West Virginia E-Filing Notice

CC-31-2013-C-53

Judge: Perri J. DeChristopher

To: David Goddard
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NOTICE OF FILING

IN THE CIRCUIT COURT OF MONONGALIA COUNTY, WEST VIRGINIA
CHRISTOPHER THOMACK, ET AL v. WEST VIRGINIA UNIVERSITY HOSPITALS, INC., ET AL
CC-31-2013-C-53

The following motion was FILED on 11/8/2024 9:26:39 PM

Notice Date: 11/8/2024 9:26:39 PM

Donna J. Hidock
CLERK OF THE CIRCUIT COURT
Monongalia County
75 High Street, Suite 12
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CC-31-2013-C-53
Monongalia County Circuit Clerk
Donna J. Hidock

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 PERRI JO DECHRISTOPHER

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.

JOINT MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT

NOW COME 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; also comes 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"), and ask the Court for entry of final judgment of this class action settlement.[1] In support of this Motion, the parties hereby state the following:

[1] Counsel recognizes that all issues requiring the Court's attention may not be resolved by the time of the December 11, 2024 Final Approval Hearing. This is particularly true since the right for class members to file a claim lasts until May, 2025. However, in such regard, counsel notes that the Court has the authority to extend the Final Approval Hearing as many times as necessary, and such was clearly set forth in the "Notice of Class Action Settlement" which states: "These deadlines may be extended for good cause, without further direct notice to you." The Notice also indicates that "This hearing date [Final Approval Hearing] may change without further direct notice to you." Such is appropriate because any putative Class Members that attends the December 11, 2024 hearing will be advised of any future hearing dates of which the Court is then aware. Moreover, any such additional hearing dates will be also

STATEMENT OF THE CASE AND SETTLEMENT

Plaintiffs Christopher Thomack ("Thomack") and Joseph Michael Jenkins ("Jenkins") 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 fee irrespective of the actual costs incurred by Defendants in producing their medical records, even when such medical records were available in electronic format. On January 18, 2013, Thomack filed a Class Action Complaint against West Virginia University Hospitals, Inc. ("WVUH") in the Circuit Court of Monongalia County. The case was removed by Defendants to the Northern District of West Virginia, which, upon motion filed by Thomack, remanded the case back to the Circuit Court of Monongalia County.

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.

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

prominently stated on the website. Counsel notes that any putative Class Members who do not attend the December 11, 2024 hearing are not entitled to any additional personal notice, as they would have forfeited their right to personal notice since they failed to attend such December 11, 2024 hearing.

Defendants' overcharging for copies of medical records. Defendants denied these allegations asserting that the amounts they charged were proper and lawful.

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. 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 Supreme Court of Appeals of West Virginia denied the Petition.

On July 21, 2017, Defendants filed their first Motion to Decertify Class. The arguments raised in the Motion to Decertify included several 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 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. 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. After briefing and a hearing on the matter, the court entered an Order Denying Defendants' Motion to Decertify Class.

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

Court of Appeals granted the writ, finding 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. 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."

Following the remand, this Court conducted a status conference, 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. Plaintiffs obtained records reflecting 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 Plaintiffs argued was substantially similar to the statute at issue for the Class. Plaintiffs argued that the charges made by Defendants under the later statute were made based upon a "cost study" which accurately estimated the costs actually incurred by Defendants in producing the medical records under the new statute. 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." However, Plaintiffs argued that 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.

Defendants subsequently filed a Renewed Motion to Decertify Class. The matter was fully briefed, and the Court entered an Order Denying Defendants' Renewed Motion to Decertify Class. Defendants next filed a "Motion for Reconsideration" of the "Order Denying Defendants'

Renewed Motion to Decertify Class." After additional briefing and another hearing, the Court entered an Order Denying Defendant's Motion for Reconsideration.

On September 16, 2021, Defendants filed a third Petition for Writ of Prohibition with the Supreme Court of Appeals of West Virginia, 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. Following briefing and oral argument, Judge Moats authored a detailed opinion for the Supreme Court of Appeals of West Virginia, denying 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. *State ex rel. West Virginia Univ. Hosp., Inc. v. Gaujot*, 887 S.E.2d 571 (W. Va. 2022).

The circuit court scheduled the case for trial the week of February 6, 2023. On multiple occasions, between July 13, 2020 and August 18, 2022, counsel for all Parties engaged in mediation. After extensive negotiations, the Parties reached an agreement regarding who would be members of the class and what the terms of a proposed settlement would be. First, the Parties agreed that members of the Settlement Class would include:

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.

Second, the Parties agreed that a class action pursuant to W.Va.R.Civ.P. 23 was the appropriate method to resolve these claims for settlement purposes. In support of that agreement, the Parties agreed 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)(l) 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 have 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).

Third, the Parties agreed to the following preliminary settlement terms:

a. Defendants (or their insurer, Intact) agreed to pay claims as approved by the agreed-upon claims administrator, Edgar Gentle, III, of Gentle, Turner, Sexton & Harbison, 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 1st of the year following the overcharge ("settlement fund");

b. 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:

    1. If between 1% and 25% of requestors 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);

    2. If the participation rate is 26% to 50%, he/she/it will receive 75% of the overcharges and interest (assuming there is sufficient money in the fund to do so);

    3. If the participation rate is 51% to 100%, he/she/it will receive 50% of the overcharges and interest (assuming the is sufficient money in the fund to do so);

    4. 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;

c. Defendant or its insurer, Intact, will bear the costs of administration;

d. Class payments will be made by Defendant or its insurer, Intact, 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;

e. 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 Defendant or its insurer, Intact;

f. Defendant or its insurer, Intact, agree to pay Plaintiffs' attorneys a total of $975,000.00, upon Court approval of the fees;

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

On October 21, 2022, the parties filed their "Joint Motions for Certification of Settlement Class and Preliminary Approval of Settlement," and the Court granted those motions by written Order on December 27, 2022. After additional motion practice designed to obtain information about the class members to ensure maximum participation rates, the parties filed their "Joint Motion to Formally Appoint Claims Administrator" on July 31, 2023, and the Court entered an "Order Appointing Claims Administrator" on August 7, 2023.

