IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

CASE NO. 21-0095

WEST VIRGINIA UNIVERSITY HOSPITALS – EAST, INC., d/b/a BERKELEY MEDICAL CENTER; CITY HOSPITAL, INC., d/b/a BERKELEY MEDICAL CENTER; THE CHARLES TOWN GENERAL HOSPITAL, d/b/a JEFFERSON MEDICAL CENTER, Petitioners,

v.

THE HONORABLE DAVID M. HAMMER, JUDGE OF THE CIRCUIT COURT OF JEFFERSON COUNTY, WEST VIRGINIA, PRESDING JUDGE; DEBRA S. WELCH and **EUGENE A. ROMAN,** individually, and on behalf of all others similarly situated, Respondents.

Relief sought from an Order of the Circuit Court of Jefferson County (CC-19-2019-C-34) granting Plaintiffs' Motion for Class Certification

PETITION FOR WRIT OF PROHIBITION

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I. QUESTIONS PRESENTED

1. Did the circuit court err when it certified a class of individuals who suffered no injury-in-fact and, therefore, do not have standing to maintain a claim against Petitioners?

2. Did the circuit court err when it certified a class action under Rule of Civil Procedure 23 where 98.5% of the proposed class members suffered no breach and sustained no injury?

II. STATEMENT OF THE CASE

West Virginia University Hospitals – East Inc., City Hospital Inc., and the Charles Town General Hospital's (collectively, "Petitioners" or "WVUHE") Petition for Writ of Prohibition arises from an Order of the Circuit Court of Jefferson County certifying a class and subclass pursuant to Rule 23 of the Rules of Civil Procedure. This matter involves a rogue former employee, Angela Roberts, who was properly accessing, but occasionally misappropriating, the personal information of WVUHE patients. The plaintiffs assert a bevy of claims allegedly arising from Ms. Roberts' access of their personal information. Despite 98.5% of the class members suffering no disclosure of their data and sustaining no injury, the circuit court entered an Order certifying a proposed class and a sub-class on December 23, 2020. Petitioners now seek a Writ of Prohibition prohibiting the Honorable David M. Hammer from conducting any further proceedings in this class action until the Order granting Plaintiffs' Motion for Class Certification has been vacated.

A. Factual Background

WVUHE hired Angela Roberts ("Ms. Roberts") on February 17, 2014, to work as a Registration Specialist at the Berkeley Medical Center and Jefferson Medical Center ("the Medical Centers"). Petitioners' Appendix ("App.") 745. Prior to the start of Ms. Roberts' employment, a background check was performed on Ms. Roberts which showed no issues with Ms. Roberts' employment. App. 751–57. As a Registration Specialist, Ms. Roberts' job involved assisting patients in scheduling appointments with WVUHE. As part of her duties as a Registration Specialist, Ms. Roberts was required to access limited patient information, such as names and addresses, that WVUHE stored in its electronic records system. Because Ms. Roberts' role required access to such information, WVUHE created a profile for Ms. Roberts giving her limited

"role-based" access to electronic patient information As part of her training as a Registration Specialist, Ms. Roberts was instructed on proper access to patient information under the Health Insurance Portability and Accountability Act ("HIPAA"), and she completed a form agreeing to abide by HIPAA. App. 758–59. During her employment at WVUHE, Ms. Roberts completed mandatory yearly HIPAA training. App. 1563–64.

