IN THE CIRCUIT COURT OF WOOD COUNTY, WEST VIRGINIA

CHARLESTON DIABETES AND ENDOCRINE CONSULTANTS, PLLC, a West Virginia Professional Limited Liability Company, PRASUNA JAMI, M.D., individually and in behalf all other similarly situated parties,

Plaintiffs,

Civil Action No.:16-C-457
Judge Jason Wharton

v.

HIGHMARK WEST VIRGINIA, INC., a West Virginia Corporation, formerly known as MOUNTAIN STATE BLUE CROSS & BLUE SHIELD, INC., and formerly known as BLUE CROSS AND BLUE SHIELD OF WEST CENTRAL WEST VIRGINIA, INC.,

Defendant.

PLAINTIFFS' RESPONSE TO DEFENDANT'S MOTION TO DISMISS AND PLAINTIFFS' MOTION TO AMEND COMPLAINT

NOW COME the Plaintiffs, Charleston Diabetes and Endocrine Consultants, PLLC and Prasuna Jami, M.D. (the "Plaintiffs"), by counsel, Scott S. Segal, C. Edward Amos, II and The Segal Law Firm, and Karen H. Miller, Joseph L. Amos, Jr. and the law office of Miller & Amos, Attorneys at Law, and hereby respond, as follows, to "Defendant's Motion to Dismiss," filed on December 5, 2016. The Plaintiffs also respectfully request to file an "Amended Complaint." (Attached hereto as **Exhibit 1.**)

I. Procedural History

On October 31, 2016, Plaintiffs filed their "Complaint" against Defendant Highmark West Virginia, Inc. ("Defendant Highmark"), citing breach of contract and

numerous breaches of West Virginia Code, as well as requesting class certification, pursuant to Rule 23 of the West Virginia Rules of Civil Procedure ("W. Va. R. C. P.").

Primarily, Plaintiffs' "Complaint" involves Defendant Highmark's contractual and statutory violations of the West Virginia Ethics and Fairness in Insurer Business Practices Act, W. Va. Code § 33-45-1 *et seq.*, otherwise known as the West Virginia Prompt Pay Act (the "Prompt Pay Act").

Simply stated, the Prompt Pay Act provides that an insurance company, such as Defendant Highmark, may only for a period of one (1) year, "Retroactively Deny" health providers' previously paid insurance claims, absent extraordinary circumstances. Plaintiffs contend that such extraordinary circumstances do not exist in their case, and that they, like countless other medical providers, are victims of Defendant Highmark's systematic practice to illegally "Retroactively Deny" healthcare providers' claims through the disguise of "audits," which cover periods of time in excess of the one (1) year statute of limitations.

On December 5, 2016, Defendant Highmark served upon Plaintiffs' counsel "Defendant's Motion to Dismiss," along with the accompanying "Defendant's Memorandum of Law in Support of its Motion to Dismiss." Defendant Highmark seeks dismissal of Plaintiffs' "Complaint" in its entirety, primarily based on the assertions that Plaintiffs do not have standing to bring their lawsuit because they have not been injured, and that Plaintiffs have not pled a single legal claim upon which relief can be granted. Plaintiffs request that "Defendant's Motion to Dismiss" be denied, as set forth below, and that "Plaintiff's Motion to Amend Complaint" be granted.

II. Legal Standards

1. The Supreme Court of Appeals of West Virginia (the "Supreme Court") has explained that:

> "[t]he purpose of a motion under Rule 12(b)(6) of the *West Virginia Rules of Civil Procedure* is to test the sufficiency of the complaint. A trial court considering a motion to dismiss under Rule 12(b)(6) must liberally construe the complaint so as to do substantial justice." *Cantley v. Lincoln County Comm'n,* 221 W.Va. 468, 470, 655 S.E.2d 490, 492 (2007). "Since the preference is to decide cases on their merits, courts presented with a motion to dismiss for failure to state a claim construe the complaint in the light most favorable to the plaintiff, taking all allegations as true." *Sedlock v. Moyle,* 222 W.Va. 547, 550, 668 S.E.2d 176, 179 (2008). Therefore, "[t]he trial court, in appraising the sufficiency of a complaint on a Rule 12(b)(6) motion, should not dismiss the complaint unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. *Conley v. Gibson,* 355 U.S. 41, 45–46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957)." Syllabus Point 3, *Chapman v. Kane Transfer Co., Inc.,* 160 W.Va. 530, 236 S.E.2d 207 (1977).[1]

2. Motions to amend a Complaint covered under W. Va. R. C. P. 15, should be granted when an amendment presents presentation of merits, the adverse party is not prejudiced, and all parties have ample opportunity to meet the issue.[2]

III. Analysis

A. Plaintiffs' contractual and statutory claims involving the Prompt Pay Act are ripe and should survive a Motion to Dismiss.