Additional issues arose with regard to whether governmental entities were included as potential class members. "Defendants' Motion to Modify December 27, 2022, Order Granting Joint Motion for Certification of Settlement Class and Preliminary Approval of Settlement" was filed on February 9, 2024. After briefing and a hearing, the Court ruled that governmental entities would not be members of the settlement class via written Order on April 4, 2024.

The parties spent significant time and energy working with the Claims Administrator to craft claims forms and notice provisions which would help maximize participation by the settlement class members. The Claims Administrator assisted in preparing a proposed timeline for notice, claims filing, objections, and other actions. The parties eventually agreed to a proposed Postcard Notice, Publication Notice, Agent-Requester Claim Forms, Patient Claim

Forms, and Other Party Claim Forms. All of these documents were presented to the Court, as part of the "Claims Administrator Revised Report Number One" on May 29, 2024. On June 10, 2024, the Court entered its "Order Approving Claims Administrator Revised Report Number One, Settlement Deadlines and Date for Approval Hearing."

In that Order, the Court scheduled the Final Fairness Hearing for December 11, 2024 at 3:00 p.m. The Court also ordered that all claims must be submitted by May 6, 2025, all objections must be filed by September 8, 2024, and all Opt-Out Forms must be submitted to the Claims Administrator by September 8, 2024. The Court directed counsel to file a Motion for Final Approval of the Class Action Settlement not later than thirty (30) days before the Final Approval Hearing on December 11, 2024.

ARGUMENT

Rule 23(c) requires the best notice practicable under the circumstances *W. Va. R. Civ. P.* 23(c)(2). In its "Order Approving Claims Administrator Revised Report Number One, Settlement Deadlines and Date for Approval Hearing," the Court found that "the Claims Administrator's suggested claimant data collection procedures, settlement by publication and proposed notice forms and procedures, Claim Forms and Settlement Timeline (Exhibits A, B, C, D, E, and F to the Claims Administrator Revised Report Number One), meet the requirements of Due Process, West Virginia Rule of Civil Procedure 23(b)(3), and all other applicable laws…."

At the time of this filing, the Claims Administrator has complied with the Court's directives contained within the "Order Approving Claims Administrator Revised Report Number One, Settlement Deadlines and Date for Approval Hearing." Specifically, Postcard Notices were mailed out on July 10, 2024. The settlement notice was published once in the following newspapers: *The Register – Harold*, *Charleston Gazette*, *The Herald – Dispatch*, *The Exponent*

Telegram, *The Dominion Post*, *The Journal – Martinsburg*, *The Intelligencer*, and *Wheeling News Register* on July 10, 2024. The Claims Administrator created a Settlement Website, www.WVUMedicalRecordsOvercharge.com, which included all pertinent documents and went live on July 10, 2024. Finally, the Claims Administrator also sent specific notices and claim forms for various groups of individuals (requesters, patients, and other parties) with detailed instructions for making a claim, objecting, opting-out, or to ask questions about the process or the settlement.

These notice provisions appraised potential class members of the settlement and their options with respect therein. These notice provisions fully satisfied the requirements of Rule 23(c)2 and established due process requirements. The Notice fairly and adequately described the nature of the action, the definition the class certified, and the binding terms and effect of the class action settlement. The Notice also explained the date and time of the final settlement hearing, the proposed plan for filing claims, and the settlement class counsels' intention to seek attorney fees, and incentive awards. Final approval of a settlement occurs after notice is issued, the period for opting out or objecting has passed, and the Court has conducted a fairness hearing. *W. Va. R. Civ. P.* 23(e).

THE SETTLEMENT WARRANTS FINAL APPROVAL

This class action lawsuit has been pending for over 11 years. The case has been heard by the Supreme Court of Appeals of West Virginia on three separate occasions. The sufficiency of the class action allegations has been vetted and found appropriate. The proposed settlement involves a negotiated methodology designed to maximize the return of Class Members' money that was paid to Defendants to obtain copies of their medical records during the class period. Further, the settlement methodology was designed to maximize the participation rate of class members in the Class Action Settlement. A circuit court may approve a class action settlement

after notice of the proposed dismissal or compromise is given to all members of the class in such manner as the Court directs. W.Va.R.Civ.P. 23(e). Notice has been provided to all class members in the manner directed by the Court's "Order Approving Claims Administrator Revised Report Number One, Settlement Deadlines and Date for Approval Hearing."

