

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.

ENTERED

D.B. No. _____

Page _____

MAR 27 2020

CELESTE RIDGWAY
CLERK CIRCUIT COURT

**ORDER DENYING THIRD-PARTY DEFENDANTS' MOTION TO DISMISS MEDTEST'S
AMENDED THIRD-PARTY COMPLAINT
FOR FAILURE TO STATE A CLAIM**

This matter came before the Court this 27th day of March 2020, upon Third-Party Defendants'¹

Renewed Motion to Dismiss Defendant MedTest's Amended Third-Party Complaint for Failure to

¹ Blue Cross Blue Shield of Alabama, Anthem, Inc., Health Care Service Corporation, a Mutual Legal Reserve Company, Cambia Health Solutions, Inc., CareFirst, Inc., Premera Blue Cross, Blue Cross and Blue Shield of Arizona, Inc., US Able Mutual Insurance Company d/b/a Arkansas Blue Cross and Blue Shield, Blue Cross of California d/b/a Anthem Blue Cross, California Physicians' Service, Inc. d/b/a Blue Shield of California, Rocky Mountain Hospital and Medical Service, Inc. d/b/a Anthem Blue Cross and Blue Shield, Anthem Blue Cross and Blue Shield, Anthem Health Plans Inc. d/b/a Anthem Blue Cross and Blue Shield of Connecticut, Highmark Inc., Highmark BCBS Inc., d/b/a Highmark Blue Cross and Blue Shield Delaware, Group Hospitalization and Medical Services, Inc. d/b/a CareFirst BlueCross BlueShield, Blue Cross and Blue Shield of Florida, Inc., Blue Cross and Blue Shield of Georgia, Inc., Blue Cross of Idaho Health Service, Inc., Regence

3/31/2020 CC 117 to list of attorneys

State a Claim. The parties have fully briefed the issues necessary. The Court held extensive oral argument in the matter on January 28, 2020, at which time Plaintiff's Counsel, Defendants' Counsel and Counsel for various Third-Party Defendants appeared. So, upon the full consideration of the issues, the record, and the pertinent legal authorities, the Court rules as follows.

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, Muhamad Amjad, Ph. D., Michael Chen, Ph. D., and James Taylor, carried out a billing scheme by making fraudulent claims for insurance benefits to Plaintiff². See Compl., ¶¶1, 37-80. On September 13, 2019,

BlueShield of Idaho, Inc., Blue Cross and Blue Shield of Illinois, Inc., Anthem Insurance Companies, Inc. d/b/a Anthem Blue Cross and Blue Shield of Indiana, Wellmark, Inc. d/b/a Wellmark Blue Cross and Blue Shield of Iowa, Anthem Health Plans of Kentucky, Inc. d/b/a Anthem Blue Cross and Blue Shield of Kentucky, Louisiana Health Service and Indemnity Company, PAC d/b/a Blue Cross and Blue Shield of Louisiana, Anthem Health Plans of Maine, Inc. d/b/a Anthem Blue Cross and Blue Shield of Maine, CareFirst of Maryland, Inc. d/b/a CareFirst BlueCross BlueShield, Blue Cross and Blue Shield of Massachusetts, Inc., Blue Cross and Blue Shield of Michigan, BCBSM, Inc. d/b/a Blue Cross and Blue Shield of Minnesota, Blue Cross & Blue Shield of Mississippi, A Mutual Insurance Company, HMO Missouri, Inc. d/b/a Anthem Blue Cross and Blue Shield of Missouri, Blue Cross and Blue Shield of Kansas City, Caring for Montanans, Inc. d/b/a Blue Cross and Blue Shield of Montana, Inc., Blue Cross and Blue Shield of Nebraska, Inc., Anthem Blue Cross and Blue Shield of Nevada, Anthem Health Plans of New Hampshire, Inc., d/b/a Anthem Blue Cross and Blue Shield of New Hampshire, Horizon Healthcare Services, Inc., d/b/a Horizon Blue Cross and Blue Shield of New Jersey, Blue Cross and Blue Shield of New Mexico Insurance Company, Empire HealthChoice Assurance, Inc. d/b/a Empire BlueCross BlueShield, Excellus Health Plan, Inc. d/b/a Excellus BlueCross BlueShield, Blue Cross and Blue Shield of North Carolina, Noridian Mutual Insurance Company d/b/a Blue Cross and Blue Shield of North Dakota, Community Insurance Company d/b/a Anthem Blue Cross and Blue Shield of Ohio, Blue Cross and Blue Shield of Oklahoma, Regence BlueCross BlueShield of Oregon, Capital Blue Cross, Independence Hospital Indemnity Plan, Inc., Triple-S Salud, Inc., Blue Cross & Blue Shield of Rhode Island, BlueCross BlueShield of South Carolina, Inc., Wellmark of South Dakota, Inc. d/b/a Wellmark, Blue Cross and Blue Shield of South Dakota, BlueCross BlueShield of Tennessee, Inc., Blue Cross and Blue Shield of Texas, Regence BlueCross BlueShield of Utah, Blue Cross and Blue Shield of Vermont, Anthem Health Plans of Virginia, Inc. d/b/a Anthem Blue Cross and Blue Shield of Virginia, Inc., Regence BlueShield, Blue Cross Blue Shield of Wisconsin d/b/a Anthem Blue Cross and Blue Shield of Wisconsin, and Blue Cross & Blue Shield of Wyoming

