

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA**

JOHN BAXLEY, JR., *et al.*,

Plaintiffs,

v.

**Civil Action No. 3:18-cv-01526
(Chambers, J.)**

BETSY JIVIDEN, *et al.*,

Defendants.

DEFENDANTS' MOTION TO STAY MAGISTRATE'S ORDER

NOW COME the Defendants Betsy Jividen, Commissioner of the West Virginia Division of Corrections and Rehabilitation, and West Virginia Division of Corrections and Rehabilitation (“Defendants”), by counsel, and pursuant to Local Rules 7.1(a)(2) and 72.2 of Civil Procedure, respectfully request that the Order entered on July 27, 2020 by Magistrate Judge Aboulhosn, Doc. 286 (“Discovery Order”) be stayed pending Defendants’ filing of objections and this Court’s consideration of the same.

Under the Discovery Order, Defendants are to respond to Plaintiffs’ outstanding discovery requests “no later than August 3, 2020.” Discovery Order, Doc. 286 at p. 10.¹ However, as set forth in the accompanying Memorandum of Law, this production would occur before Defendants’ objections to the Discovery Order are due under Federal Rule of Civil Procedure 72(a). This Court would not have the opportunity to evaluate and enter a decision on Defendants’ objections to the Discovery Order, effectively rendering moot the relief Defendants intend to seek. Further, issuing a brief stay for consideration of these objections does not substantially prejudice the Plaintiffs.

¹ The Discovery Order begins at page 2, and the ECF Document page numbers begin at page 1. References herein are to the ECF Document page numbers at the top of the Discovery Order.

WHEREFORE, based upon the foregoing discussion, Defendants respectfully request that this Court stay the Discovery Order issued on July 27, 2020, Doc. 286, in its entirety, until Defendants timely file their objections and the Court considers the objections regarding the Discovery Order and for such further relief as this Courts deems just and proper.

**Respectfully submitted on behalf of Defendants
by:**

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/s/ James C. Stebbins

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CERTIFICATE OF SERVICE

I, James C. Stebbins, co-counsel for all Defendants, do hereby certify that on this 29th day of July, 2020, I electronically served a copy of the foregoing “**DEFENDANTS’ MOTION TO STAY MAGISTRATE’S ORDER**” via the CM/ECF system that will send notification to the following counsel of record:

Lydia C. Milnes, Esq.
Jennifer S. Wagner, Esq.
Mountain State Justice
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/s/ James C. Stebbins
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**DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF THEIR
MOTION TO STAY MAGISTRATE'S ORDER**

NOW COME Betsy Jividen, Commissioner of the West Virginia Division of Corrections and Rehabilitation, and West Virginia Division of Corrections and Rehabilitation ("DCR"), collectively "Defendants," by counsel, and in support of their Motion to Stay Magistrate's Order ("Motion to Stay"), aver that Magistrate Judge Aboulhosen's July 27, 2020 Order, Doc. 286 ("Discovery Order") should be stayed in its entirety to provide them with the time allowed under Federal Rule of Civil Procedure 72(a) to file objections to that order.

Summary of Background Facts

Magistrate Judge Aboulhosen's Discovery Order grants Plaintiffs' Third Motion to Compel Discovery (Doc. 238) ("Plaintiffs' Third Motion to Compel") with regard to outstanding discovery disputes. While the parties were able to resolve a majority of issues related to the discovery dispute outlined in that motion, generally three types of issues remained: (1) Wexford Health Sources, Inc. ("Wexford") documents related to patient health records, audits and reviews; (2) personnel files and documents related to Debbie Hissom, an employee of DCR, and contractor Wexford's

employees; and (3) incident reports and use of force reports for named Plaintiffs. Discovery Order at pp. 1-2.¹

Defendants contended that Plaintiffs' motion was untimely; that disciplinary files were irrelevant; that it did not have custody or control over responsive documentation from Wexford and that the information should be obtained from Wexford, not DCR; that some of the information sought was confidential; and that some of the requested information was irrelevant. *See* Defendant's Response in Opposition to Plaintiffs' Third Motion to Compel (Doc. 251); *see also* Doc. 286 at 4-5 (summarizing Defendants' positions). The Discovery Order found that the remaining discovery in dispute should be provided by August 3, 2020 and provided a briefing schedule for a request for attorney fees. Doc. 286 at 10-11.

Legal Standard

Under Local Rule of Civil Procedure 72.2, "[w]hen an objection to a magistrate judge's ruling on a non-dispositive pretrial motion is filed pursuant to FR Civ P 72(a), the ruling remains in full force and effect unless and until it is stayed by the magistrate judge or by a district judge." In *Meade v. Parsley*, 2011 U.S. Dist. LEXIS 41947, *3-4 (S.D. W.Va. 2011), the Court considered the following standard in evaluating a motion to stay a proceeding:

A district court has broad discretion to stay an action as part of its inherent authority to manage its docket. *Wince v. Easterbrooke Cell. Corp.*, 681 F. Supp. 2d 688, 692 (N.D. W. Va. 2010) (citing *Landis v. North American Co.*, 299 U.S. 248, 254-55, 57 S. Ct. 163, 81 L. Ed. 153 (1936)). Nevertheless, the court's discretion has limits. "[P]roper use of this authority calls for the exercise of judgment which must weigh competing interests and maintain an even balance. The party seeking a stay must justify it by clear and convincing circumstances outweighing potential harm to the party against whom it is operative." *Williford v. Armstrong World Indus.*,

¹ The Discovery Order begins at page 2, and the ECF Document page numbers begin at page 1. References herein are to the ECF Document page numbers at the top of the Discovery Order.