The vast majority of "Defendant's Memorandum of Law in Support of its Motion to Dismiss" steps far afield from the written allegations in the underlying "Complaint," with its continuous assertions that the Plaintiffs have suffered no injury-in-fact because they have not repaid Defendant Highmark any monetary amounts as a result of their

[1] *Hill v. Stowers,* 224 W. Va. 51, 54–55, 680 S.E.2d 66, 69–70 (2009).
[2] *See Interstate Drilling, Inc. v. Parcoil Gathering Sys.,* 199 W. Va. 359, 484 S.E.2d 475 (W. Va. 1997).

illegal audit.[3] Additionally, Defendant Highmark continually states that the Plaintiffs have not alleged any damages, which is not accurate. Ultimately, Defendant Highmark concludes that the Plaintiffs' claims are unripe, and that this Honorable Court lacks subject matter jurisdiction. This conclusion is not only improper procedurally under Rule 12(b), it is also wrong as a matter-of-law.

1. Count I – Breach of Contract

It is acknowledged by Defendant Highmark, in "Defendant's Memorandum of Law in Support of its Motion to Dismiss," that a valid contractual relationship, titled "Network Agreement," exists between the parties.[4] It cannot be in dispute that the "Network Agreement" requires conformance with the Prompt Pay Act, as it states:

> [Defendant Highmark] shall adhere to and comply with the standards for processing and payment of claims for health care service set forth in the Prompt Pay Act [W.Va. Code § 33-45-1 *et seq.*] for claims subject to this law and as set forth in the Provider Manual.[5]

First, in an attempt to dismiss Plaintiffs' breach of contract claim, Defendant Highmark makes the argument that the audit process is incomplete and, therefore, the lawsuit is unripe. Defendant Highmark steps far outside of the "Complaint" in its argument and asserts that negotiations were ongoing at the time the Plaintiffs ceased communications and filed their lawsuit.[6] Defendant Highmark goes even further outside the "Complaint" to speculate that had the Plaintiffs not filed this lawsuit, the result of the audit **may** have been that Defendant Highmark would not have recouped the payments that Plaintiffs contend violate the Prompt Pay Act.[7] Nonetheless,

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[3] See "Defendant's Memorandum of Law in Support of its Motion to Dismiss," at pgs. 1 and 5.
[4] *Id.* at pgs. 1 and 2.
[5] See "Complaint" at Exhibit 1, § K.
[6] See "Defendant's Memorandum of Law in Support of its Motion to Dismiss," at pg. 5.
[7] *Id.* at 8.

Defendant Highmark's speculations are irrelevant, and the Plaintiffs appropriately pled a breach of contract.

Plaintiffs' theory of the case, in part, is that Defendant Highmark illegally "Retroactively Denied" previously paid claims past the applicable one (1) year statute of limitations. This breach of contract claim matured when Defendant Highmark sent its "Retrospective Post-Payment Audit" results to the Plaintiff on or about September 9, 2015, seeking an overpayment of One Hundred Forty-Six Thousand Three Hundred Sixty-Seven Dollars ($146,367). At that point, the audit was complete and an illegal monetary demand was made by Defendant Highmark. The Plaintiffs acknowledged that Defendant Highmark does provide its medical providers with certain avenues to challenge the audit results; however, the Plaintiffs contend this is also illegal and in violation of the Prompt Pay Act.[8] The fact that negotiations, if any, had taken place or were taking place between the parties prior to the filing of the lawsuit, is irrelevant and inadmissible. The bottom line is that Defendant Highmark had already improperly or illegally "Retroactively Denied" the claims and sought re-payment of the alleged overpayment.

Next, Defendant Highmark makes the argument that the Plaintiffs have not suffered an injury-in-fact or alleged any damages and, therefore, the breach of contract claims should be dismissed. However, Plaintiffs' breach of contract claims have been sufficiently pled, based on the language in the "Complaint" as well as on the theory of statute of limitations and nominal damages.

Rule 8(a) of the W. Va. R. C. P. states that a complaint ". . . shall contain (1) a short and plain statement of the claim showing that the pleader is entitled to relief, and

[8] See "Complaint," at Count III, pgs. 9-10.

(2) a demand for judgment for relief the pleader seeks." The Supreme Court has stated that "[c]omplaints are to be read liberally as required by the notice pleading theory underlying the West Virginia Rules of Civil Procedure."[9]

The Plaintiffs "Complaint," under "Count I - Breach of Written Contract ("Network Agreement")," pleads the following damages:

> 27. As a direct and proximate result of Defendant Highmark's breach of the "Network Agreement," as detailed in this Complaint, the Plaintiffs have suffered and are entitled to compensatory damages, pursuant to W.Va. Code § 33-45-3.
>
> 28. Defendant Highmark's actions were willful, wanton, and/or undertaken with reckless disregard for the rights of the Plaintiffs, thus the Plaintiffs are entitled to punitive damages in an amount to be determined by the jury.
>
> 29. As a direct and proximate result of Defendant Highmark's breach of the "Network Agreement," the Plaintiffs are entitled to an award of attorney fees and costs, pursuant to W.Va. Code § 33-45-3.

