

**IN THE CIRCUIT COURT OF MONONGALIA COUNTY, WEST VIRGINIA**

CHRISTOPHER THOMACK, and  
JOSEPH MICHAEL JENKINS, on  
their own behalf and on behalf of all  
other similarly situated persons consisting  
of a class of aggrieved persons,

Plaintiffs,

v.

CIVIL ACTION NO. 13-C-53  
(JUDGE PHILLIP D. GAUJOT)

WEST VIRGINIA UNIVERSITY HOSPITALS, INC.,  
West VIRGINIA UNITED HEALTH SYSTEM, INC.  
d/b/a WVU Healthcare and any related entities of WVU  
Healthcare acting in concert with WVU Healthcare,

Defendants.

**ORDER GRANTING JOINT MOTION FOR CERTIFICATION OF  
SETTLEMENT CLASS AND PRELIMINARY APPROVAL OF SETTLEMENT**

On a previous date, the Plaintiffs, Christopher Thomack and Joseph Michael Jenkins, individually and as the Representatives of the Class of all similarly situated individuals and entities, by and through their counsel, David E. Goddard, David J. Romano, and Richard A. Monahan; and the Defendants, West Virginia University Hospitals, Inc. and West Virginia United Health System, Inc. d/b/a WVU Healthcare and any related entities of WVU Healthcare acting in concert with WVU Healthcare (hereinafter "Defendants"), by and through their counsel, Marc E. Williams and Robert L. Massie, filed a Joint Motion for Certification of Settlement Class and Preliminary Approval of Settlement.

The Parties contend that the proposed settlement provides substantial benefits to the Settlement Class, resolves substantial issues without further prolonged

litigation and attendant expense, eliminates the inherent risk of litigation, and is fair, reasonable, and adequate.

For background purposes, the Court notes the following:

1. Plaintiffs Christopher Thomack and Joseph Michael Jenkins both requested copies of their medical records from Defendants during the relevant class period, and both were charged 40 cents per page and a \$10.00 search irrespective of the actual costs incurred by Defendants in producing their medical records, even when such medical records were available in electronic format.

2. On January 18, 2013, Plaintiff Christopher Thomack (“Thomack”) filed a Class Action Complaint against West Virginia University Hospitals, Inc. (“WVUH”) in the Circuit Court of Monongalia County. On February 22, 2013, WVUH removed the matter to the United States District Court for the Northern District of West Virginia, in the Clarksburg Division. Plaintiff Thomack filed his Motion to Remand and Memorandum in Support on March 22, 2013. On October 3, 2013, Plaintiffs’ Motion to Remand was granted, and the matter was transferred back to the Circuit Court of Monongalia County.

3. Plaintiff Thomack filed a Motion for Class Certification and a Memorandum of Law in Support of Class Certification on October 23, 2013.

4. On June 4, 2013, Plaintiff Joseph Michael Jenkins (“Jenkins”) filed his Complaint in the Circuit Court of Harrison County. On June 27, 2013, Plaintiff Jenkins filed his First Amended Complaint, which added Class Action claims against West Virginia United Health System, Inc. d/b/a WVU Healthcare and its related entities (“WVUHS”). The Class Action claims against WVUHS were severed from the remainder of the *Jenkins* matter and were transferred to the Circuit Court of Monongalia County for consolidation with the Class

Action case brought by Thomack.

5. Through agreement of Plaintiffs Thomack and Jenkins, and WVUH and WVUHS, this Court ordered that the Thomack and Jenkins case should be consolidated.

6. Plaintiffs Thomack and Jenkins filed their Consolidated Amended Complaint on January 9, 2014. This Consolidated Amended Complaint set forth causes of action including violations of W. Va. Code § 16-29-1 *et. seq.*, and other statutory and common law claims all related to the same course of conduct – Defendants’ overcharging for copies of medical records.

7. On January 29, 2014, Defendants filed their joint Answer to Plaintiffs’ Consolidated Amended Complaint.

8. After briefing the issue of class certification, this Court entered an order on April 16, 2014, certifying a class of Plaintiffs, naming Plaintiffs Thomack and Jenkins as representative plaintiffs in the matter, and appointing counsel for the Plaintiffs as Class counsel.

