

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

HIGHMARK WEST VIRGINIA, INC.,

Plaintiff,

vs.

Civil Action No.: 18-C-271

Presiding Judge: Shawn D. Nines

Resolution Judge: Christopher C. Wilkes

MEDTEST LABORATORIES, LLC, et al.,

Defendants.

MEDTEST LABORATORIES LLC,

Counterclaim and Third-Party
Plaintiff,

vs.

HIGHMARK WEST VIRGINIA INC., et al.,

Counterclaim and Third-Party
Defendants.

**ORDER GRANTING IN PART PLAINTIFF'S MOTION TO COMPEL AND DENYING
DEFENDANTS' EMERGENCY MOTION FOR STAY**

This matter came before the Court this 13th day of July 2021, upon Plaintiff Highmark West Virginia Inc.'s Motion to Compel. The Plaintiff, Highmark West Virginia Inc., by counsel, Stuart A. McMillan, Esq., and Defendant and Counterclaim Plaintiff, MedTest Laboratories, LLC, by counsel, Patrick J. Sheehan, Esq., 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.

ENTERED

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CELESTE RIDGWAY
CLERK, CIRCUIT COURT

FINDINGS OF FACT

1. This matter was initiated with the Complaint filed on or about October 18, 2018, alleging causes of action for fraudulent misrepresentation & inducement (Count I); breach of contract (Count II), unjust enrichment (Count III); civil conspiracy (Count IV); joint venture (Count V); negligence (Count VI); and “piercing the MedTest LLC veil” (Count VII), related to an alleged billing scheme wherein Plaintiff Highmark West Virginia (hereinafter “Plaintiff” or “Highmark WV”) alleged Defendants MedTest Laboratories, LLC (hereinafter “MedTest”), Brice and/or Billy Taylor, Muhammad Amjad, Ph. D., Michael Chen, Ph. D., and James Taylor, carried out a billing scheme by making fraudulent claims for insurance benefits to Plaintiff¹. See Compl., ¶¶1, 37-80. On September 13, 2019, Plaintiff filed an Amended Complaint adding Cenegen, LLC as a Defendant, and this Amended Complaint asserts the same causes of action as the original Complaint in the matter². See Am. Compl., ¶¶39-82.

2. Plaintiff served its first discovery requests on MedTest on February 15, 2019. See Pl’s Mot., p. 4; *see also* Def’s Resp., p. 4. Plaintiff served its second discovery requests on MedTest on December 13, 2019. *Id.* Although MedTest has produced documents pursuant to these requests, Plaintiff alleges “MedTest’s productions are substantially deficient”. See Pl’s Mot., p. 4-5.

3. On or about May 11, 2021, Plaintiff filed the instant Plaintiff Highmark West Virginia Inc.’s Motion to Compel, seeking an order compelling Defendants to respond to certain discovery requests, mainly involving laboratory records, including requisition forms and laboratory test results, arguing “MedTest has refused to either provide the records or admit that it does not possess the records”. See Pl’s Mot., p. 4, 6-7. The motion also seeks “documents and communications between

¹ The Court notes Defendants filed a motion to dismiss the entire Complaint, and this motion was denied by Judge Waters by Order Denying Defendants’ Motion to Dismiss filed March 21, 2019. See Ord., 3/21/19.

² The Court notes that thereafter, on September 13, 2019, Defendants filed their First Amended Counterclaims and Third-Party Complaint asserting their own various causes of action. See First Am. Counterclaims and Th. Pty. Compl., ¶¶108-139.

MedTest and Health Care Providers” and any agreements between MedTest and “reference labs” and “all records showing that MedTest referred tests to and supervised these labs”. *Id.* at 7-8. Finally, the motion also seeks communications in the form of “text messages or social media correspondence”. *Id.* at 8.

4. On or about June 14, 2021, Defendant filed its Response in Opposition to Plaintiff/Counterclaim-Defendant Highmark West Virginia’s Motion and Cross-Motion for a Protective Order, arguing the motion to compel should be denied and moving the court for a protective order limiting discovery under Rule 26(c)(2) and 37(a)(2) of the West Virginia Rules of Civil Procedure. *See* Def’s Resp., p. 1. 2.

5. On a prior day, Plaintiff fled Plaintiff Highmark West Virginia Inc.’s Response to Defendant MedTest Laboratories, LLC’s Cross-Motion for a Protective Order, stating MedTest did not prevail on its partial motion for summary judgment. *See* Resp., p. 2.