A class action settlement should be approved when the circuit court finds it fair, adequate, and reasonable. *Allen v. Monsanto Company*, 2013 WL 6153150 at *7 (W. Va. 2013) (unpublished); *see also* Louis J. Palmer, Jr. & Robin Jean Davis, *Litigation Handbook on West Virginia Rules of Civil Procedure* at 667 (5th ed. 2017). Federal courts have also provided some guidance on what factors should be considered when evaluating a class action settlement. *In re Jiffy Lube Sec. Litig.* 927 F. 2d 155 (4th Cir 1991):

> [W]e have identified four factors for determining a settlement's fairness, which are: (1) the posture of the case at the time settlement was proposed; (2) the extent of discovery that had been conducted; (3) the circumstances surrounding the negotiations; and (4) the experience of counsel in the area of the class action litigation.

Lumber Liquidators, 952 F.3d 471, 484 (4th Cir. 2020) (citing *Jiffy Lube*, 927 F.2d at 159).

All four factors set forth in *Lumber Liquidators* favor approval of this class action settlement. The first three factors overlap significantly. The posture of the case is largely dependent upon how much discovery has occurred, and both influence the circumstances around negotiations. This settlement was reached after nearly ten years of litigation and only after the trial date was set and reset. The parties were equally entrenched in their positions, and every legal battle was hard fought.

With regard to the second factor, there is no "minimum or definitive amount of discovery that must be taken in order to find that this factor supports settlement." *Muhammad v. Nat'l City Mortgage, Inc*. 2008 WL 537 7783 (S.D. W.Va. 2008). Still, the parties in this case participated

in both written discovery and taking deposition testimony. In fact, at least nine (9) sets of written discovery requests were served on and answered by Defendants during this case.

In considering the circumstances surrounding the negotiations, the central inquiry for the Court is whether counsel has "sufficiently developed the case such that they can appreciate the merit of the claims." *Muhammad* at 3. In the absence of evidence to the contrary, the Court "may presume that settlement negotiations were conducted in good faith and the resulting agreement was reached without collusion." *Muhammad* at 3. The parties engaged in numerous hearings, motions, and three separate proceedings before the Supreme Court of Appeals of West Virginia. In other words, the case was mature for a considered and reasoned resolution, and the parties had fully explored all viable non-settlement options outside of a full-blown trial. The settlement was only reached after the parties engaged in multiple days of mediation with an experienced mediator. Another factor weighing in favor of the legitimacy of the settlement is the number of opt-outs and objections. Of 31,329 potential claims, only two Class Members opted out (0.0006%) and there were not any Class Members who filed objections (0.00%). Those figures strongly support the settlement's adequacy. *See e.g. Lumber Liquidators*, 952 F.3d at 485.

Finally, the last factor, the experience of counsel involved in class action litigation, also weighs heavily in favor of approving the settlement. Plaintiffs' counsel and Defendants' counsel are all experienced class action litigators with more than 25 years of legal experience each.

ATTORNEY FEES AND COSTS

The class counsel's proposed fees are reasonable. A request for attorney fees in the amount of $975,000 to be split between the three Plaintiff law firms was fully disclosed in the Parties' "Joint Motions for Certification of Settlement Class and Preliminary Approval of Settlement." Because the attorney fee award is part of a fee-shifting provision contained within the West

Virginia Medical Records Statute, and thus not linked to the amount of the class settlement, Plaintiffs' counsel opted to wait to mediate their fees until after a fair and adequate settlement was agreed upon for the Class Members. *See* Louis J. Palmer, Jr. & Robin Jean Davis, *Litigation Handbook on West Virginia Rules of Civil Procedure* at 667 (5th ed. 2017) (noting the danger of collusiveness when attorney fees are negotiated simultaneously with the settlement). To alleviate that risk, a separate full day mediation occurred after the resolution of the settlement amounts payable to the Class Members to negotiate legal fees. As previously stated, this case has spanned more than a decade with three separate writs and extensive motions practice and discovery. Further, Plaintiff's counsel agreed to forfeit their claims for repayment of case expenses in an effort to finalize the settlement.

Again, the class damage payments will not be reduced by class counsel's fees. Since the Medical Records Act provides attorney fees to the prevailing party, the Defendants have agreed to pay an amount for claimed fees and incentive awards in addition to the benefits to the class. *See Buckhannon Bd. & Care Home v. W.Va. Dept. of Health & Human Res*., 532 U.S. 598, 604 (2001).

THE SETTLEMENT TREATS CLASS MEMBERS EQUITABLY

One additional factor Courts consider in evaluating a potential class action settlement looks at whether class members are treated equitably. In determining whether to approve a class action settlement, the issue is not whether everyone affected by the settlement is completely satisfied. *Id.* Instead, the test is whether the settlement as a whole is a fair, adequate, and reasonable resolution of the claims asserted. *Skochin v. Genworth Financial* 2020 WL 6532833, *8 (E.D.Va. 2020). This settlement treats class members equitably. The only distinction in how

class members are treated is based on the timing of the request since interest is calculated beginning on January 1st the year following the date of the request.

THE PROPOSED INCENTIVE AWARDS SHOULD BE APPROVED

In its discretion, courts may award special compensation to class representatives to compensate them for the services they provided and the risks they incurred during the litigation. Incentive awards are routinely approved in class actions to encourage socially beneficial litigation by compensating named plaintiffs for their expenses and personal time spent advancing the litigation on behalf of the class and any risk they incurred. *Kay Co. v. Equitable Production Co.*, 749 F. Supp. 2d 455, 472 (S.D.W.Va. 2010). This case would never have been filed without the named Plaintiffs volunteering to commit their time and effort. The $10,000 award was agreed upon by all parties in an arms-length mediation and is consistent with those awarded in other cases. *Id.* at 473.