Beginning around March 1, 2016, approximately two years after commencing employment at WVUHE, Ms. Roberts began a romantic relationship with Ajarhi "Wayne" Roberts ("Mr. Roberts").[1] During the course of that relationship, Mr. Roberts convinced Ms. Roberts to use her position as a Registration Specialist to steal information that he could use to attempt to commit bank and credit card fraud. App. 771–72 (pgs. 21:18–22:6). To accomplish these thefts, Ms. Roberts would wait until a patient contacted her to schedule an appointment where she accessed the patient's information. Sometimes, she would contemporaneously write down the patient's information on a separate sheet of paper or would print the patient's driver's license, in violation of her WVUHE and HIPAA training. App. 772–773 (pgs. 22:20–23:10), 7955–96 (pg. 24:24-25:1); 1256 (pg. 42:15–25). WVUHE's auditing software, which tracks its employees' access of its electronic medical information, could not detect Ms. Roberts' theft because she only accessed the records of patients for whom she needed to schedule appointments or perform other job duties. *See* App. 1260 (pg. 46:5–14). In other words, Ms. Roberts only accessed the records of patients with whom she had legitimate work-based interactions so that her supervisors would not notice any suspicious access to patient files. Further, Ms. Roberts did not steal information from every patient file she accessed as part of her job. App. 1257 (pg. 43:1–8). Rather, she would only steal

[1] Despite sharing a surname, the two are unrelated and were never married.

the information if she determined there was enough information in the patient file for it to be worth taking to Mr. Roberts. *See* App. 1273–74 (pgs. 59:20–60:5).

In December 2016, law enforcement conducted a search of Mr. Roberts' home. During this search, they discovered slips of paper transcribed by Ms. Roberts and printed copies of drivers' licenses. App. 772–73 (pgs. 22:14–23:10). In addition to the information collected and provided by Ms. Roberts, police discovered slips of paper with sensitive information written by someone other than Ms. Roberts,[2] as well as stolen utility bills that could not have come from WVUHE. App. 773 (pg. 23:7–9); App. 1266 (pg. 52:2–16.) During the search, police were able to determine that information relating to a total of 113 individuals was in Mr. Roberts' apartment. It was not determined that Ms. Roberts' actions compromised all 113 individuals' data; instead, stolen utility bills or data illicitly taken from other sources by other persons could have compromised those individuals' data. The police also determined that, of those 113 persons, only 10 persons actually suffered some type of credit card fraud. App. 793-797 (pgs. 24:2-26:11). As a result of the information located in Mr. Roberts' home, both Mr. Roberts and Ms. Roberts were criminally prosecuted and eventually pled guilty to crimes committed in the course of the identity theft conspiracy.

In response to law enforcement's investigation, WVUHE undertook its own investigation and examined every record accessed by Ms. Roberts as part of her job since she commenced her relationship with Mr. Roberts. WVUHE determined that, as part of her job duties, Ms. Roberts had accessed the data of 7,445 people since March 2016. Out of an abundance of caution, in

[2] During her deposition, Ms. Roberts provided testimony about the involvement of an additional unknown woman in Mr. Roberts' scheme after Ms. Roberts ended her relationship with him. App. 1266 (pg. 52:3-20). According to Ms. Roberts, Mr. Roberts was never successful in obtaining any fraudulent credit cards until after they broke up, and she believed that he was obtaining assistance from another woman. *See* App. 1269 (pg. 55:16-25.)

February 2017, WVUHE sent a letter to each individual whose records had been lawfully accessed by Ms. Roberts as part of her job during the relevant time period. App. 799–802. The letter offered each of the 7,445 persons one year of credit monitoring. App. 799–800. The letter made clear that these individuals were being notified even though it was not evident that their personal information had been taken.

The named plaintiffs in this case, Debra S. Welch ("Plaintiff Welch") and Eugene A. Roman ("Plaintiff Roman"), purport to represent all of those individuals whose information was properly accessed by Ms. Roberts as part of her job and therefore received a letter from WVUHE as described above. It is undisputed that Plaintiff Welch was not among the 113 individuals whose data was located in Mr. Roberts' home during the search. Rather, it is believed that Plaintiff Welch contacted Ms. Roberts in her role as a Registration Specialist, and Ms. Roberts properly accessed Plaintiff Welch's data as part of her job in scheduling an appointment. As a result of this contact, Plaintiff Welch received the letter described above. No evidence has ever been presented that Plaintiff Welch's personal information was taken or that she has ever been the victim of any identity theft.