Said language in the "Complaint" satisfies the notice pleading requirement. It is improper for Defendant Highmark to allege in "Defendant's Memorandum of Law in Support of its Motion to Dismiss" that the Plaintiffs have not suffered any damages because they have not paid it any money. Plaintiffs allege that compensatory damages can come in various other forms. It would be appropriate for Defendant Highmark to inquire about this matter further during pre-trial discovery, or by possibly submitting a motion for a more definite statement pursuant to Rule 12, if this Court deems it necessary. Further, as explained below, breach of contract claims do not require that

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[9] *State ex rel. McGraw v. Scott Runyan Pontiac-Buick, Inc.*, 194 W. Va. 770, 776, 461 S.E.2d 516, 522 (1995) (*quoting Mandolidis v. Elkins Indus., Inc.*, 161 W.Va. 695, 246 S.E.2d 907 (1978); *John W. Lodge Distrib. Co., Inc. v. Texaco, Inc.*, 161 W.Va. 603, 245 S.E.2d 157 (1978). *See also Conley v. Gibson*, 355 U.S. 41, 47–48, 78 S.Ct. 99, 102–03, 2 L.Ed.2d 80, 85–86 (1957)).

the non-breaching party be damaged in order to bring a civil action against the breaching party.

The Supreme Court has ". . . consistently held that the statute of limitations begins to run when the breach of the contract occurs or when the act breaching the contract becomes known. The statute of limitations does not begin to run when a party to the contract declares a forfeiture."[10] Thus, the Plaintiffs have access to the courts immediately upon the breach of contract, and could, in fact, harm themselves by waiting for total forfeiture by Defendant Highmark.

Also, it is imperative to note that Plaintiffs pled in their "Complaint" that:

> On or about September 9, 2015, Defendant Highmark notified the Plaintiffs, via written correspondence, of the "retrospective post-payment audit" results. Defendant Highmark demanded that the Plaintiffs remit to it an "overpayment" in the amount of One Hundred Forty-Five Thousand Three Hundred Sixty-Seven Dollars ($145,367), through: (1) remittance of the entire refund; (2) offset against future Highmark WV payments; or (3) remittance via installment payments.[11]

Had the Plaintiffs not filed their lawsuit when they did, they would be at the total mercy of Defendant Highmark, who could, at any time, start offsetting the alleged overpayment amount against future claim payments.

Additionally, Defendant Highmark has overlooked the availability of nominal damages, which permits a breach of contract claim to survive and the exact damages to be developed through discovery. The Supreme Court has held as good law since 1936, that:

> "[w]here a complaint sets up a contract and alleges a breach thereof, a demurrer, on the ground that the complaint does not state facts sufficient to constitute a cause of action, is not

[10] *McKenzie v. Cherry River Coal & Coke Co.*, 195 W. Va. 742, 749, 466 S.E.2d 810, 817 (1995).
[11] See "Complaint" at ¶ 10.

> well taken, since plaintiff is entitled to nominal damages at least." *Sunnyside Land Co. v. Willamette Bridge Railway Co.*, 20 Or. 544, 26 P. 835.[12]

Defendant Highmark has glossed over such holding, and instead stated on pg. 10 of "Defendant's Memorandum of Law in Support of its Motion to Dismiss" that:

> In order to establish a breach of contract claim, Plaintiffs must plead and ultimately prove (1) the existence of a valid, enforceable contract, (2) that they performed under the contract, (3) that Highmark WV breached its duties under the contract, and (4) that they have been injured as a result. *See, e.g.*, ***Executive Risk*** *Indem., Inc., v. Charleston Area Med. Ctr., Inc*, 681 F. Supp.2d 694, 730 (S.D. W. Va. 2009). (Emphasis added).
>
> Plaintiffs, however, have not pleaded that Highmark WV breached the parties' contract or that they have been damaged.

Although Defendant Highmark's quotation adequately captures the elements of breach of contract, it completely ignores the court's other rulings. In fact, the *Executive Risk* court stated, and Defendant Highmark **omitted,** that:

> Because I [Judge Joseph R. Goodwin] have found that CAMC has alleged that ERC breached a contract, then **I am permitted to infer that CAMC has suffered at least nominal damages sufficient to state a claim. *Id.* CAMC may still prove other damages at trial, but nominal damages arising from a breach ensures that CAMC can survive a motion to dismiss.** I therefore **FIND** that CAMC has alleged sufficient facts to state a claim for breach of contract, and ERC's Motion to Dismiss is **DENIED** as to CAMC's breach of contract claim.[13] (Emphasis added.)