CONCLUSION

The settlement is fair and reasonable and in the best interests of the class. The requested Attorney Fee award of $975,000 to be split between the three Plaintiff law firms is fair and reasonable. The requested incentive awards of $10,000 to each named Plaintiff is fair and reasonable.

WHEREFORE, the Plaintiffs respectfully request this Honorable Court to grant Final Approval of Proposed Settlement in this case and for such other and further relief as this Honorable Court deems appropriate.

Jointly submitted this 8th day of November, 2024.

/s/ David E. Goddard
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Counsel for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on the 8th day of November, 2024, I served the foregoing "Joint Motion for Final Approval of Class Action Settlement" upon counsel of record via facsimile as follows:

Marc E. Williams, Esquire
Robert L. Massey, Esquire
Nelson Mullins Riley & Scarborough LLP
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Counsel for Defendants

/s/ David E. Goddard
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Counsel for Plaintiffs

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Monongalia County Circuit Clerk
Donna J. Hidock

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 PERRI JO DECHRISTOPHER)

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.

FINAL ORDER APPROVING CLASS SETTLEMENT

This matter comes to the Court for final approval of a class action settlement pursuant to West Virginia Rule of Civil Procedure 23(e). Previously, the Court conditionally certified a settlement class by a Preliminary Approval Order entered on December 27, 2022. The parties now ask the Court for final approval of the class settlement, as requested in the "Joint Motion for Final Approval of Class Action Settlement" submitted on November __, 2024.

A Final Approval Hearing was held on December 11, 2024 where the "Joint Motion for Final Approval of Class Action Settlement" was heard.

Having reviewed the parties' written submissions as described above, the arguments of counsel on December 11, 2024, the entire record of this action, and perceiving no need for further oral argument, the Court hereby **ORDERS** as follows:

I. FINDINGS OF FACT

A. Procedural History

1. Plaintiffs Christopher Thomack ("Thomack") and Joseph Michael Jenkins ("Jenkins") 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 fee 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, Thomack filed a Class Action Complaint against West Virginia University Hospitals, Inc. ("WVUH") in the Circuit Court of Monongalia County.

3. The case was removed by Defendants to the Northern District of West Virginia, which, upon motion filed by Thomack, remanded the case back to the Circuit Court of Monongalia County.

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").

5. 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.

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

7. 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.

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.

10. In an Order entered on August 26, 2014, the Supreme Court of Appeals of West Virginia denied the Petition.

11. On July 21, 2017, Defendants filed their first Motion to Decertify Class. The arguments raised in the Motion to Decertify included several 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 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.

12. 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.

13. After briefing and a hearing on the matter, the court entered an Order Denying Defendants' Motion to Decertify Class.

14. On October 1, 2018, Defendants filed their second Petition for Writ of Prohibition

with the Supreme Court of Appeals of West Virginia, challenging class certification on the basis of commonality, ascertainability, and standing.

15. Following briefing and oral argument, the Supreme Court of Appeals of West Virginia granted the writ, finding 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. 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."

16. Following the remand, this Court conducted a status conference, 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.

17. Plaintiffs obtained records reflecting 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, Plaintiffs urged was substantially similar to the statute at issue for the Class. Importantly, the charges made by Defendants under the later statute were made based upon a "cost study" which accurately estimated the costs actually incurred by Defendants in producing the medical records under the new statute. 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." 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.

18. Defendants filed a Renewed Motion to Decertify Class on September 17, 2019.

The matter was fully briefed, and the Court entered an Order Denying Defendants' Renewed Motion to Decertify Class on October 30, 2020.

19. On March 1, 2021, Defendants filed a "Motion for Reconsideration" of the "Order Denying Defendants' Renewed Motion to Decertify Class."

20. After additional briefing and another hearing, the Court entered an Order Denying Defendant's Motion for Reconsideration on July 28, 2021.

21. On September 16, 2021, Defendants filed a third Petition for Writ of Prohibition with the Supreme Court of Appeals of West Virginia, 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.

22. Following briefing and oral argument, the Supreme Court of Appeals denied the writ in an opinion filed on April 26, 2022. The Court found 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.

23. The circuit court scheduled the case for trial the week of February 6, 2023.

24. On multiple occasions, between July 13, 2020 and August 18, 2022, counsel for all Parties engaged in mediation. After extensive negotiations, the Parties reached an agreement regarding who would be members of the class and what the terms of a proposed settlement would be.

25. On October 21, 2022, the parties filed their "Joint Motions for Certification of Settlement Class and Preliminary Approval of Settlement."

26. The parties agreed that a class action pursuant to W.Va.R.Civ.P. 23 was

the appropriate method to resolve these claims and agreed as follows:

i. The information and documentation developed during the discovery phase of this action and submitted by Defendants prior to engaging in settlement discussions 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)(l) is met in this case.

ii. 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.

iii. 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.

iv. 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.

v. 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).

27. The Parties agreed to the following preliminary settlement terms:

a. Defendants (or their insurer, Intact) agreed to pay claims as approved by the agreed-upon claims administrator, Edgar Gentle, III, of Gentle, Turner, Sexton & Harbison, 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 1st of the year following the overcharge ("settlement fund");

b. 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:

1. If between 1% and 25% of requestors 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);

2. If the participation rate is 26% to 50%, he/she/it will receive 75% of the overcharges and interest (assuming there is sufficient money in the fund to do so);

3. If the participation rate is 51% to 100%, he/she/it will receive 50% of the overcharges and interest (assuming the is sufficient money in the fund to do so);

4. 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;

c. Defendant or its insurer, Intact, will bear the costs of administration;

d. Class payments will be made by Defendant or its insurer, Intact, 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;

e. 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 Defendant or its insurer, Intact;

f. Defendant or its insurer, Intact, agree to pay Plaintiffs' attorneys a total of $975,000.00, upon Court approval of the fees;

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

28. The Court granted those motions certifying the settlement class and giving preliminary approval to the settlement by written Order on December 27, 2022.