6. On June 29, 2021, Defendants filed their Emergency Motion to Stay.

7. On Jun 30, 2021, the Court received Highmark’s Response in Opposition to the Emergency Motion to Stay.

8. On July 1, 2021, a hearing was held on the Emergency Motion to Stay.

9. The motion to compel was discussed a hearing on MedTest’s Emergency Motion for Stay on July 1, 2021 via Microsoft Teams. Stuart A. McMillan and Peter G. Markham appeared for Plaintiff, and Samuel A. Hrko and Patrick J. Sheehan appeared for the MedTest Defendants. Defendant Muhammad Amjad, PH.D. appeared pro se.

10. The Court finds the issue ripe for adjudication.

CONCLUSIONS OF LAW

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).

Pursuant to Rule 37(a)(2) of the West Virginia Rules of Civil Procedure, if a party fails to respond to written discovery requests, “the discovering party may move for an order compelling an answer, or a designation, or an order compelling inspection in accordance with the request.” W. Va. R. Civ. P. 37(a)(2). “[A]n evasive or incomplete answer or response is to be treated as a failure to answer or respond.” W. Va. R. Civ. P. 37(a)(3).

W. Va. R. Civ. P. 26(b)(1) permits discovery of any non-privileged matter that is relevant to the subject matter of the action. “The scope of discovery in civil cases is broad.” *State ex rel Shroades v. Henry*, 187 W. Va. 723, 725, 421 S.E.2d 264, 266 (1992). Broad discovery is necessary to eliminate surprise and trial by ambush. *McDougal v. McCammon*, 193 W. Va. 229, 237, 455 S.E.2d 788, 796 (1995); *Graham v. Wallace*, 214 W. Va. 178, 184-85, 588 S.E.2d 167, 173-174 (2003). Further discovery is not limited “only to admissible evidence, but applies to information reasonably calculated

to lead to the discovery of admissible evidence.” *State ex rel. Arrow Concrete Co. v. Hill*, 194 W. Va. 239, 246, 460 S.E.2d 54, 61 (1995).

Plaintiff has filed the instant motion to compel, arguing MedTest “has failed to provide full and complete responses to Highmark WV’s discovery requests and the responses it has provided are evasive or incomplete, despite Highmark WV’s good faith efforts to confer with MedTest to remedy its deficiencies”. See Pl’s Mot., p. 9. Plaintiff seeks an order compelling Defendants to respond to certain types of discovery requests: those involving laboratory records, specifically supporting records requesting and authorizing the laboratory tests and records of the test results, documents regarding reference laboratories, discovery regarding health care providers, mainly addiction/recovery centers, who provided specimens for testing to MedTest or one of MedTest’s contract laboratories, and communications in the form of “text messages or social media correspondence”. *Id.* at 9-10. The Court will take the issues in turn.

Laboratory Records

First, the Court considers the motion’s request for certain laboratory records. Such records, including records requesting and authorizing the laboratory tests and records of the test results, are sought by Plaintiff, as Plaintiff avers they are necessary in order to substantiate MedTest’s claims that the laboratory tests for which MedTest claimed reimbursement from Plaintiff were performed and were legitimate. See Pl’s Mot., p. 9-10.

The Court finds this information must be compelled. Defendants indicated in their response, and at the July 1 hearing, that they never said they would not comply, and that they were not making a massive effort to fully comply because of their Motion for Summary Judgment that was pending. The Court notes a pending motion is not a stay on discovery. At any rate, the pending motion for partial summary judgment has now been ruled upon. The Court grants the motion as to this discovery request.

Reference Laboratories

Second, the Court considers the motion's request for certain discovery related to "reference laboratories". Plaintiff avers evidence has shown that specimens from all over the country were sent to undisclosed laboratories with whom MedTest had a contract to pay a flat fee per specimen. *See* Pl's Mot., p. 2. Plaintiff argues MedTest then submitted claims for the tests as if it had performed the test itself. *Id.* Plaintiff seeks records relating to all the labs to which MedTest contracted out its lab testing and communications containing responsive material for this reason³. *Id.* at 4. Plaintiff argues MedTest has only produced some contracts and invoices related to its contracted reference labs, and no substantive records supporting referral of individual specimens for testing or MedTest's supervision of any lab. *Id.* at 8.