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[12] Syl. Pt. 2, *Harper v. Consol. Bus Lines*, 117 W. Va. 228, 185 S.E. 225 (1936).
[13] *Exec. Risk Indem., Inc. v. Charleston Area Med. Ctr., Inc.*, 681 F. Supp. 2d 694, 726 (S.D.W. Va. 2009).

Therefore, based upon the law cited above, it is appropriate for the Court to allow Plaintiffs' breach of contract claim to continue because, at a minimum, there is an inference of nominal damages.

2. Counts II and III - Breach of the Prompt Pay Act

Count II of Plaintiffs' "Complaint" is similar to Count I, in that it seeks recovery for Defendant Highmark's "Retroactive Denial" of Plaintiffs' previously paid claims, in violation of West Virginia Code. However, Count III seeks recovery from Defendant Highmark for its failure to implement reasonable policies for reconsideration of "Retroactive Denials."

The Prompt Pay Act details that any provider's loss caused by an insurer's (such as Defendant Highmark) breach of the Prompt Pay Act, allows for a private cause of action to recoup such loss. W. Va. Code § 33-45-3, titled "Damages, attorney fees and costs available to providers upon insurer's violation of article or breach of contract provisions," states:

> Any provider who suffers loss as the result of an insurer's violation of any provision of this article or an insurer's breach of any provider contract provision required by this article is entitled to initiate an action to recover actual damages. The commissioner shall not be deemed to be a "trier of fact" for purposes of this section.

Although, Defendant Highmark states that the Plaintiffs do not plea any damages, embodied in the "Complaint" is the following:

REQUEST FOR RELIEF

> **WHEREFORE,** Plaintiffs requests [sic] that they and the Class be awarded the following:
>
> a. Reformation of Defendant Highmark's audit policy to comport with West Virginia law;

b. Compensatory damages in an amount to be determined by a jury;
c. Punitive damages, to the extent warranted by the evidence and warranted by the law;
d. Pre and post judgment interest as allowed by law;
e. Reasonable attorneys' fees, costs and expenses; and
f. Any other and further relief as this Honorable Court deems just and appropriate under the circumstances.[14]

Additionally, in Paragraphs 27 (Count I), 33 (Count II), and 44 (Count III), Plaintiffs clearly state, and put Defendant Highmark on notice, that they ". . . have suffered and are entitled to compensatory damages, pursuant to W. Va. Code § 33-45-3."

Further, in Paragraphs 29, 35, and 46, Plaintiffs make a statutory claim for attorney fees, pursuant to the language of the Prompt Pay Act. Therefore, the plain language of the "Complaint" appropriately pleads damages. Based upon the language in the "Complaint," the Plaintiffs have certainly pled damages and put Defendant Highmark on notice of the types of damages they seek. Should it desire more information, Defendant Highmark should engage in pre-trial discovery, as opposed to moving for dismissal of the entire suit.

3. Count IV - Breach of the West Virginia Unfair Trade Practice Act and Motion to file an "Amended Complaint."

Plaintiffs wish to withdraw Count IV from the "Complaint" and, in order to do so, respectfully request that this Honorable Court permit them to file an "Amended Complaint." This civil action is currently in its infancy. Defendant Highmark has not yet filed an "Answer" in this matter, and no discovery has been exchanged. Further, at this time, the Plaintiffs do not intend to add any additional causes of action in their "Amended Complaint," but do request the right to add additional allegations in support

[14] See Complaint at 14-15.

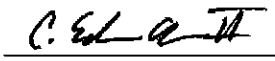
of the already existing causes of action. Therefore, Defendant Highmark will not be prejudiced by the filing of an "Amended Complaint."

However, the Plaintiffs do not intend or consent to blanket waiving of the possibility of filing other Amended Complaints involving additional causes of action which may come to light through discovery.

WHEREFORE, for the foregoing reasons, the Plaintiffs request that this Honorable Court **DENY** "Defendant's Motion to Dismiss" and **GRANT** "Plaintiffs' Motion to Amend."

CHARLESTON DIABETES AND ENDOCRINE CONSULTANTS, PLLC AND PRASUNA JAMI, M.D.

By Counsel:



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CERTIFICATE OF SERVICE

I, C. Edward Amos, II, counsel for the Plaintiffs, do hereby certify that I have caused to be served the foregoing, ***Plaintiffs' Response to Defendant's Motion to Dismiss and Plaintiffs' Motion to Amend Complaint***, upon the Defendant, by mailing a true copy thereof to the counsel of record for the Defendant via United States mail, postage pre-paid on this the 30th day of January, 2017, duly addressed as follows:

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