29. After additional motion practice designed to obtain information about the class members to ensure maximum participation rates, the parties filed their "Joint Motion to Formally Appoint Claims Administrator" on July 31, 2023, and the Court entered an "Order Appointing Claims Administrator" on August 7, 2023.

30. Additional issues arose with regard to whether governmental entities were included as potential class members.

31. "Defendants' Motion to Modify December 27, 2022 Order Granting Joint Motion for Certification of Settlement Class and Preliminary Approval of Settlement" was filed on February 9, 2024.

32. After briefing and a hearing, the Court ruled that governmental entities would not be members of the settlement class via written Order on April 4, 2024.

B. Proposed Class Description

33. The Parties agreed that members of the Settlement Class would include:

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.

34. Governmental entities are not members of the settlement class.

C. Claims Process

35. Following preliminary approval, the parties filed their "Joint Motion to Formally Appoint Claims Administrator" on July 31, 2023, and the Court entered an "Order Appointing Claims Administrator" on August 7, 2023.

36. The parties spent significant time and energy working with the Claims Administrator to craft claims forms and notice provisions which would help maximize participation by the settlement class members.

37. The Claims Administrator assisted in preparing a proposed timeline for notice, claims filing, objections, and other actions.

38. The parties eventually agreed to a proposed Postcard Notice, Publication Notice, Agent-Requester Claim Forms, Patient Claim Forms, and Other Party Claim Forms.

39. All of these documents were presented to the Court, as part of the "Claims Administrator Revised Report Number One" on May 29, 2024.

40. On June 10, 2024, the Court entered its "Order Approving Claims Administrator Revised Report Number One, Settlement Deadlines and Date for Approval Hearing." In that Order, the Court scheduled the Final Fairness Hearing for December 11, 2024 at 3:00 p.m. The Court also ordered that all claims must be submitted by May 6, 2025, all objections must be filed by September 8, 2024, and all Opt-Out Forms must be submitted

to the Claims Administrator by September 8, 2024. The Court directed counsel to file a Motion for Final Approval of the Class Action Settlement not later than thirty (30) days before the Final Approval Hearing on December 11, 2024.

41. The Court notes that the Claims Administrator has complied with the Court's directives contained within the "Order Approving Claims Administrator Revised Report Number One, Settlement Deadlines and Date for Approval Hearing." Specifically, Postcard Notices were mailed out on or about July 10, 2024. The settlement notice was published once in the following newspapers: *The Register – Harold*, *Charleston Gazette*, *The Herald – Dispatch*, *The Exponent Telegram*, *The Dominion Post*, *The Journal – Martinsburg*, *The Intelligencer*, and *Wheeling News Register* on July 10, 2024. The Claims Administrator created a Settlement Website, www.WVUMedicalRecordsOvercharge.com, which included all pertinent documents and went live on July 10, 2024, 2024. Finally, the Claims Administrator also sent specific notices and claim forms for various groups of individuals (requesters, patients, and other parties) with detailed instructions for making a claim, objecting, opting-out, or to ask questions about the process or the settlement.

D. Final Approval Hearing and Claims Report Submissions

42. Pursuant to the "Order Approving Claims Administrator Revised Report Number One, Settlement Deadlines and Date for Approval Hearing," the parties' request for final approval of the settlement was brought on for hearing on December 11, 2024, pursuant to Rule 23(e), upon notice duly given to counsel of record, and to class members by the Claims Administrator. Counsel appeared to present oral argument in support of final approval.

43. During the hearing, the Court heard from all counsel, as well as the Claims Administrator.

44. The Claims Administrator advised the Court that, at the time of the Final Fairness Hearing on December 11, 2024, of the 31,329 potential claims, only two Class Members opted out (0.0006%) and there were not any Class Members who filed objections (0.00%).

45. The Court notes that Defendants and/or their insurer may not pay the claims until after all claims have been submitted on May 6, 2025, at which time the number of claims made (the participation rate) will be known.

E. Fees and Costs and Incentive Awards

46. Plaintiffs' claims were filed under a shifting statute, W. Va. Code §16-29-1(d) which specifically provides patients the right to enforce their right to access their own medical records through the methods and process to be followed set forth in the West Virginia Medical Records Act. When those statutory methods are violated, the violator "shall pay any attorney fees and costs, including court costs incurred in the course of such enforcement." W. Va. Code § 16-29-1(d). Further, the provisions of this article "may be enforced by a patient, authorized agent, or authorized representative." W. Va. Code §§ 16-29-1 and 16-29-2.

47. Consistent with the fee shifting statutes, the Parties advised the Court that they had entered into a negotiated Attorney Fee award of $975,000, which Plaintiffs' counsel represent is a conservative value for the number of hours spent by Plaintiff's counsel in obtaining this Class Action Settlement.