² 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.

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 matter³. *See* Compl., ¶¶39-82; *see also* Th. Pty. Def's Mem., p. 3.

2. On or about April 8, 2018, Defendants filed their Answer on Behalf of MedTest Laboratories, LLC, Billy Taylor, Brice Taylor, James Taylor, Vitas Laboratories and Michael Chen, Ph.D., Counterclaims and Third-Party Complaint, asserting causes of action for breach of contract against Highmark WV (Count I); negligence against Highmark WV (Count II); fraudulent misrepresentation and inducement against all Defendants (Count III); civil conspiracy against all Defendants (Count IV); joint venture against all Defendants (Count V); and unjust enrichment against all Defendants (Count VI). *See* Counterclaims and Th. Pty. Compl., ¶¶98- 129. On September 13, 2019, Defendants filed their First Amended Counterclaims and Third-Party Complaint asserting the same claims. *See* First Am. Counterclaims and Th. Pty. Compl., ¶¶108- 139; *see also* Th. Pty. Def's Mem., p. 3.

3. Relevant to the instant motion are fraudulent misrepresentation and inducement against all Defendants (Count III); civil conspiracy against all Defendants (Count IV); joint venture against all Defendants (Count V); and unjust enrichment against all Defendants (Count VI) of the First Amended Counterclaim and Third-Party Complaint filed September 13, 2019, as Plaintiff seeks to dismiss these causes of action. *See* Th. Pty. Def's Mot., p. 3.

4. On or about June 18, 2019, this civil action was referred to the Business Court Division. On July 22, 2019, the matter was referred to the Business Court Division via Administrative Order of the Supreme Court of Appeals of West Virginia. By Order Assigning Presiding and Resolution Judge

³ The Court notes that all the aforementioned Defendants may hereinafter be referred to as "Defendants" or "Third-Party Plaintiffs".

to Case entered on or about July 29, 2019, the matter was assigned to the undersigned as Presiding Judge.

5. On October 15, 2019, Third-Party Defendants filed the instant Third-Party Defendants' Renewed Motion to Dismiss Defendant MedTest's Amended Third-Party Complaint for Failure to State a Claim, seeking dismissal of Counts III through VI of the First Amended Counterclaim and Third-Party Complaint filed September 13, 2019, arguing MedTest has not alleged facts sufficient to state any of the claims it has asserted against the Third-Party Defendants. *See See Th. Pty. Def's Mot.*, p. 3; *see also Th. Pty. Def's Mem.*, p. 2.

6. On November 1, 2019, Defendant/Counterclaim and Third-Party Plaintiff MedTest filed Third-Party Plaintiff's Memorandum of Law in Opposition to Third-Party Defendants' Motions to Dismiss MedTest's Amended Third-Party Complaint for Lack of Personal Jurisdiction and Improper Venue, arguing it has alleged sufficient detail of its claims. *See Def's Resp.*, p. 1.

7. On or about November 15, 2019, Third-Party Defendants filed their Joint Reply Brief in Support of Renewed Motion to Dismiss MedTest's Amended Third-Party Complaint for Failure to State a Claim, reiterating its position that MedTest's claims lack supporting factual allegations, and arguing its tort claims were not, in fact, pleaded in the alternative. *See Reply*, p. 1. Further, Third-Party Defendants aver the Response failed to demonstrate MedTest has stated a claim on any of the four counts asserted against Third-Party Defendants in the Amended Third-Party Complaint. *Id.* at 2.