9. On June 25, 2014, Defendants WVUH and WVUHS filed a Petition for Writ of Prohibition to enjoin the Circuit Court of Monongalia’s Order certifying the Class of plaintiffs. In an Order entered on August 26, 2014, the West Virginia Supreme Court of Appeals denied the Petition.

10. The matter then proceeded through discovery and various other procedural issues, including temporary consolidation with defendant hospitals within West Virginia University Health Systems in other similar matters bringing the same claims against those entities for systematic overcharging to produce copies of patient medical records.

11. The various cases that brought claims against entities other than Defendants have each since been transferred back to the courts in which they were each originally filed.

12. On July 21, 2017, Defendants filed their first Motion to Decertify Class. The

arguments raised in the Motion to Decertify included several of arguments Defendants had relied upon in opposing class certification, including that the class was not ascertainable and that the claims lacked commonality. Defendants additionally argued that the May 24, 2017 West Virginia Supreme Court of Appeals' decision in *State ex rel. Healthport Technologies, LLC v. Stucky*, No. 17-0038, 2017 WL 2332876 mandated decertification because it caused Plaintiffs to lack standing to pursue their claims.

13. Plaintiffs filed their Response in Opposition to Motion to Decertify on November 30, 2017, producing evidence showing that the representative Plaintiffs had suffered the "injury in fact" required under *Healthport* to assert standing, and asserting that nothing in the course of the litigation had changed which would merit any reconsideration of the other elements of class certification, each of which had already been properly analyzed and ruled upon by the trial court. Defendants' Reply brief in support of their Motion to Decertify Class was filed on December, 8, 2017.

14. The first Motion to Decertify Class was heard by the trial court on December 13, 2017, and each side was given the opportunity for extensive argument on the matter. After the hearing, each side submitted proposed orders at the request of the trial court, and on February 23, 2018, the court entered its "Order Denying Defendants' Motion to Decertify Class".

15. On February 26, 2018, the parties appeared before the Circuit Court of Monongalia County again, for a hearing that had originally been set as a pretrial but was conducted as a status conference. During that hearing, the need to amend the class definition to comport with the standing requirements set forth in *Healthport* was discussed, and the parameters for those amendments were discussed in detail.

16. Plaintiffs took depositions of a Rule 30(b) designee, Christine Matheny, on May 17, 2018.

17. On October 1, 2018, Defendants filed their Petition for Writ of Prohibition with the West Virginia Supreme Court of Appeals, challenging class certification on the basis of commonality, ascertainability, and standing.

18. Following briefing and oral argument, the West Virginia Supreme Court of Appeals entered its opinion in *State ex. rel. W. Virginia Univ. Hosp., Inc. v. Gaujot*, 829 S.E.2d 54 (W. Va. 2019). The West Virginia Supreme Court of Appeals found that “on the record before us, it does not appear that the circuit court has addressed the question of commonality with sufficient factual findings and conclusions” to determine that the Order Denying Motion to Decertify Class included the requisite analysis. *Id.* at 64.

19. The matter was remanded back to this Court for Rule 23 analysis, “particularly as they relate to commonality,” and with instructions that, if the Rule 23 requirements were met “to craft a class definition consistent with such findings.” *Id.*

20. Following the remand, this Court conducted a status conference on June 19<sup>th</sup>, 2019, during which it was decided that additional discovery should be undertaken to bolster the evidentiary record in this matter for purposes of Rule 23 analysis.

21. Discovery was undertaken in preparation for the filing of additional briefing on the issue of class certification.

22. Specifically, Melissa Martin, Director of Health Information Management for West Virginia University Hospitals was deposed on August 13, 2019. Ms. Martin had previously signed the affidavit which was relied upon by the WVSCA in its decision.

23. Plaintiffs also obtained records regarding different charges that were made by

Defendants in responding to similar records requests from June 5, 2014 through July 31, 2014, under a version of the statute that was substantially similar to the statute at issue impacting the Class in the case at bar.