With regard to this category, Defendant argues the motion should be denied because Plaintiff did not properly meet and confer with regard to this alleged discovery deficiency prior to filing the instant motion to compel. *See* Def's Resp., p. 13. Specifically, with regard to this category, Defendant avers that none of Plaintiff's discovery correspondence ever raised any deficiencies with MedTest's responses to this request. *Id.* at 7.

Rule 37 of the West Virginia Rules of Civil Procedure provides, in pertinent part:

(2) *Motion.* If a deponent fails to answer a question propounded or submitted under Rule 30 or 31, or a corporation or other entity fails to make a designation under Rule 30(b)(7) or 31(a), or a party fails to answer an interrogatory submitted under Rule 33, or if a party, in response to a request for inspection submitted under Rule 34, fails to respond that inspection will be permitted as requested or fails to permit inspection as requested, the discovering party may move for an order compelling an answer, or a designation, or an order compelling inspection in accordance with the request. The motion must include a certification that the movant in good faith has conferred or attempted to confer with the person or party failing to make the discovery in an effort to secure the information or action without court action.

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

³ Plaintiff avers Requests for Production Nos 51-53 and 2-12 of Highmark's Second Requests for Production requested this discovery regarding reference lab contracts. *See* Pl's Mot., p. 7.

Here, while the Court will not grant the motion due to concerns over the threshold meet and confer requirement being met, the Court reminds the parties of their duty to participate in discovery and to meet and confer regarding specific discovery disputes. It seems that Defendants ongoing concerns in the response to the instant motion regarding the stay while waiting on a West Virginia Supreme Court decision and not fully participating in discovery due to its own pending motion for partial summary judgment have now been alleviated. The Court expects the parties to work together and that all discoverable material to be produced. If parties cannot come to an agreement after a specific meet and confer, then a motion to compel may be filed. At this time, the instant motion is denied as to this request.

Providers

Third, the Court considers the motion's request for discovery regarding health care providers, mainly addiction/recovery centers, who provided specimens for testing to MedTest or one of MedTest's contract laboratories. Plaintiff avers it seeks this information in order to discern the relationship or affiliation that MedTest had with these providers located in multiple states throughout the country in order to explain why these providers "are funneling their laboratory tests to MedTest". See Pl's Mot., p. 10.

Like the previous category, with regard to this category, Defendant argues the motion should be denied because Plaintiff did not properly meet and confer with regard to this alleged discovery deficiency prior to filing the instant motion to compel. See Def's Resp., p. 13. Specifically, Defendant argues Plaintiff took issue with Defendant's response to this request one time in January 2020 via letter, and Defendant fully responded in its February 2020 response letter. *Id.* at 7. Defendant avers Plaintiff "never raised any issues with respect to MedTest's response" to this request again. *Id.*

Here, while the Court will not grant the motion due to concerns over the threshold meet and confer requirement being met, the Court reminds the parties of their duty to participate in discovery and to meet and confer regarding specific discovery disputes. It seems that Defendants ongoing concerns in the response to the instant motion regarding the stay while waiting on a West Virginia Supreme Court decision and not fully participating in discovery due to its own pending motion for partial summary judgment have now been alleviated. The Court expects the parties to work together and that all discoverable material to be produced. If the February 2020 response letter was not sufficient, the Court directs the parties to discuss what, exactly, is still being sought by Highmark. If parties cannot come to an agreement after a specific meet and confer, then a motion to compel may be filed. At this time, the instant motion is denied as to this request.

Text Message and Social Media Communications

Finally, fourth, the Court considers the motion's request for communications in the form of "text messages or social media correspondence". Plaintiff avers evidence in this case, specifically text message productions from Defendant Amjad, show records of communications responsive to its request exist. *See* Pl's Mot., p. 8, 10. Further, Plaintiff averred it has "reason to believe" there are relevant and responsive communications over social media platforms that have not been produced as well. *Id.* at 8-9.

Like the previous two categories, with regard to this category, Defendant argues the motion should be denied because Plaintiff did not properly meet and confer with regard to this alleged discovery deficiency prior to filing the instant motion to compel. *See* Def's Resp., p. 13. Specifically, with regard to this category, Defendant avers that none of Plaintiff's discovery correspondence ever raised any deficiencies with MedTest's responses to this request. *Id.* at 7.