8. On January 28, 2020, the parties, by counsel⁴, appeared before the undersigned for a hearing on the instant Third-Party Defendants' Renewed Motion to Dismiss Defendant MedTest's Amended Third-Party Complaint for Failure to State a Claim and related filings.

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

⁴ The Court notes Defendant Muhammad Amjad, Ph. D. attended the hearing in person, *pro se*.

STANDARD OF LAW

10. This matter comes before the Court upon a partial motion to dismiss. Motions to dismiss are governed by Rule 12(b)(6) of the West Virginia Rules of Civil Procedure. “The 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.” Syl. Pt. 3, *Chapman v. Kane Transfer Co., Inc.*, 160 W.Va. 530 (1977). “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). “We recognized, however, that liberalization in the rules of pleading in civil cases does not justify a carelessly drafted or baseless pleading.” *Par Mar v. City of Parkersburg*, 183 W.Va. 706, 711 (1990).

11. A motion to dismiss under Rule 12(b)(6) enables a circuit court to weed out unfounded suits. *Williamson v. Harden*, 214 W.Va. 77, 79 (2003).

CONCLUSIONS OF LAW

12. Third-Party Defendants filed the instant Third-Party Defendants’ Renewed Motion to Dismiss Defendant MedTest’s Amended Third-Party Complaint for Failure to State a Claim, seeking dismissal of Counts III through VI of the First Amended Counterclaim and Third-Party Complaint filed September 13, 2019, arguing MedTest has not alleged facts sufficient to state any of the claims it has asserted against the Third-Party Defendants. See *See Th. Pty. Def’s Mot.*, p. 3; *see also Th. Pty. Def’s Mem.*, p. 2.

13. After having reviewed and considered the Amended Counterclaim and Third-Party Complaint filed September 13, 2019, the Motion to Dismiss, memoranda of law and exhibits of the parties, as well as the oral arguments of counsel, this Court hereby **DENIES** the instant Third-Party

Defendants' Renewed Motion to Dismiss Defendant MedTest's Amended Third-Party Complaint for Failure to State a Claim, concluding as a matter of law that the First Amended Counterclaim and Third-Party Complaint states viable claims upon which relief can be granted. The issues will be taken up in turn.

Count III: Fraudulent Misrepresentation and Inducement

14. First, Third-Party Defendants averred that Count III of the First Amended Counterclaim and Third-Party Complaint must be dismissed because the cause of action fails to allege the elements of the claim and lacks the particularity required for fraud claims. *See* Th. Pty. Def's Mem., p. 4. Further, Third-Party Defendants averred that Count III fails because it seeks to recover contract damages in tort in violation of the economic loss rule. *Id.*

15. Under West Virginia Rule of Civil Procedure 9(b), "not only must fraud or mistake be pleaded, the circumstances creating the fraud or mistake must be set out in the pleadings with particularity." *Hager v. Exxon Corp.*, 241 S.E.2d 920, 923 (1978); *see also* W. Va. R. Civ. P. 9(b).

16. In view of West Virginia's pleading standards, including the heightened standard of pleading fraud claims with particularity, and after having carefully considered and assessed the allegations in the 139 separately numbered paragraphs of Third-Party Plaintiff's First Amended Counterclaim and Third-Party Complaint, this Court finds and concludes that Count III is pled sufficiently. In particular, in paragraph 123 of the First Amended Counterclaim and Third-Party Complaint, Third-Party Plaintiff details what it alleges to be the misrepresentations at the heart of the cause of action contained in Count III. *See* First Am. Counterclaims and Th. Pty. Compl., ¶123. The Court finds these allegations describe with requisite particularity the "circumstances creating the fraud". *Hager*, 241 S.E.2d at 923.

17. Further, with regard to Third-Party Defendants' allegation that Count III fails because it seeks to recover contract damages in tort in violation of the economic loss rule, the Court finds and concludes that Third-Party Plaintiffs have validly pled this claim in the alternative.

18. Rule 8 of the West Virginia Rules of Civil Procedure governs the general rules of pleading. Rule 8(a) provides, in pertinent part: "A pleading which sets forth a claim for relief, whether an original claim [or] counterclaim...shall contain (1) a short a plain statement of the claim showing that the pleader is entitled to relief, and (2) a demand for judgment for the relief the pleader seeks. *Relief in the alternative or several types may be demanded.*" W. Va. R. Civ. P. 8(a) (emphasis added).