During her deposition, Plaintiff Welch testified that she has no reason to believe anyone has attempted to open accounts in her name, her credit score has not changed, she has not received any bills for things she did not buy, and she could report no other suspicious activity. App. 1354, 1380–81 (pgs. 31:7-13, 56:12–21, 57:2–6, 58:15–17). In fact, Plaintiff Welch testified that there has been no fraudulent activity on her accounts at all. Rather, Plaintiff Welch admitted that she is simply anxious about speculative future identity theft and wants compensated for that anxiety. App. 1380–82 (pgs. 57:2–6, 58:15–59:14). Plaintiff Welch further admitted that she understood

the statement in WVUHE's letter that there was no confirmation her personal information had been taken. App. 1372-73 (pgs. 49:12–50:5).

Unlike Plaintiff Welch, Plaintiff Roman was one of the 10 individuals whose information was found in Mr. Roberts' apartment and who was a victim of identity theft. Plaintiff Roman has visited WVUHE or a related hospital on several occasions and associates his identity theft with a visit for blood work around the time Ms. Roberts worked there, though Plaintiff Roman cannot recall precisely when. App. 1446–47 (pgs. 34:19–35:8). Plaintiff Roman did not call ahead to make an appointment but simply showed up and provided information to the receptionist, who he confirmed was not Ms. Roberts. App. 1450, 1512 (pgs. 38:3–15, 100:2–22). In fact, Plaintiff Roman has no recollection of ever having any interaction with Ms. Roberts.

At some point, Plaintiff Roman noticed a new address and phone number on his online mortgage account. Then, Plaintiff Roman was told by law enforcement that certain information relating to him was found in Mr. Roberts' apartment and likely came from WVUHE. However, Plaintiffs have produced no evidence supporting his assertion of how his information came to be in Mr. Roberts' possession other than what Plaintiff Roman claims law enforcement told him. Plaintiff Roman testified that some of his information found in Mr. Roberts' apartment—such as his social security number—was information Plaintiff Roman did not provide to WVUHE during his visits to the hospital, and he can offer no explanation for how that information could have been in the apartment if, in fact, his stolen information came from WVUHE. Moreover, Plaintiff Roman testified that his identity had been stolen before and that much of his identifying information was available online. App. 1496–97 (pgs. 84:17–85:3); App. 1515–16 (pgs. 103:13–104:14).

Finally, although the police made Plaintiff Roman aware that a credit card had been taken out in his name by Mr. Roberts, Plaintiff Roman did not pay for any charges on that credit card

and he simply reported the issue to the Berkeley County prosecuting attorney, who handled it for him. App. 1473–76 (pgs. 61:8–15; 62:2–9; 63:20–64:3). In fact, he does not even know the name of the bank that issued the fraudulent credit card or whether the bill even had contact information for him to use to challenge the legality of the bill. *Id.* He did establish an account at a credit monitoring company, and he never saw any problem on his credit reports. App. 1482, 1484. Plaintiff Roman has no recollection of receiving a letter from WVUHE about the breach. App. 1489 (pg. 77:16–23.)

B. Procedural History

On or about February 18, 2019, Plaintiff Welch, individually and on behalf of all others similarly situated, served WVUHE with her initial Complaint. App. 27–46. On September 25, 2019, Plaintiff Welch filed her initial Motion for Class Certification and its supporting memorandum. App. 115–36. Before the circuit court could rule on Plaintiff Welch's Motion for Class Certification, she asked for leave to amend the Complaint. An agreed order was entered, and on March 20, 2020, Plaintiffs filed an Amended Complaint adding Plaintiff Roman on behalf of an allegedly similarly-situated subclass of individuals. App. 72–73, 76–92.

