

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

CHRISTOPHER FAIN, *et al.*, individually and
on behalf of all others similarly situated,

Plaintiffs,

v.

WILLIAM CROUCH, *et al.*,

Defendants.

CIVIL ACTION NO. 3:20-cv-00740

HON. ROBERT C. CHAMBERS, JUDGE

**MEMORANDUM IN SUPPORT OF JOINT MOTION FOR
EXTENSION OF FACT DISCOVERY DEADLINE**

Pursuant to Federal Rules of Civil Procedure 16(b)(4) and 29(b), and Local Rule 16.1(f)(3), Defendants William Crouch, Cynthia Beane, and the West Virginia Department for Health and Human Resources, Bureau of Medical Services (collectively, “Defendants”)¹ and Plaintiffs Christopher Fain, Zachary Martell, and Brian McNemar (collectively, “Plaintiffs”) (collectively, the “Parties”) jointly move this Court for an extension of the deadline for fact discovery by 90 days, from the current deadline of December 1, 2021 to March 1, 2022. (ECF No. 75.) Defendant Cheatham does not oppose the relief requested in this motion. Although the Parties have been diligently pursuing discovery, the Parties have conferred and agree that more time is required to complete fact discovery and to comply with the other deadlines in the current Scheduling Order. The requested extension will not affect any other deadline in the Scheduling

¹ In light of the stay of case schedule deadlines against Defendant The Health Plan of West Virginia, Inc. (“The Health Plan”) entered on October 18, 2021, this motion does not involve The Health Plan. (ECF No. 121.)

Order or delay the ultimate completion of discovery in the case, but instead will simply allow the fact discovery period to run concurrently with a portion of the expert discovery period.

BACKGROUND

Over the course of the fact discovery period, Plaintiffs have served several sets of discovery requests on Defendants (ECF Nos. 69-71, 110-112, 128-129) and served notice of third-party subpoenas to the three Managed Care Organizations for West Virginia's Medicaid program (ECF No. 123).² The parties have held conferences to meet and confer about written discovery responses and document production issues, and participated in a discovery-related conference with the Honorable Judge Eifert regarding those issues (ECF No. 118). Nonetheless, Covid-related illness and delays have impeded the discovery process, seriously hampering the parties' ability to complete document discovery and take efficient and meaningful depositions before the December 1, 2021 fact discovery cut-off.

For example, the individual in the Bureau for Medical Services that has been facilitating discovery, including coordinating with the West Virginia Office of Technology to assist the Medicaid Defendants with their document review and production was out of the office for multiple weeks while he cared for a child with Covid, and then took time to recover from Covid after contracting it himself. As a result, the Medicaid Defendants have been unable to complete document production and require additional time to conduct the relevant searches of custodian records, review potentially responsive documents, conduct a privilege review, and prepare

² On July 7, 2021, Plaintiffs emailed courtesy copies of their first set discovery requests to Defendants, Plaintiffs later served the same discovery requests on Defendants by U.S. mail on July 20, 2021. (ECF Nos. 69-71.) On September 23, 2021, Plaintiffs served their second set of discovery requests on Defendants. (ECF Nos. 110-112.) Plaintiffs served their third set of discovery requests on October 18, 2021. (ECF Nos. 128-129.) Shortly thereafter, Plaintiffs electronically served notice of Plaintiffs' intent to serve Rule 45 subpoenas. (ECF No. 123.)

responsive non-privileged documents for production. With the work remaining on document discovery, the parties are concerned that production may not be complete before the December 1, 2021 deadline to complete depositions. This will lead to significant inefficiencies since the parties likely will need to reopen depositions if relevant documents are produced after the depositions are conducted. The requested extension will allow the parties to bring document discovery to an orderly conclusion so that depositions can be conducted effectively and without wasteful duplication.