48. The Parties also request approval of incentive or service awards of $10,000.00 for each named Plaintiff.

II. CONCLUSIONS OF LAW

49. A class action settlement should be approved when the circuit court finds it fair, reasonable, and adequate. *Allen v. Monsanto Company*, 2013 WL 6153150 at *7 (W. Va. 2013) (unpublished); *see also* Louis J. Palmer, Jr. & Robin Jean Davis, *Litigation Handbook on West Virginia Rules of Civil Procedure* at 667 (5th ed. 2017).

50. Federal courts have provided guidance on what factors should be considered when evaluating a class action settlement. *In re Jiffy Lube Sec. Litig.* 927 F. 2d 155 (4th Cir 1991):

> [W]e have identified four factors for determining a settlement's fairness, which are: (1) the posture of the case at the time settlement was proposed; (2) the extent of discovery that had been conducted; (3) the circumstances surrounding the negotiations; and (4) the experience of counsel in the area of the class action litigation.

Lumber Liquidators, 952 F.3d 471, 484 (4th Cir. 2020) (citing *Jiffy Lube*, 927 F.2d at 159).

51. All four factors set forth in *Lumber Liquidators* favor approval of this class action settlement.

52. At the time the settlement was proposed, this case had been pending for nearly ten (10) years. The parties had engaged in significant written and deposition discovery and extensive motion practice. Three writs of prohibition had been filed and ruled upon by the Supreme Court of Appeals of West Virginia.

53. With regard to the second factor, there is no "minimum or definitive amount of discovery that must be taken in order to find that this factor supports settlement." *Muhammad v. Nat'l City Mortgage, Inc*. 2008 WL 537 7783 (S.D. W.Va. 2008).

54. Still, the parties in this case participated in both written discovery and taking deposition testimony. In fact, at least nine (9) sets of written discovery requests were served on and answered by Defendants during this case.

55. In considering the circumstances surrounding the negotiations, the central inquiry for the Court is whether counsel has "sufficiently developed the case such that they can appreciate the merit of the claims." *Muhammad* at 3.

56. In the absence of evidence to the contrary, the Court "may presume that settlement negotiations were conducted in good faith and the resulting agreement was reached without collusion." *Muhammad* at 3.

57. The Court finds this case was mature for a considered and reasoned resolution, and the parties had fully explored all viable non-settlement options prior to trial.

58. The settlement was reached after the parties engaged in multiple days of mediation with an experienced mediator.

59. Another factor weighing in favor of the legitimacy of the settlement is the number of opt-outs and objections. Of the 31,329 potential claims, only two Class Members opted out (0.0006%) and there were not any Class Members who filed objections (0.00%). Those figures strongly support the settlement's adequacy. *See e.g. Lumber Liquidators*, 952 F.3d at 485.

60. Finally, the last factor, the experience of counsel involved in class action litigation, also weighs heavily in favor of approving the settlement. Plaintiffs' counsel and Defendants' counsel are all experienced class action litigators with more than 25 years of legal experience.

61. The Court further finds that all potential class members have been treated equitably.

62. In determining whether to approve a class action settlement, the issue is not whether everyone affected by the settlement is completely satisfied. *Id.* Instead, the test is whether the settlement as a whole is a fair, adequate, and reasonable resolution of the claims asserted. *Skochin v. Genworth Financial* 2020 WL 6532833, *8 (E.D.Va. 2020).

63. This settlement treats class members equitably. The only distinction in how class members are treated is based on the timing of the request since interest is calculated beginning on January 1st the year following the date of the request.

64. The Court concludes that each of the factors outlined above has been satisfied, and the Court hereby finds that the settlement is fair, reasonable, and adequate.

A. Notice to the Class

65. "[T]he court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude the member from the class if the member so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if the member desires, enter an appearance through counsel." W. Va. R. Civ. P. 23(c)(2).

66. The Court previously concluded that it was provided with information sufficient to enable it to determine whether to give notice of the proposal to the Settlement Class and, thus, found that the proposed Class Notice constituted the best notice practicable under the circumstances, was reasonably calculated to communicate actual notice of the litigation and proposed settlement to persons in the Settlement Class, and was due and sufficient notice to all persons entitled to notice of the settlement of this action.

67. The Court now finds that the Class Notice was properly given to class members, consistent with the parties' proposal.

68. The Court is satisfied that the Class Notice campaign described by the Claims Administrator was the best notice practicable under the circumstances and was reasonably

calculated to communicate actual notice of the litigation and the proposed settlement to persons in the Settlement Class, in light of the Defendants' records for generating the Class Lists, the number of postcard notices mailed, the number of returned mail postcards, attempts to re-mail for returned mail postcards, the "take rate" of claims which was in line with the typical rate for consumer class actions, and considering that the Class Period dates back to ROI requests from 2008.

69. The Court finds that the method of notice to potential class members was reasonably calculated to apprise potential class members in the Settlement Class of the settlement such that the settlement and the Court's final judgment is binding on all class members, whether or not they received actual notice of the settlement and final judgment.

70. Under the circumstances, it is fair and reasonable to make the Settlement Agreement and its release of claims binding on all class members in the Settlement Class.

71. Accordingly, the Court concludes that notice was properly given to all potential class members of the proposed class settlement.

B. Approval of the Proposal

72. While the West Virginia Rules of Civil Procedure are silent on this issue, the Court notes that Federal Rule of Civil Procedure 23(e)(2) directs to the Court to consider whether: "(A) the class representatives and class counsel have adequately represented the class; (B) the proposal was negotiated at arm's length; (C) the relief provided for the class is adequate, taking into account (i) the costs, risks, and delay of trial and appeal; (ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims; (iii) the terms of any proposed award of attorney's fees, including timing of payment; and (iv) any agreement required to be identified under Rule 23(e)(3); and (D) the

proposal treats class members equitably relative to each other."

