

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
HUNTINGTON DIVISION

CHRISTOPHER FAIN; ZACHARY
MARTELL; and BRIAN MCNEMAR,
individually and on behalf of all others similarly
situated,

Plaintiffs,

v.

CIVIL ACTION NO. 3:20-cv-00740
JUDGE CHAMBERS

WILLIAM CROUCH, in his official capacity as
Cabinet Secretary of the West Virginia
Department of Health and Human Resources;
CYNTHIA BEANE, in her official capacity as
Commissioner for the West Virginia Bureau for
Medical Services; WEST VIRGINIA
DEPARTMENT OF HEALTH AND HUMAN
RESOURCES; TED CHEATHAM, in his official
capacity as Director of the West Virginia Public
Employees Insurance Agency; and THE
HEALTH PLAN OF WEST VIRGINIA, INC.,

Defendants.

**REPLY IN FURTHER SUPPORT OF MOTION TO CERTIFY APPEAL OF THE
COURT’S JUNE 28, 2021 MEMORANDUM OPINION AND ORDER**

The Health Plan of West Virginia, Inc. (“THP”), by counsel, hereby submits this
Reply in further support of The Health Plan’s Motion to Certify Appeal of the Court’s June 28,
2021, Memorandum Opinion and Order (“Motion”).

I. SUMMARY

The purpose of this Reply is to address a single argument raised in “Plaintiffs’
Opposition to The Health Plan of West Virginia, Inc.’s Motion to Certify Appeal of the Court’s
June 28, 2021 Memorandum Opinion and Order” (“Response”). (ECF No. 101). In their

Response, Plaintiffs argue The Health Plan's Motion should be dismissed as untimely. (ECF No. 101, p. 2). Specifically, Plaintiffs argue, "Here, The Health Plan's request is inexcusably dilatory. ... The Health Plan no (sic) offers no justification for its tardiness in requesting certification." (ECF No. 101, p. 3). However, Plaintiffs' argument that "delay warrants denial" is misleading. The Health Plan waited to file its Motion because The Health Plan and Plaintiffs have been engaged in confidential settlement negotiations that, if successful, would obviate the need for the filing of the instant Motion and/or appeal to the Fourth Circuit.

II. CERTIFICATION OF GOOD FAITH EFFORTS

On September 16, 2021, The Health Plan conferred in good faith with Plaintiffs' counsel through email and telephone, and invited Plaintiffs to withdraw their argument by Stipulation or other appropriate means. The Health Plan did not demand Plaintiffs withdraw their entire Response, only the argument that delay justifies the denial of the motion. Unfortunately, Plaintiffs refused to withdraw their argument.

III. ARGUMENT

On June 28, 2021, this Court entered its Memorandum Opinion and Order, denying THP's Motion to Dismiss. On or about July 6, 2021, The Health Plan contacted counsel for Plaintiffs to discuss settlement. Since that time, The Health Plan and Plaintiffs have engaged in confidential settlement negotiations in accordance with Rule 408 of the Federal Rules of Evidence.

As noted above, Plaintiffs argue that "The Health Plan no (sic) offers no justification for its tardiness in requesting certification." (ECF No. 101, p. 3). Plaintiffs' argument is highly disingenuous given that Plaintiffs were actively engaged in settlement discussions with The Health Plan, and therefore knew, or should have known, that The Health Plan intended to

explore settlement options before seeking such relief. Further, Plaintiffs knew that by tendering this argument, Plaintiffs are forcing The Health Plan to invade the sacred protections of Rule 408 of the Federal Rules of Evidence in order to defend itself.

In their Response, Plaintiffs admit that there is no deadline for a party to file a motion to certify appeal. (ECF No. 101, p. 2). When The Health Plan began its dialogue with Plaintiffs on or about July 6, 2021, The Health Plan notified Plaintiffs that it was not waiving its appellate rights. Had Plaintiffs intended to take the position that the “clock is ticking,” and that Plaintiffs expected The Health Plan to promptly file its motion for relief (or else face the argument that “delay warrants denial”), then Plaintiffs should have notified The Health Plan of same.

For these reasons, this Court should ignore any argument that delay justifies denial.¹

IV. CONCLUSION

For the reasons set forth above, The Health Plan respectfully requests that this Court ignore any argument that delay justifies denial of its Motion.² Further, for reasons stated more fully in its Motion, THP respectfully requests that the Court grant its motion and certify its June 28, 2021 Memorandum Opinion and Order (ECF No. 63) for immediate appeal pursuant to 28 U.S.C. § 1292(b).

¹ To salvage what protections, if any, remain under Rule 408 as to these settlement negotiations, The Health Plan will not divulge the content of communications between it and Plaintiffs. Suffice it to say, these conversations have been substantial, occurring across multiple platforms including telephone calls, zoom meetings, email exchanges and letters. The most recent telephone call was Monday, September 13, 2021.

² In Section III of the Response, Plaintiffs argue that an immediate appeal will not materially advance The Health Plan’s involvement in litigation because, to date, The Health Plan has not yet sought a stay of these proceedings. (ECF No. 101, p. 5-6.) However, as noted above, the parties are engaging in settlement discussions. In the event those discussion prove unfruitful, then The Health Plan may seek a stay of these proceedings. Point being, Plaintiffs’ argument under section III of Plaintiffs’ Response is without merit.

Dated: September 20, 2021.

/s/ Aaron C. Boone

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CERTIFICATE OF SERVICE

I hereby certify that on September 20, 2021, I electronically filed the foregoing
document with the Clerk of the Court using the CM/ECF system, which will send notification of
such filing to the following CM/ECF participants:

Walt Auvil, Esquire
Anna P. Prakash, Esquire
Nicole J. Schladt, Esquire
Sasha Buchert, Esquire
Avatara Smith-Carrington, Esquire
Tara L. Borelli, Esquire
Carl S. Charles, Esquire
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Lou Ann S. Cyrus, Esquire
Roberta F. Green, Esquire
Caleb B. David, Esquire
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Christopher K. Weed, Esquire

/s/ Aaron C. Boone _____

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