ARGUMENT

As this Court has explained, “[s]cheduling orders may be modified only for good cause and with the court’s consent. Fed. R. Civ. P. 16(b).” *Esquire Grp., Inc. v. Columbia Gas Transmission, LLC*, No. CV 3:14-24972, 2016 WL 8715666, at *2 (S.D.W. Va. Feb. 26, 2016); *see also, Jackson v. United States*, No. CV 3:14-15086, 2016 WL 502056, at *1 (S.D.W. Va. Feb. 8, 2016). “Rule 16(b)’s good cause standard focuses on the diligence of the moving party.” *Id.* (citing *Montgomery v. Anne Arundel Cty., Maryland*, 182 Fed. Appx. 156, 162 (4th Cir. 2006) (citations omitted). In order to establish good cause, “the movant must show the deadlines cannot reasonably be met despite the movant’s diligence; good cause is lacking if the movant has not acted diligently to comply with the schedule.” *Esquire Grp., Inc.*, 2016 WL 8715666, at *2. Additionally, “[d]istrict courts have discretion to consider other factors before amending a scheduling, which include: the danger of prejudice to the non-moving party, the length of delay and its potential impact on the proceeding, the movant’s reason for the delay, and whether the movant acted in good faith.” *Id.*

Here, the Parties are acting in good faith and have been diligently pursuing discovery, there is no risk of prejudice, and the length of the extension requested will not impact the rest of

the scheduling order. As explained in the Background section, *supra*, the Parties have acted diligently to pursue written and document discovery. This includes serving extensive requests, and meeting and conferring to resolve issues informally and with the Honorable Judge Eifert. But the Covid-related illness of personnel critical to substantial completion of that process has severely hampered the Parties' ability to make substantial progress with document production, as needed for the parties to efficiently conduct depositions. Granting the extension of the fact discovery deadline will not prejudice the Parties as the Parties have conferred and agree that more time is required to complete fact discovery. More importantly, the requested extension will not affect any other deadline in the Scheduling Order or delay the ultimate completion of discovery in the case. Ultimately, the Parties can establish the good cause required by Rule 16(b)(4).

Rule 29(b) states that “[u]nless the court orders otherwise, the parties may stipulate that: (b) other procedures governing or limiting discovery be modified—but a stipulation extending the time for any form of discovery must have court approval if it would interfere with the time set for completing discovery, for hearing a motion, or for trial.” *George Golf Design, Inc. v. Greenbrier Hotel, Inc.*, No. CV 5:10-01240, 2011 WL 13228487, at *4 (S.D.W. Va. Dec. 6, 2011). Here, the Parties have met, conferred, and agreed to extension of the fact discovery deadline and have done so in a manner that does not interfere with scheduled Court proceedings. *See generally, Walker v. W. Pub. Corp.*, No. CIV.A. 5:09-0723, 2011 WL 3667632, at *2 (S.D.W. Va. Aug. 18, 2011), objections sustained in part and overruled in part, No. 5:09-CV-00723, 2011 WL 3667613 (S.D.W. Va. Aug. 22, 2011) (“Federal Rule of Civil Procedure 29(b) anticipates that parties may agree in these regards as long as their stipulations do not interfere with scheduled Court proceedings.”). That is the case here since the requested extension will

simply permit fact discovery to run concurrently with a portion of the expert discovery period, which does not close until April 29, 2022. (ECF No. 75.)

CONCLUSION

For the forgoing reasons, the Parties respectfully request that the Court grant the Joint Motion for Extension of Fact Discovery Deadline and enter the accompanying proposed order.

Dated: October 20, 2021

Respectfully submitted,

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CERTIFICATE OF SERVICE

Now come Plaintiffs Christopher Fain, Zachary Martell and Brian McNemar by and through counsel, and do hereby certify that the foregoing MEMORANDUM IN SUPPORT OF JOINT MOTION FOR EXTENSION OF FACT DISCOVERY DEADLINE was served on Defendants' counsel listed below via email on October 20, 2021:

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