24. Importantly, the charges made by Defendants under the later statute were determined upon a “cost study” which the Defendants asserted accurately estimated the costs actually incurred by Defendants in producing the medical records under the new statute.

25. The deposition testimony of the Defendant’s witnesses established that the actual costs incurred during the class period could not be calculated on an individual basis because the “[s]ystems have changed, locations of records have changed, staff has changed.” Depo. of Melissa Martin, at p. 37.

26. The deposition testimony of the Defendant’s witnesses also established that the cost study was transferrable to the time frame at issue during the Class period in the case at Bar. Deposition Transcript of Christine Metheny, at p. 60.

27. Defendants filed their Renewed Motion to Decertify Class on September 17, 2019. The matter was fully briefed, and on January 22, 2020, the parties appeared before the Court to argue Defendants’ Renewed Motion to Decertify Class.

28. On October 30, 2020, the Court entered an Order Denying Defendants’ Renewed Motion to Decertify Class.

29. On March 1, 2021, Defendants filed a “Motion for Reconsideration” of the October 30, 2020 Order, and Plaintiffs responded in opposition.

30. Plaintiffs’ Response included an Affidavit from their expert, Kathryn S. Crous, which addressed the method of calculations set forth in Plaintiffs’ spreadsheet and asserted that calculating the average charge for all of the invoices produced by Defendants for

the time period from June 6, 2014 to July 31, 2014 created a simple mechanism to determine the amount of Defendants' overcharges during the relevant class time period.

31. On July 28, 2021, the Court entered an Order Denying Defendant's Motion for Reconsideration.

32. On September 16, 2021, Defendants filed another Petition for Writ of Prohibition with the West Virginia Supreme Court of Appeals, challenging class certification on the basis of commonality, ascertainability, and predominance factors required for class certification under Rule 23. Defendants also argued that the circuit court failed to give careful consideration to ethical issues pertaining to the inclusion of lawyers within the class definition.

33. Following briefing and oral argument, the West Virginia Supreme Court of Appeals entered its opinion in *State ex. rel. W. Virginia Univ. Hosp., Inc. v. Gaujot*, 2022 WL 1222964 (W. Va. April 26, 2022). The WVSCA denied the writ after finding that the Rule 23 requirements had been met, and that a detailed analysis of the inclusion of lawyers in the class had not been mandated by its earlier decision.<sup>1</sup>

34. The Court held a status hearing on June 23, 2022 and scheduled the case for trial the week of February 6, 2023.

35. Counsel for all Parties engaged in multiple mediations with mediator Charles S. Piccirillo.

36. With the filing of the Joint Motion for Certification of Settlement Class and Preliminary Approval of Settlement on October 21, 2022, the Court was advised that the parties had reached an amicable resolution of all claims and asked the Court to certify the settlement class and to preliminarily approve of the settlement.

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<sup>1</sup> Counsel for the Plaintiffs are not members of the Class in this case.

37. The Court is aware of the risks and uncertainties inherent in the continued litigation of this action and the substantial outlays of additional time and money required to fully adjudicate the claims and defenses asserted in this action, and to further litigate such appeals as may thereafter be pursued.

38. The Court understands that the proposed Settlement Class which will be included in the Parties' proposed settlement agreement includes:

- a. Any patient who requested medical records in writing from January 18, 2008 and through June 5, 2014;
- b. "patient" will include any person who was an authorized agent or representative of patient (this includes anyone who used a medical authorization, including lawyers, insurance companies or any other person or entity who utilized a valid authorization from said patient (other than lawyers associated with Goddard Law, Bordas & Bordas, and Romano Law Office));
- c. Fees charged for the records have been paid; and
- d. Only the individual or entity who actually paid the fee is a member of the Class.

39. The Court believes that the class action procedural device provided for under W.Va.R.Civ.P. 23 was adopted with the goals of promoting economies of time, effort, and expense, uniformity of decisions, and fostering efficiency and fairness in handling large numbers of similar claims. The Court further understands that a primary function of the class action is to furnish a procedural mechanism to litigate numerous small damage claims which could not otherwise be economically adjudicated individually.

