Virginia Rules of Civil Procedure, and may recommend a contempt sanction against a party and sanctions against a nonparty. As an agent and officer of the Court, the Discovery Commissioner (and those working at his discretion) shall enjoy the same protections from being compelled to give testimony and from liability for damages as those enjoyed by other judicial adjuncts performing similar functions.

### ***Access to Information***

The Discovery Commissioner may require reports from any party in a form specified by the Discovery Commissioner, as reasonably required to enable the Discovery Commissioner to perform all assigned duties.

The Discovery Commissioner SHALL have access to all Court filings in this matter and further SHALL have access to said files unredacted and shall be treated as a party regardless of any protective orders. As such, the Discovery Commissioner SHALL maintain the confidentiality of any redacted information and/or any information that is subject to a protective order.

The Clerk of this Court is directed to forward copies of this order to: all counsel of record; and to the Discovery Commissioner G. Nicholas Casey Jr at his address of 4401 Kanawha Ave. SE, Charleston, WV 25304; and to the Business Court Central Office at West Virginia Business Court Division, 380 West South Street, Suite 2100, Martinsburg, West Virginia, 25401.

IT IS SO ORDERED.

09-27-2023



SHAWN D. NINES, JUDGE  
WEST VIRGINIA  
BUSINESS COURT DIVISION

Date: 9/27/23  
Certified copies sent to:  
Counsel of record: E. McLaughlin  
Parties: M. Card  
Other: (please indicate) S. Gaine  
By: [initials]  
certified/1st class mail: [initials]  
fax: P. Conley  
hand delivery: R. Aliff  
interdepartmental: K. Bellman  
Other directives accomplished: G.N. Casey  
Deputy Circuit Clerk: Sus. Ct.