19. Further, Rule 8(e) provides, in pertinent part: "A party may set forth two or more statements of a claim...alternately or hypothetically, either in one count...or in separate counts....A party may also state as many separate claims...as the party has regardless of consistency and whether based on legal or on equitable grounds or on both." W. Va. R. Civ. P. 8(e)(2).

20. Additionally, the West Virginia Supreme Court of Appeals has stated that alternative claims or defenses are allowed. Specifically, the West Virginia Supreme Court of Appeals has held that "[t]his rule gives parties considerable latitude in framing their pleadings and expressly permits claims or defenses to be pled alternatively...". *Arnold Agency v. West Virginia Lottery Comm'n*, 206 W. Va. 583, 526 S.E.2d 814 (1999).

21. In *Highmark W. Va., Inc. v. Jamie*, the West Virginia Supreme Court of Appeals found that although a physician could not recover twice for the same injury in a dispute with a health insurance company, he was not precluded from pleading more than one theory of recovery; in fact, Rule 8 specifically authorized alternative pleading. 221 W. Va. 487, 655 S.E.2d 509 (2007).

22. In light of Rule 8 and the relevant case law, the Court finds Third-Party Plaintiffs have validly pled Count III in the alternative. At this stage in the proceeding, it would be inappropriate to dismiss Count III on this basis. Accordingly, the instant motion to dismiss is **DENIED** as to Count III.

Count IV: Civil Conspiracy

23. Next, Third-Party Defendants averred that Count IV of the First Amended Counterclaim and Third-Party Complaint must be dismissed because the only cause of action based on tort that is asserted against Third-Party Defendants is Count III, and because Third-Party Defendants contend Count III fails, the claim for civil conspiracy contained in Count IV must also fail. *See Th. Pty. Def's Mem.*, p. 7.

24. The Court recognizes the well-settled law that a "civil conspiracy is not a *per se*, stand-alone cause of action; it is instead a legal doctrine under which liability for a tort may be imposed on people who did not actually commit a tort themselves but who also shared a common plan for its commission with the actual perpetrator(s)." *Dunn v. Rockwell*, 689 S.E.2d 255 (2009). However, as the Court found above that the instant motion to dismiss shall not be granted as to Count III, Third-Party Defendants' argument must fail. The Court concludes the motion to dismiss will not be granted as to Count IV on this basis.

25. Further, Third-Party Defendants have argued that Count IV fails because the First Amended Counterclaim and Third-Party Complaint did not plead any factual support for the allegation that Third-Party Defendants unlawfully conspired. *See Th. Pty. Def's Mem.*, p. 7.

26. In view of West Virginia's liberal notice pleading standard, and after having carefully considered and assessed the allegations in the 139 separately numbered paragraphs of Third-Party Plaintiff's First Amended Counterclaim and Third-Party Complaint, this Court finds and concludes that Count IV is pled sufficiently. The pleading plainly alleges that Highmark WV and the Third-Party

Defendants conspired to represent to MedTest and other health care providers and health insurance plan members that MedTest was an in-network provider of laboratory testing services, entitling it to provide services to Blues' members nationwide, but then refused to compensate MedTest for the provision of such testing services. *See* Def's Resp., p. 23-24.

27. Discovery will develop this claim – or not. At this stage in the proceeding, however, the Court finds Third-Party Plaintiff has met its burden of pleading the elements of the cause of action under this state's liberal pleading standards to state a claim for civil conspiracy.

28. Finally, the Court notes that Third-Party Defendants argue that the gist of the action doctrine bars the tort claims in Count IV, as well as Count III. As stated previously, the Court finds the tort claims were validly pled in the alternative to the breach of contract claim against Highmark WV contained in Count I. For this reason, the Court finds this argument must fail.

29. Accordingly, the Court finds and concludes that the instant motion to dismiss shall be **DENIED** as to Count IV.

Count V: Joint Venture

30. Further, Third-Party Defendants averred that Count V of the First Amended Counterclaim and Third-Party Complaint must be dismissed because Third-Party Plaintiff fails to state a claim because it used only four conclusory statements to aver its cause of action for Count V. *See* Th. Pty. Def's Mem., p. 11.