40. In deciding whether this matter should proceed as a class action for settlement purposes, the Court must determine that all of the prerequisites contained in W.Va.R.Civ.P. 23(a) (i.e., numerosity, commonality, typicality, and adequacy of representation) are met, and that one of the three subdivisions of Rule 23(b) is satisfied.



41. The Court previously entered an Order, dated April 16, 2014, granting preliminary Class Certification. The Court **FINDS** that the rationale supporting preliminary class certification for the litigation Class set forth in that Order applies equally to the Court's decision to approve a Settlement Class.

42. In support of its decision to **GRANT** the Parties "*Joint Motion for Certification of Settlement Class and Preliminary Approval of Settlement*", the Court hereby **FINDS** as follows:

- a. The information and documentation developed during the discovery phase of this action and submitted by Defendants prior to engaging in settlement discussions has established that the total number of medical records requests fulfilled for Class Members during the relevant time frame is approximately 28,720 requests, such that the "numerosity" requirement of W.Va.R.Civ.P. 23(a)(1) is met in this case.
- b. The questions of fact and law implicated by and related to the overarching liability questions presented for adjudication in this action are common to all members of the Settlement Class such that the "commonality" requirement of W.Va.R.Civ.P. 23(a)(2) is met in this case.
- c. The claims asserted by Plaintiffs and the claims of each member of the Settlement Class arise from essentially the same course of practice or course of conduct (i.e., the alleged overcharging for medical records by using a uniform 40 cents per page and \$10.00 search fee for every request rather than an individualized assessment of the actual costs incurred as required under the relevant statute); and Plaintiffs and each member of the Settlement Class will make essentially the same legal argument to prove liability such that the "typicality" requirement provided for under W.Va.R.Civ.P. 23(a)(3) is met in this case.
- d. The interests of Plaintiffs are aligned with the interests of the Settlement Class; and in pursuing such interests the representative Plaintiffs and their counsel have proceeded with vigor and have demonstrated that they are and have been committed to diligently pursuing the claims sought to be adjudicated in this action such that the "adequacy" requirement provided for under W.Va.R.Civ.P. 23(a)(4) is met in this case.
- e. The adjudication of the common issues in this action has important and desirable advantages of judicial economy compared to any individual issues when viewed by themselves; and the questions of law and fact common to all

putative members of the Settlement Class predominate over questions affecting only individual members such that the use of the Class procedural device will provide the best method to fully and efficiently adjudicate the issues raised in this action. Other factors weighing in favor of permitting these proceedings to go forward as a class action include: (i) the relatively small dollar amount of many Class members' individual claims, (ii) the absence of other litigation concerning medical record charges against these Defendants in West Virginia, (iii) Monongalia County, West Virginia is a forum where this case may be fully and fairly adjudicated, and, (iv) managing the settlement of the instant dispute does not present case management problems of a magnitude sufficient to prevent certification of the Settlement Class. Accordingly, the instant action may be maintained as a class action under W.Va.R.Civ.P. 23(b)(3).

43. The Court hereby **ORDERS** that this matter shall be conditionally certified as a class action pursuant to W.Va.R.Civ.P. 23(b)(3) for the purpose of effectuating the Parties' Settlement Agreement, and **ORDERS** that the Settlement Class shall be defined as set forth below:

- a. Any patient who requested medical records in writing from 01/18/2008 and through June 5, 2014;
- b. "patient" will include any person who was an authorized agent or representative of patient (this includes anyone who used a medical authorization, including lawyers, insurance companies or any other person or entity who utilized a valid authorization from said patient (other than lawyers associated with Goddard Law, Bordas & Bordas, and Romano Law Office));
- c. Fees charged for the records have been paid; and
- d. Only the individual or entity who actually paid the fee is a member of the Class.

44. The Court hereby **ORDERS** that Christopher Thomack and Joseph Michael Jenkins shall be designated as Class Representatives for the Class of Plaintiffs conditionally certified as a Settlement Class.

45. The Court hereby **ORDERS** that that attorneys David E. Goddard of Goddard Law, David J. Romano of Romano Law Office LC, and Richard A. Monahan of

Bordas & Bordas, PLLC, be designated as counsel for the Settlement Class.

