

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

WEST VIRGINIA RADIO CORPORATION, and
WEST VIRGINIA NEWSPAPER PUBLISHING
COMPANY d/b/a THE DOMINION POST
Plaintiff(s),

vs.

Civil Action No.: 13-C-468
(Judge Thomas C. Evans, III)

WEST VIRGINIA UNIVERSITY BOARD OF
GOVERNORS, WEST VIRGINIA UNIVERSITY
FOUNDATION, INC., WEST VIRGINIA MEDIA
HOLDINGS, LLC, ANDREW A. PAYNE, III, DAVID
B. ALVAREZ, ALBERT BRAY CARY, JR., RALPH
BALLARD, RICHARD BALLARD, OLIVER LUCK,
JAMES P. CLEMENTS, and IMG COLLEGE, LLC,
Defendant(s).

**ORDER DENYING THE MOTION OF WEST VIRGINIA UNIVERSITY BOARD OF
GOVERNORS TO UNSEAL DOCUMENTS RESPONSIVE TO
REQUEST FOR PRODUCTION NO. 87 AND GRANTING CROSS-MOTION FOR PROTECTIVE
ORDER OF PLAINTIFF WEST VIRGINIA RADIO CORPORATION**

This matter came before the Court pursuant to the "Motion of West Virginia University Board of Governors to Unseal Documents Responsive to Request for Production No. 87" and a cross-motion made by Plaintiff West Virginia Radio Corporation for a protective order. The matter has been fully briefed and is submitted for decision.

The West Virginia University Board of Governors asserts that the documents responsive to Request for Production No. 87 have probative value likely to lead to discoverable evidence with respect to the credibility of witnesses about to be deposed during discovery. Movant further asserts that the information is relevant as to any bias and may be used for impeachment purposes, especially regarding financial information in the event that said witnesses would be unable to appear at trial. The information sought, which was required to be filed under seal with the Clerk, relates to WV Radio's revenue and

financial data. Therefore, Defendant requests that this Court unseal the documents responsive to Request for Production No. 87 and permit inquiry into the financial data during the upcoming discovery depositions.

As Plaintiff points out, this Court has previously determined that WV Radio's revenue and financial data as it relates to WVU's Mountaineer Sports Network is not relevant to any of the underlying claims or defenses in this lawsuit and may be relevant at trial only to establish the bias of employees called by WV Radio to testify. WV Radio's commercially sensitive information was filed under seal and is now entitled to a protective order limiting the scope of the depositions of and WV Radio employees, including Rule 30(b)(7) representatives, to exclude examination on the topic of the financial data of WV Radio.

West Virginia Rule of Civil Procedure 26(b)(1) states in pertinent part that "[p]arties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action...." W. Va. R. Civ. P. 26(b)(1). However when parties step beyond the scope of permissible discovery, the other side may seek issuance of a protective order from the court seeking, among other things, to prevent discovery from being had, to limit the scope of the discovery to certain matters, and to restrict inquiry into certain matters. W. Va. R. Civ. P. 26(c)(1), (2), (4). Such a motion for protective order should be granted where justice requires in order to protect a person or party from annoyance, embarrassment, oppression, or undue burden or expense. W. Va. R. Civ. P. 26(c).

Here, the Motion to Unseal must be denied and overruled as premature so as to protect WV Radio from the undue burden of revealing its sensitive financial information to competitors in this litigation. The Court previously stated during oral argument on WVU BOG's motion to compel that information about WV Radio's revenue from production or affiliation contracts with WVU is relevant *only*:

to the extent that the witness would know, have knowledge of revenue generated from West Virginia Radio's previous association with MSN and WVU, that that is a factor that is — that the jury knows that this witness knows that information and knows what the information is because it could tend to show bias of the witness toward West Virginia Radio.

(Exhibit A at 85:22-86:4.) The Court has previously ruled that this financial information was relevant only to the purported bias of WV Radio employees offered as witnesses at trial. The Court struck a careful balance on this issue, requiring the production of WV Radio's financial information from 2008-2011, but limiting the Defendants' access to that information to use at trial if, and only if, WV Radio proffered WV Radio employees as part of its case and good cause is shown that disclosure at that time will be relevant on the issue of bias and the credibility of a particular witness. Since that ruling, WV Radio has not designated trial witnesses nor is there currently any evidence that any WV Radio employees would be unavailable to testify at a trial if necessary nor is there submitted documents or affidavits, depositions or other discovery material from which the court might find that disclosure is appropriate.

Furthermore, this Court cannot find that barring access to this financial data prejudices any of the Defendants. The Court's Second Amended Scheduling Order contemplates that the parties will exchange final witness lists on or before May 22, 2015, after which the parties have until June 3, 2015, to complete any necessary trial depositions. (Second Amended Scheduling Order at ¶¶ 7-8.) If WV Radio identifies any WV Radio employees as trial witnesses and WVU BOG or the other Defendants submit evidence that these witnesses are likely to be unavailable for trial, and shows a factual basis for disclosure, WVU BOG or other Defendants may move this Court for access to WV Radio's sealed financial information to allow them to conduct any necessary trial depositions. Therefore, this Court denies Defendant's Motion to Unseal.

Plaintiff WV Radio seeks a protective order to prohibit the inquiry at depositions of WV Radio or its employees into WV Radio's revenue and financial information as it relates to its historical dealings with WVU and the Mountaineer Sports Network, including the documents filed under seal in response to RFP 87. First, because the information is relevant only to show purported bias in a trial witness who also possesses that knowledge, it contravenes the reasoning of the Court to allow WVU BOG to call a Rule 30(b)(7) witness to specifically testify to revenues generated by WVRC as a result of its production and/or

affiliation contracts or agreements with West Virginia University from 2008 through 2012. If, however, a testifying witness at trial has knowledge of the financial data, and there is good cause shown for disclosure, then that trial witness can be examined on the extent of his or her knowledge of such information without regard for a corporate representative's knowledge of that information.

Accordingly, this Court finds it appropriate to limit the scope of the discovery and restrict inquiry into this matter, pursuant to the West Virginia Rules of Civil Procedure. THEREFORE, this Court DENIES the Motion of West Virginia University Board of Governors to Unseal Documents Responsive to Request for Production No. 87 and GRANTS the Cross-Motion for Protective Order of Plaintiff West Virginia Radio Corporation, prohibiting Defendants from probing into this area during any discovery deposition of WV Radio's employees or representatives.

The Court directs the Circuit Clerk to distribute attested copies of this order to all counsel of record, any *pro se* parties, and the Business Court Division Central Office, Berkeley County Judicial Center, 380 W. South Street, Martinsburg, West Virginia 25401, or via email at Business.Court@courtswv.gov.

ENTER: March 11, 2015



THOMAS C. EVANS, III, CIRCUIT JUDGE
BUSINESS COURT DIVISION

ENTERED

March 11, 2015

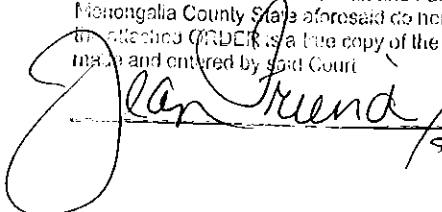
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JEAN FRIEND, CIRCUIT CLERK

STATE OF WEST VIRGINIA, SS:

I, Jean Friend, Clerk of the Circuit and Family Courts of Monongalia County, State aforesaid, do hereby certify that the attached ORDER is a true copy of the original Order made and entered by said Court.



Circuit Clerk