

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA
CLARKSBURG

FRANCES G. POST, individually and
on behalf of all others similarly
situation,

Plaintiff,

v.

Civ. Action No. 1:19-CV-73
(Judge KleeH)

AMERISOURCEBERGEN CORPORATION,
a Delaware corporation, US
BIOSERVICES CORPORATION, a
Delaware corporation, Ig.G. OF
AMERICA, INC., a Maryland corporation,
and IHS ACQUISITION XXX, INC., a Delaware
Corporation,

Defendants.

MEMORANDUM ORDER DENYING DEFENDANTS'
MOTION TO DISMISS [DKT. NO. 15]

On March 30, 2020, this Court issued an Order [Dkt. No. 36] denying in part and granting in part Defendants' Motion to Dismiss [Dkt. No. 15] further noting that a memorandum opinion would follow. For the reasons discussed herein, that Order is **AMENDED** to the extent that the motion to dismiss [Dkt. No. 15] is **DENIED** as to Counts I, II, III, IV, V, and VI, and **DENIED AS MOOT** as to Count VII. The Court further **DENIES** the motion to dismiss based on The Medical Professional Liability Act ("MPLA").

PROCEDURAL HISTORY

On April 18, 2019, the Plaintiff filed a Complaint against

Defendants AmerisourceBergen Corporation ("AmerisourceBergen"), US Bioservices Corporation ("US Bioservices"), I.g.G. of America, Inc. ("I.g.G."), and IHS Acquisition XXX, Inc. ("IHS") (collectively, "Defendants") [Dkt. No. 1]. An Amended Complaint was filed on May 8, 2019 [Dkt. No. 9]. Defendants filed a Motion to Dismiss on July 15, 2019 [Dkt. No. 15], to which Plaintiff responded on August 7, 2019 [Dkt. No. 19]. Defendants filed a reply on August 20, 2019 [Dkt. No. 20] which makes the matter ripe for consideration.

I. FACTUAL BACKGROUND

Plaintiff, Frances G. Post ("Post" or "Plaintiff"), alleges seven claims in this matter: Count I, Negligence; Count II, Personal Injury; Count III, Civil Conspiracy; Count IV, Fraudulent Concealment; Count V, Unjust Enrichment/Disgorgement; Count VI, Breach of Confidentiality and Violation of Privacy; and Count VII, Punitive Damages [Dkt. No. 9]. Post is a resident of Morgantown, West Virginia and alleges that she, and putative class members, are individuals who were directed by Felix Brizuela, D.O. ("Brizuela") to purchase immunoglobulin ("IVIG") from Defendants in Morgantown, West Virginia¹ [Id. at 2]. IVIG is an intravenously

¹ For purposes of the Motion to Dismiss, the Court accepts as true the facts alleged in the Amended Complaint. See Anderson v. Sara Lee Corp., 508 F.3d 181, 188 (4th Cir. 2007) (quoting Erickson v. Pardus, 551 U.S. 89, 94 (2007)).

administered blood product prepared by pooling immunoglobulins from the plasma of thousands of human donors [Id. at 5]. Plaintiff alleges that I.g.G. employed an Executive Account Manager and Director of Sales to target Felix Brizuela, D.O., among other physicians, to achieve an increase in sales of IVIG and to increase the profits of AmerisourceBergen, US Bioservices, I.g.G, and IHS Acquisition² [Id. at 5-6]. Plaintiff asserts that Defendants made