31. A review of the allegations contained in Count V of the First Amended Counterclaim and Third-Party Complaint reveals these allegations are more than sufficient to state a claim for joint venture under West Virginia's liberal pleading standards. For this reason, the Court finds the instant motion to dismiss shall be **DENIED** as to Count V.

Count VI: Unjust Enrichment

32. Next, Third-Party Defendants averred that Count VI of the First Amended Counterclaim and Third-Party Complaint must be dismissed because Third-Party Plaintiff “cannot maintain a quasi-contractual theory in the face of an express contract.” *See* Th. Pty. Def’s Mem., p. 11. Again, the Court finds Third-Party Plaintiff has validly pled Count VI in the alternative, as allowed by Rule 8(e). For this reason, it would be inappropriate to dismiss the claim for unjust enrichment on this basis at this stage in the litigation.

33. Further, Third-Party Defendants averred that Count VI of the First Amended Counterclaim and Third-Party Complaint fails because it fails to state a claim because it did not allege MedTest conferred a benefit on Third-Party Defendants, as opposed to the members of health insurance plans. *See* Th. Pty. Def’s Mem., p. 13; *see also* Def’s Resp., p. 27.

34. In response, Third-Party Plaintiff alleged that “[p]lainly, although the Blues’ members benefitted from the laboratory services, provided, the Blues also benefitted by retaining the millions of dollars of reimbursements that they owed MedTest for the provision of those services”. *See* Def’s Resp., p. 27. Further, the Court considers that at the hearing, upon questioning by the undersigned, counsel for MedTest stated that there would be a benefit to listing participating network providers on Third-Party Defendants’ website(s), as it makes the business more competitive, that one of the ways they compete is by demonstrating how big one’s network is, if there are many options for getting one’s medical testing done versus just a few, and that is promoted heavily. In support of this, counsel averred at the hearing that there are several subparagraphs of the First Amended Counterclaim and Third-Party Complaint about how they promote the BlueCard program for people to get treatment all across the country.

35. Given the foregoing, the Court concludes that Third-Party Plaintiff has met its burden under the liberal pleading standards of pleading all the elements of Count VI, including the element that there was a "benefit conferred upon the defendant". See *Emplr. Teamsters-Local Nos. 175/505 Health & Welfare Tr. Fund v. Bristol Myers Squibb Co.*, 969 F. Supp 2d 463, 471 (S.D. W. Va. 2013). Accordingly, the Court finds dismissal would be inappropriate at this stage in the proceedings. For this reason, the instant motion to dismiss is **DENIED** as to Count VI.

36. In conclusion, the Court finds and concludes that the instant Third-Party Defendants' Renewed Motion to Dismiss Defendant MedTest's Amended Third-Party Complaint for Failure to State a Claim shall be **DENIED**. The Court finds and concludes that the First Amended Counterclaim and Third-Party Complaint is pleaded sufficiently and that Third-Party Plaintiff has met its burden of stating viable claims for relief under relevant West Virginia rules and law. The Court further **DIRECTS** the parties to proceed with discovery.

CONCLUSION

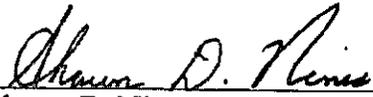
In conclusion, based upon the above set forth Findings of Fact and Conclusions of Law, the Court finds that Third-Party Plaintiff's claims set forth in the First Amended Counterclaim and Third-Party Complaint shall not be dismissed; therefore, Third-Party Defendants' motion shall be denied.

WHEREFORE, it is hereby **ORDERED** and **ADJUDGED** that Third-Party Defendants' Renewed Motion to Dismiss Defendant MedTest's Amended Third-Party Complaint for Failure to State a Claim is hereby **DENIED**.

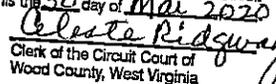
The Court notes the objections of the parties to any adverse ruling herein.

The Clerk is directed to enter this Order as of the date first hereinabove appearing, and send attested copies to all counsel of record, as well as to the Business Court Central Office at Business Court Division, 380 West South Street, Suite 2100, Martinsburg, West Virginia, 25401.

ENTERED this 27th day of March 2020.



Shawn D. Nines
Business Court Division

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 27 day of Mar 2020, as fully as the same appears to me of record.
Given under my hand and seal of said Circuit Court, this the 30 day of Mar 2020

Clerk of the Circuit Court of Wood County, West Virginia
By: _____, Deputy