46. The Court notes that under the terms of the Parties' Proposed Settlement, Defendants will pay claims as approved by the agreed-upon claims administrator, Edgar Gentle, III, of Gentle, Turner & Benson, LLC in Birmingham, AL, up to a total of \$1,440,000.00, which for purposes of this settlement includes both overcharges and interest (but not attorney fees or claim administration costs), with interest being calculated on the individual claims at 5.5% per annum, simple interest, beginning on January 1<sup>st</sup> of the year following the overcharge ("settlement fund").

47. The Court further notes that the Parties' Proposed Settlement provides that, depending on the total number of Class members, each Class member will get his/her/its prorated portion of the overcharges (computed by using the actual invoiced amount minus \$2.08) and interest calculated as set forth above in the preceding paragraph, as follows:

- a. If between 0.0% and 25.0% of requestors [Class members] file claim forms approved by the administrator ("take rate"), he/she/it will receive 100% of his/her/its overcharges and interest (assuming there is sufficient money in the fund to do so);
- b. If the participation rate by Class members is between 25.0% and 50.0%, he/she/it will receive 75% of the overcharges and interest (assuming there is sufficient money in the fund to do so);
- c. If the participation rate by Class members is between 50.0% and 100%, he/she/it will receive 50% of the overcharges and interest (assuming there is sufficient money in the fund to do so);
- d. If there are more approved claims eligible for redemption which, with interest, exceed the maximum settlement fund of \$1,440,000.00, then each will receive his/her/its proportionate share of the total settlement fund of \$1,440,000.00.

48. The Court notes that the Parties' Proposed Settlement provides that Defendants' insurer, will bear the costs of administration;

49. The Court notes that the Parties' Proposed Settlement provides that the

Class payments will be made by Defendants' insurer, after proper submission of claims by Class members and the approval of the claim by the administrator ("redemption") based upon the redemption percentages set forth above. It is expressly understood that payments by the Defendants' insurer shall only be made after approval of the claims as described herein and shall be made directly to the Class members consistent with this Order;

50. The Court notes that the Parties' Proposed Settlement provides that the administrator will make no more than two attempts (as determined by Claims Administrator) to contact Class members and advise them of their rights to participate in this class action. However, if events arise which show a justifiable need for a third attempt, which shall be decided by the Court if the parties are unable to agree, then the Claims Administrator may make a third attempt to notify potential Class members as to their right to complete a claim form. There will be a time frame of nine (9) months to submit claims, with that time frame beginning to run from the date that the first Notices (i.e. first attempt) is sent by the Claims Administrator to the Class. The Settlement Administrator or his agent or outside designee will have full access to obtain information in person or remotely (with an agreed confidentiality order in place or an order crafted by the Court if no agreement can be reached) from Defendant through any means necessary (including access to medical records or bills, paper records, electronic records, or any other means that may be necessary) so that the Settlement Administrator can fulfill his obligation to send meaningful notice to as many potential Class Members as possible. Defendants have advised that they can produce social security numbers, dates of birth, and/or updated addresses electronically. All parties have agreed to cooperate in good faith to assist the claims administrator with the goal to receive

as many completed claims forms as reasonably possible from the Class. Plaintiffs will agree to a confidentiality order regarding any confidential information they may receive;

51. The Court notes that the Parties' Proposed Settlement provides that the two Class Representatives, Christopher Thomack and Joseph Michael Jenkins, will receive \$10,000.00 each as incentive in acting as Class Representatives in addition to any recovery provided to Class members, to be paid by Defendants' insurer;

52. The Court notes that the Parties' Proposed Settlement provides that Defendants, will pay to Plaintiffs' attorneys a total of \$975,000.00, upon Court approval of these fees;

53. The Parties' Proposed Settlement provides that Plaintiffs' counsel will not seek reimbursement of case expenses.

54. The Court notes that the Parties have also agreed that the notice of conditional certification of class action and preliminary approval of class action settlement to be furnished to the members of the Settlement Class shall advise each Class member of the right to be excluded from the Settlement Class by "opting out" of the Settlement Class by completing the "opt-out form" to be included with the notice. Any member of the Settlement Class choosing to "opt out" of the settlement will not receive any distribution from the settlement fund provided for under the terms of the Settlement Agreement and will otherwise not participate in the Settlement Agreement. Said notice will further advise all Class members of their right to object to the Settlement Agreement and their right to attend the Final Fairness Hearing to be conducted by the Court for the purpose of determining the fairness, reasonableness, and adequacy of all aspects of the settlement agreement.