² Felix Brizuela, D.O. is a Doctor of Osteopathic Medicine and a board-certified neurologist with a neurology practice in Morgantown, West Virginia [Dkt. No. 19 at 2, n.1]. A federal grand jury indicted Brizuela on 21 counts of distributing controlled substances outside the bounds of professional medical practice, in violation of 21 U.S.C. §§ 841(a)(1), (b)(1)(C); one count of conspiracy to distribute controlled substances outside the bounds of professional medical practice, in violation of 21 U.S.C. §§ 841(a)(1), (b)(1)(E)(i), (b)(1)(E)(iii); and 16 counts of illegal remuneration in violation of the federal anti-kickback statute, in violation of 42 U.S.C. §§ 1320a-7b(b)(1)(B) [N.D. W.Va. Criminal Action No: 1:18-cr-00001, Dkt. No. 1]. The anti-kickback charges related to a financial arrangement involving Brizuela, Southwest Laboratories, LLC ("Southwest"), and Medspan Laboratory, Inc. ("Medspan") [Id.]. In January 2019, Brizuela was tried and convicted of certain felony offenses related to services he provided at a pain management and/or suboxone clinic and opioid prescribing practices in his private practice [Dkt. No. 19 at 2, n.1]. On June 19, 2020, the United States Court of Appeals for the Fourth Circuit reversed the conviction and remanded the case for a new trial. United States v. Felix Brizuela, Jr., No. 19-4656, --- F.3d ---, 2020 WL 3393440 (4th Cir. 2020). The reversal of Brizuela's conviction was based on his contention that, under United States v. Kennedy, 32 F.3d 876 (4th Cir. 1994) and Federal Rule of Evidence 404(b), the district court improperly admitted the testimony of patients whose treatment was not the basis for any of the charges in the indictment. Brizuela, 2020 WL 339440, at *2. The Fourth Circuit determined that the government did not establish that the error was harmless and vacated the conviction. Id. at *3. On remand, Brizuela pled guilty to Count 2 of the Indictment, distribution of controlled substances outside the bounds of professional medical practice in violation of 21 U.S.C.

payments to Felix Brizuela, D.O. to induce him to misdiagnose patients and wrongfully disclose sensitive, private, and protected medical information of Plaintiff and other putative class members for the purpose of increasing new-book sales of IVIG, which increased Defendants' profits [Id. at 5].

For the period relevant to the allegations in the Amended Complaint, Felix Brizuela, D.O. and Felix Brizuela, D.O., PLLC operated a neurology office located at 1271 Suncrest Towne Centre, Morgantown, West Virginia [Dkt. No. 9 at 5]. Plaintiff contends Defendants greatly incentivized the aggressive sale of IVIG, especially to new purchasers, because Defendants knew: (1) once a person is prescribed IVIG, the person will likely take IVIG infusions for the remainder of his/her natural life; (2) IVIG is expensive for the purchaser and lucrative for Defendants; and (3) Defendants devised an internal practice which enabled them to secretly under report and under pay bonus commissions on IVIG sales to bolster corporate profits [Id. at 6]. Plaintiff asserts that Defendants charged high rates for the IVIG product and increased prices as the customer continued to purchase IVIG [Id.].

Plaintiff claims to have received infusions every two weeks at an initial charge of \$8,758.29 for each infusion [Dkt. No. 9 at

§§ 841(a)(1) and 841(b)(1)(C) [N.D. W.Va. Criminal Action No: 1:18-cr-1-1, Dkt. No. 494]. Brizuela was sentenced on October 1, 2020, and the government dismissed the remaining charges in the Indictment [Id., Dkt. No. 495].

6]. The cost to Plaintiff was then raised to \$9,126.28 and \$10,450.44, respectively, for each infusion over a period of approximately twelve (12) months [Id.]. Plaintiff contends that Defendants so aggressively incentivized bonus commissions to its sales executives to book IVIG transactions that some sales executives earned an IVIG quarterly bonus in excess of \$900,000.00, and that sales executives received a higher bonus commission percentage for the first six months of every new-book IVIG transaction [Id.].

Plaintiff alleges that on April 3, 2012, Defendants began making payments to Felix Brizuela, D.O., that were unlawful, wrongful, violated Defendants' written policies, violated ethical standards, and placed the health, safety, and wellbeing of Plaintiff and putative class members at risk [Dkt. No. 9 at 7]. The payments made by Defendants to Brizuela continued until March 19, 2015 [Id.]. Plaintiff claims that Brizuela performed no services for Defendants to earn the payments made to him other than increasing the number of new-book IVIG transactions [Id.]. While Defendants paid Felix Brizuela, D.O. to obtain new-book IVIG transactions, Brizuela became one of the highest volume IVIG prescribing practitioners in the United States as measured by data from the Centers for Medicare and Medicaid Services ("CMS") [Id.]. During the approximate 26-month period Defendants made payments to Felix Brizuela, D.O., Defendants obtained approximately 65 new-

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