Here, while the Court will not grant the motion due to concerns over the threshold meet and confer requirement being met, the Court reminds the parties of their duty to participate in discovery and to meet and confer regarding specific discovery disputes. It seems that Defendants ongoing concerns in the response to the instant motion regarding the stay while waiting on a West Virginia Supreme Court decision and not fully participating in discovery due to its own pending motion for partial summary judgment have now been alleviated. The Court expects the parties to work together and that all discoverable material to be produced. If parties cannot come to an agreement after a specific meet and confer, then a motion to compel may be filed. At this time, the instant motion is denied as to this request.

Motion for Stay

Next, the Court addresses MedTest's Emergency Motion to Stay filed June 29, 2021. Defendants seek a complete stay in the instant civil action largely based on a Criminal Complaint filed against Defendant Billy Taylor in federal court in Arkansas. The parties and the Court acknowledge that it involves a common subject of billing fraud schemes. At the hearing held July 1, 2021, the Court stated that it is not uncommon for civil and criminal cases to go on at the same time, advised the parties to communicate with Billy Taylor's criminal attorney and U.S. Attorneys, and potentially the federal court probation office, involved in the Arkansas matter to discuss what exactly he can and cannot do with regard to contact with patient records as part of his bond terms. Counsel for Highmark indicated their position is they will not be prejudiced by any potential ways that Mr. Taylor could not participate in discovery due to the bond conditions at this point in the litigation. The parties noted that Mr. Taylor's corporate deposition which was scheduled for on or about July 9, 2021 has been postponed.

While counsel for Defendants proposed a 120-day stay, the Court finds this would not serve to keep the case moving, 120 days would push right up against the discovery deadline in this case, and

given the nature of an indictment that may come, the parties would be in the same position in 120 days. The Court noted there is not allegations of any criminal conduct which is violent where the safety of others is at risk. The Court does not find that the common subject of billing fraud schemes necessitates or justifies a stay of discovery in this civil action in Wood County. The Arkansas case involves alleged fraud of the U.S. government, not a private insurer. At this time, counsel for Highmark averred at the hearing that the focus in the alleged actions in this case involve opioid rehab centers, which counsel averred is not the subject of the allegations in the federal case. Counsel for Highmark argued at the hearing that it is not a victim of the particular scheme alleged in the federal matter in Arkansas.

The court finds and concludes a brief, partial thirty (30) day stay is appropriate here. During this time, the parties are directed to meet and confer, and to confer with the appropriate federal officials in Arkansas in order to plan how to best move forward with discovery in this matter without Mr. Taylor running afoul of the terms of his bond.

The Court notes that during this stay of depositions and discovery related to items subject to Mr. Taylor's bond and potential forfeiture affidavits, unrelated discovery may still be produced, as detailed in the above section on the pending motion to compel.

CONCLUSION

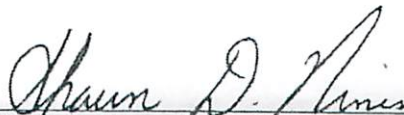
Accordingly, it is hereby **ADJUDGED** and **ORDERED** that Plaintiff Highmark West Virginia Inc.'s Motion to Compel is hereby **GRANTED IN PART AND DENIED IN PART**.

It is further hereby **ADJUDGED** and **ORDERED** that Defendants' Emergency Motion to Stay is hereby **DENIED**.

It is further hereby **ADJUDGED** and **ORDERED** that a partial thirty day **STAY** of certain discovery regarding Billy Taylor is in effect. It is further hereby **ADJUDGED** and **ORDERED** that unrelated discovery subject to the motion to compel shall still be produced during this time.

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

07-13-2021
date of entry


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

STATE OF WEST VIRGINIA
COUNTY OF WOOD, TO-WIT:

I, CELESTE RIDGWAY, CLERK OF THE CIRCUIT COURT
OF WOOD COUNTY, WEST VIRGINIA, HEREBY
CERTIFY THAT THE FOREGOING IS A TRUE AND COMPLETE
COPY OF AN ORDER ENTERED IN SAID COURT, ON THE
13 DAY OF JULY 2021
AS FULLY AS THE SAME APPEARS TO ME OF RECORD.
GIVEN UNDER MY HAND AND SEAL OF SAID CIRCUIT
COURT, THIS 14 DAY OF JULY, 2021.


CLERK OF THE CIRCUIT COURT OF
WOOD COUNTY, WEST VIRGINIA

BY:


DEPUTY