55. After considering the lengthy history of this litigation, the various legal arguments and theories that have been presented to this Court throughout the nearly ten-year timespan this case has been on the Court's docket, and the explanations contained within the Parties' Joint Motion for Preliminary Approval of the proposed settlement, the Court hereby **FINDS** that the consideration to be paid under the Parties' Settlement Agreement is believed to be fair and reasonable; and such consideration is paid by Defendants for the purpose of completely resolving and extinguishing any and all claims against Defendants and their officers, directors, managers, agents, representatives, and employees made by each Participating Class Member of the Settlement Class, with the exception of any other pending cases involving other healthcare entities that were sought to be consolidated with this Civil Action but were determined to remain in each case's original jurisdiction for resolution

56. The Court hereby **PRELIMINARILY FINDS** the following: (1) that the proposed settlement class membership is appropriate; (2) that the settlement methodology outlined above is appropriate; (3) that the appointment of the suggested Claims Administrator is appropriate; (4) that it is appropriate that the Defendants and/or its insurer will pay the costs associated with administration of the settlement; (5) that the payments to be made to the named Class Plaintiffs Christopher Thomack and Joseph Michael Jenkins is appropriate; and (6) that the suggested amount of attorney fees to be paid to Plaintiff's counsel is fair and reasonable considering the efforts of Plaintiffs' counsel, the time expended and numerous hearings and appeals that this case generated.

57. The Court understands that the Parties will move the Court for final approval of the proposed settlement and request the Court to conduct a Final Fairness

Hearing to be scheduled not earlier than 60 days after the date by which final notices are required to be mailed to each class member, but as soon after such 60-day period as may be available for docketing by the Court.

58. The Court notes that the purpose of the Final Fairness Hearing will be to provide the Court with an additional opportunity to consider the terms of the proposed settlement and to furnish any member of the Settlement Class who may wish to oppose the proposed settlement or otherwise address the Court with an opportunity to be heard.

59. Accordingly, the Court hereby **ORDERS** Class Counsel, in conjunction with the Claims Administrator, to provide to all members of the Settlement Class the best notice of class certification practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort as provided for under W.Va.R.Civ.P. 23(C)(2) in the form and plan to be approved by the Court.

The Clerk is **DIRECTED** to send a Certified copy of this Order to all counsel of record.

ENTER: 12/27/2022

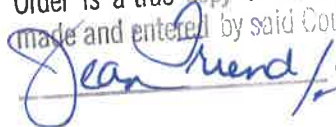
  
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JUDGE PHILLIP D. GAUJOT

ENTERED: Dec. 27, 2022

DOCKET LINE 470, Jean Friend, Clerk

STATE OF WEST VIRGINIA SS:

I, Jean Friend, Clerk of the Circuit Court and Family Court of Monongalia County State aforesaid do hereby certify that the attached Order is a true copy of the original Order made and entered by said Court.

  
\_\_\_\_\_  
Circuit Clerk

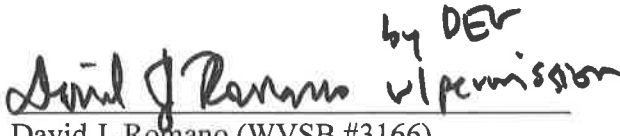
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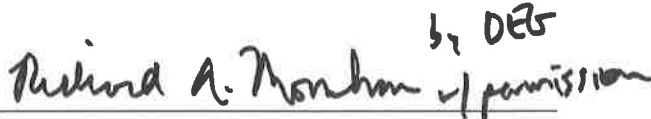
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