73. "Such approval is required to ensure that any settlement reached is consistent with the plaintiff's fiduciary obligations to the class." *Muhammad v. Nat'l City Mortg., Inc.*, No. CIV.A. 2:07-0423, 2008 WL 5377783, at *3 (S.D. W. Va. Dec. 19, 2008).

i. Adequacy of Representation

74. The Court previously concluded that Class Counsel and the class representatives adequately represent the class.

75. The Court is satisfied by the explanation of legal services provided and the experience, reputation, and the ability of Class Counsel in consideration of the skill required to properly perform the legal services rendered.

ii. Proposal Negotiated at Arm's Length

76. The Court concludes that the proposal was negotiated at arm's length without collusion between the parties.

77. First, courts should consider the stage of the current litigation and the amount of discovery that the parties have completed. *Jiffy Lube Sec. Litig.*, 927 F.2d at 159. This factor assists the court in evaluating whether the plaintiff and his counsel have sufficiently developed the case such that they can appreciate the merits of the claims. *In re Serzone Prods. Liab. Litig.*, 231 F.R.D. 221, 244 (S.D. W. Va. 2005) (Goodwin, J.). "There is, however, no minimum or definitive amount of discovery that must be undertaken." *Id.* (citing *Jiffy Lube*, 927 F.2d at 159).

78. Second, absent evidence to the contrary, the Court may presume that settlement negotiations were conducted in good faith and that the resulting agreement was reached without collusion. Newberg on Class Actions § 11.28 at 1159 (3d ed. 1992); *see Polar Int'l Brokerage Corp. v. Reeve*, 187 F.R.D. 108, 112 (S.D.N.Y. 1999). Courts determine whether the discussions

were "hard fought and always adversarial." *S.C. Nat'l Bank v. Stone*, 139 F.R.D. 325 (D.S.C. 1991).

79. As evidenced by the length of this litigation, the number of motions and hearings the Court has addressed, the number of writs sought, and amount of discovery that the parties exchanged, it is clear that nothing was given that was not earned in an adversarial nature.

80. Third, the opinion of Class Counsel, with substantial experience in litigation of similar size and scope, is an important consideration. "When the parties' attorneys are experienced and knowledgeable about the facts and claims, their representations to the court that the settlement provides class relief which is fair, reasonable and adequate should be given significant weight." *Rolland v. Cellucci*, 191 F.R.D. 3, 10 (D. Mass. 2000); *see also In re Compact Disc Litig.* 216 F.R.D. at 212.

81. Here, Class Counsel are skilled and experienced in class action litigation, have served as class counsel in several cases, are experienced in the complex legal issues presented by this case, and have researched the outcomes from similar class actions concerning medical record copying charge lawsuits in other jurisdictions. The Court is satisfied that this factor also weighs in favor of approval.

iii. Adequacy of Relief

82. The Court concludes that the class settlement set forth in the Settlement Agreement is within the range of possible settlements suitable for final approval as fair, just, equitable, reasonable, adequate, and in the best interest of the Settlement Class.

83. In assessing the adequacy of a proposed settlement, the Court must consider the following five factors: (1) the relative strength of the plaintiffs' case on the merits; (2) the existence of any difficulties of proof or strong defenses the plaintiffs would likely encounter if

the case were to go to trial; (3) the anticipated duration and expense of additional litigation; (4) the solvency of the defendants and the likelihood of recovery on a litigated judgment; and (5) the degree of opposition to the settlement. *Jiffy Lube,* 927 F.2d at 159.

84. "The most important factor to be considered in determining whether there has been such clear abuse of discretion is whether the trial court gave proper consideration to the strength of the plaintiff's case." *Flinn v. FMC Corp.,* 528 F.2d 1169, 1172 (4th Cir. 1976). "[I]f the settlement offer was grossly inadequate, it can be inadequate only in light of the strength of the case presented by plaintiffs." *Id.* at 1172 (quoting *City of Detroit v. Grinnell Corp.,* 495 F.2d 448, 455 (2d Cir.1974)).

85. "The essence of any settlement is compromise. A settlement compromising conflicting positions in class action litigation serves the public interest." *Muhammad*, 2008 WL 5377783, at *5 (citing *Rolland v. Cellucci*, 191 F.R.D. 3, 11 (D. Mass. 2000).

86. "In evaluating a settlement, the trial court should not decide the merits, or proceed from the assumption that victory is one hundred percent assured and that all claimed damages are properly recoverable." *Id.* (citing *In re Compact Disc Litig.*, 216 F.R.D. at 211). "A settlement is by nature a compromise between the maximum possible recovery and the inherent risks of litigation. The test is whether the settlement is adequate and reasonable and not whether a better settlement is conceivable." *In re Warfarin Sodium Antitrust Litig.*, 212 F.R.D. 231, 258 (D. Del. 2002) (citation omitted).

87. Here, the settlement is designed to provide maximum repayment of all (or at least most) of the claimed damages that may be awardable by a jury to as many claimants as will fill out a claim form.

88. The Court is satisfied that the settlement is an adequate compromise of the parties'

conflicting positions on the merits of the Plaintiffs' claims.

89. The method of distributing relief to the class, including the method of process class-member claims, was effective.

90. The proposed award of attorneys' fees of $975,000 to be split evenly by the three Plaintiff law firms within thirty (30) days of the entry of this Order is fair and reasonable.