Inc., 715 F.2d 124, 127 (4th Cir. 1983) (internal quotations and citations omitted).

In this case, clear and convincing circumstances, that is the ability to meaningfully object under Federal Rule of Civil Procedure 72(a), exist that outweigh the harm, if any, to Plaintiffs in obtaining the documents sought.

Argument

Federal Rule of Civil Procedure 72(a) provides:

When a pretrial matter not dispositive of a party's claim or defense is referred to a magistrate judge to hear and decide, the magistrate judge must promptly conduct the required proceedings and, when appropriate, issue a written order stating the decision. A party may serve and file objections to the order within 14 days after being served with a copy. A party may not assign as error a defect in the order not timely objected to. **The district judge in the case must consider timely objections and modify or set aside any part of the order that is clearly erroneous or is contrary to law.**

(emphasis added). The Discovery Order acknowledges that the Defendants may file objections within fourteen (14) days of entry of the Order. *See* Doc. 286 at p. 11. As noted above, pursuant to Local Rule of Civil Procedure 72.2, a ruling on a non-dispositive pretrial motion remains in effect unless stayed by a magistrate judge or by a district judge.

The Discovery Order was entered on July 27, 2020, giving Defendants until August 10, 2020 to file objections to the Discovery Order for this Court to consider under Federal Rule of Civil Procedure 72(a). However, the Discovery Order further provides that Defendants must provide responses by or before August 3, 2020. Doc. 286 at p. 10. This would effectively render Defendants' ability to object and its intended objections moot.

The parties have exchanged voluminous information and are currently briefing class certification and individual plaintiff dispositive motions. All named Plaintiffs who currently seek to be and are offered as class representatives, Debbie Hissom, and a Rule 30(b)(7) representative

of Wexford have been deposed. Initial briefs have already been filed. No depositions are currently scheduled.

Although Plaintiffs have alleged that the information sought is relevant to their class certification motion, Defendants aver it is not. The Fourth Circuit has held that, in addition to falling within one of the three categories of Rule 23(b), a prospective class under Rule 23(a) of the Federal Rules of Civil Procedure “must comply with four prerequisites: (1) numerosity; (2) commonality; (3) typicality; and (4) adequacy of representation.” *EQT Prod. Co. v. Adair*, 764 F.3d 347, 357 (4th Cir. 2014)(internal citations omitted). While Defendants certainly do intend to argue that Plaintiffs cannot establish a class and do not believe they can do so, Defendants do not believe the documents at issue under the Discovery Order are critical to the initial class certification analysis especially given the voluminous discovery already produced.

Wexford has provided documents pursuant to a subpoena duces tecum, and a Rule 30(b)(7) deposition has been taken. *See* Doc. 202. During that deposition, Plaintiffs had ample opportunity to inquire into class certification issues. Wexford provides healthcare at one (1) regional jail facility out of ten (10) in West Virginia. Given that only one facility out of 10 at issue utilizes Wexford and the amount and type of information that has already been provided, the information sought related to Wexford, including the information sought by Plaintiffs concerning an individual employee, adds little, if anything, to the class certification arguments presented by Plaintiffs in their motion and that must be balanced against the potential harm to Defendants.

With regard to the use of force and incident reports of named Plaintiffs, Defendants aver these documents, even if relevant and otherwise required to be produced, which Defendants dispute, are not required or relevant for class certification briefing. The requested information regarding Ms. Hissom’s personnel file is likewise inapposite to any class certification briefing;

however, her privacy interest in the same is significant and should be considered. Ms. Hissom has been deposed for class purposes, and Plaintiffs had ample opportunity to question her at that time on matters relevant to class certification. (Doc. 75).

Finally, Defendants' Response to class certification is due August 7, 2020, and Plaintiffs' Reply is not due until August 14, 2020. Therefore, even a limited stay of the Discovery Order would allow this Court to consider the objections on an expedited basis without materially delaying these proceedings. Little to no prejudice will occur from the granting of this Motion to Stay, and the prejudice to Defendants in losing the ability to object to the Discovery Order under Federal Rule of Civil Procedure 72(a) far outweighs any prejudice to Plaintiffs.

Conclusion

For the Defendants' ability to object to the Discovery Order to have any meaning, the August 3, 2020 deadline to respond to the discovery requests at issue should be stayed, along with the briefing on any attorney fees. If Defendants produce the disputed discovery on or before August 3, 2020, its objections to the Discovery Order will be rendered moot before this Court can review the same. As set forth above, issuing a brief stay for consideration of these objections will not substantially prejudice the Plaintiffs. For these reasons, Defendants respectfully request that this Court stay the Discovery Order issued on July 27, 2020, Doc. 286, in its entirety, until Defendants timely file their objections and the Court considers the objections regarding the Discovery Order and such further relief as this Courts deems just and proper.

**Respectfully submitted on behalf of Defendants
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