91. The terms of the negotiated incentive award of $10,000.00 to each named Plaintiff are fair, reasonable and consistent with incentive awards ordered in other class actions. The Court recognizes the named Plaintiffs participated in and contributed to this case for the benefit of the Settlement Class.

92. Finally, the Court has reviewed the Settlement Agreement, comprising the copies of the executed original and amendments thereto, and finds the terms to be adequate.

iv. Equitable Treatment of the Class

93. Upon reviewing the submissions from the Claims Administrator, the Court concludes that class members were given adequate notice of the settlement, their rights to opt out or object to the settlement, and the final approval hearing on December 11, 2024.

94. The Claims Administrator made efforts to re-mail the Class Notice and ROI requestor contact information using the National Change of Address process through the USPS, skip-tracing, and manual updates from requestors.

95. Class Counsel assisted with the claims process to ensure that potential class members had an adequate opportunity to make a claim.

96. Based upon the Parties' arguments and the Claims Administrator's testimony presented at the final approval hearing, as well as their written submissions, the Court concludes that the claims process and the proposal for settlement was also fair, just, equitable, reasonable,

adequate, in the best interest of Agreement, and that Class Members were treated equitably relative to each other.

97. Accordingly, the Court approves the proposal for class settlement and the claims process effectuating the proposal.

C. Class Member Objections

98. The Claims Administrator advised potential class members of their right to object to the proposed settlement but received no written objection by the deadline.

99. In the Class Notice, potential class members were also advised of their right to appear at the final approval hearing on December 11, 2024.

100. No objection was heard during the final approval hearing.

101. Having received no objections, the Court concludes that this factor weighs in favor of approval.

III. ORDER

102. The Parties have fully complied with the Court's "Order Approving Claims Administrator Revised Report Number One, Settlement Deadlines and Date for Approval Hearing." Based on the foregoing findings, and good cause appearing, **IT IS HEREBY ORDERED, ADJUDGED, AND DECREED:**

103. Based upon these findings of fact and conclusions of law, the Court hereby **GRANTS** final approval of the Settlement and **ORDERS** as follows:

A. The Settlement, the terms of which are incorporated herein by reference, is hereby **APPROVED** as fair, just, equitable, adequate, reasonable, and in the best interests of the Settlement Class. As such, the parties are **DIRECTED** to consummate the remaining terms of the Settlement in accordance with its terms.

B. The Settlement Class defined in this Order is **DETERMINED AND ADJUDGED** a final and permanent class for purposes of this action and final judgment. The Settlement Class is defined as:

1. Any patient who requested medical records in writing from January 18, 2008 and through June 5, 2014;

2. "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));

3. Fees charged for the records have been paid;

4. Only the individual or entity who actually paid the fee is a member of the Class; and

5. No governmental entities are included as members of the Settlement Class.

C. Class members who timely filed requests to be excluded from the Settlement Class are listed in Exhibit A hereto. All persons identified therein are hereby **EXCLUDED** from the Settlement Class.

D. The court **AWARDS** $975,000.00 to Class Counsel as attorney fees to be paid in three equal installments to Goddard Law, Bordas & Bordas, and Romano Law Office. These fees and costs are reasonable and appropriate compensation and reimbursement for Class Counsel's work and expense, which have resulted in the appropriation of monetary benefits that will be provided to Class Members. Defendants or their insurer are **DIRECTED** to pay these attorney fees within thirty (30) days of the entry of this Order.

E. The Court hereby **AWARDS** $10,000.00 to each named Plaintiff as fair and reasonable compensation. Defendants or their insurer are **DIRECTED** to pay these incentive fees within thirty (30) days of the entry of this Order.

F. It is hereby **ORDERED** that upon payment of the settlement funds, the attorney fee award, and the named plaintiff incentive awards, then this case shall be **DISMISSED WITH PREJUDICE**.

G. It is hereby **ORDERED** that the **DISMISSAL WITH PREJUDICE** of this lawsuit shall bind each Class Member and shall declare all Class Members bound by this dismissal and shall enjoin all Class Members from hereafter prosecuting Released Claims against Defendants or the Released Parties. The Judgment shall

bind all Class Members even if they never received notice of the settlement and Agreement, with the exception of Class Members who are excluded from the Settlement Class as provided in Exhibit A attached hereto.

H. It is hereby **ORDERED** that notice of entry of this Order and the ensuing Judgment shall be given to Class Members by the Claims Administrator by including it on the Settlement website. It shall not be necessary to send notice of entry of this Order or the ensuing Judgment to Class Members.

I. After entry of this Order, the Court shall retain Jurisdiction over the construction, interpretation, implementation, and enforcement of this Settlement and over the administration and distribution of the settlement payments.

J. Defendants are **ORDERED** to distribute the settlement payments in accordance with the provisions of the Settlement Agreement.

104. Finally, the Court **ORDERS** the Circuit Clerk to send a certified copy of this Order to all counsel of record and to the Claims Administrator.

It is **SO ORDERED**.

DATED:_____

_____
Judge Perri Jo DeChristopher

Jointly proposed by:

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EXHIBIT A

The following individuals or entities have submitted valid opt-out notices and should be excluded from Class participation:

Name of Person/Entity Opting Out	Invoice Number(s)
Cindy Ann Ditmar	Release ID No. 341800
Richard Smith, Jr.	To be determined due to more than one Richard Smith invoice; the Claims Administrator will investigate further.