In the Amended Complaint, Plaintiffs assert causes of action for alleged Breach of the Duty of Confidentiality, Unjust Enrichment, Prima Facie Negligence, Breach of Contract (Express and Implied), Negligent Supervision, Negligence, and Violations of the West Virginia Consumer Credit and Protection Act ("WVCCPA"). App. 85–91. In addition to class certification and a finding of liability, Plaintiffs seek compensatory damages for credit and identity protection and monitoring, as well as damages for alleged past and future annoyance, embarrassment, emotional distress, and any costs associated with "any identity theft." App. 91. Plaintiffs also seek statutory damages and penalties under the WVCCPA and restitution of the portion of any payments made

to WVUHE that was used to protect patient data. App. 90, 92. Plaintiffs also seek equitable relief including credit monitoring and protection services, maintenance of credit insurance, and an order requiring Petitioners to establish a "specific device encryption security program" to prevent the unauthorized disclosure of patient information. App. 91.

On August 17, 2020, Plaintiffs filed a second Motion for Class Certification, App. 554–55, seeking to certify an expanded class consisting of "All West Virginia citizens whose personal information was accessed in the data breach identified by the Defendant it [sic] its February 23, 2017 correspondence to Debra Welch." App. 82. Plaintiffs also sought to certify a subclass, represented by Plaintiff Roman, consisting of "[t]he 109 West Virginia citizens whose information was found in Angela Roberts and her co-conspirator [sic] possession." *Id.*

C. Circuit Court's Erroneous Order

The circuit court held a hearing on Plaintiffs' Motion for Class Certification on September 25, 2020. Petitioners argued, in part, that the prerequisites for class certification cannot be met because Plaintiff Welch did not have standing to maintain her claims against Petitioners and because the proposed class did not satisfy the commonality, typicality, or predominance prongs of Rule of Civil Procedure 23, where almost all of the class members suffered no breach and sustained no injury. App. 719–20, 726–36, 737–41.

Several months later, on December 23, 2020, the circuit court entered its Order granting class certification. App. 1–26. Despite that 98.5% of the proposed class members – including Plaintiff Welch – have suffered no disclosure of their personal information and thus no damages, the circuit court concluded that Plaintiffs had satisfied the commonality and typicality requirements for class certification under Rule 23(a), had satisfied the predominance requirement under Rule 23(b), and had standing to maintain their claims against Petitioners. Based on its

determination that Plaintiffs had met the requirements of Rules 23(a) and 23(b)(3), the circuit court essentially adopted Plaintiffs' class and subclass definitions and certified

> a class . . . that includes all West Virginia citizens residents [sic] whose personal information was accessed in the data breach identified by the Defendant in its February 23, 2017 data breach notices.
>
> [and]
>
> a subclass of those 109 individuals whose information was found in the possession of Ms. Roberts' accomplice.[3]

App. 25. The circuit court appointed Plaintiffs Welch and Roman as the respective class and subclass representatives. *Id.*

Because the circuit court erroneously concluded that Plaintiffs met their burden of showing that this action is proper for class certification, Petitioners seek a Writ of Prohibition prohibiting the Honorable David M. Hammer from conducting any further proceedings in this class action until the Order granting Plaintiffs' Motion for Class Certification has been vacated.

III. SUMMARY OF ARGUMENT

This case is about a rogue employee, Angela Roberts, who properly accessed, but occasionally misappropriated, the personal information of WVUHE patients. However, almost all of the proposed class members – including named Plaintiffs Debra Welch and Eugene Roman – have absolutely no evidence that their data was ever divulged by Ms. Roberts and are unable to prove any attempts at identity theft or other consequences arising out of Ms. Roberts' legitimate access of their medical records. Rather, data relating to only 113 individuals – or 1.5% of the proposed class – was potentially compromised. It has not been determined that Ms. Roberts' actions in fact compromised all 113 individuals' data, and of those 113, only 10 were readily

[3] While data relating to 113 individuals was located in Mr. Roberts' apartment, only 109 of those individuals were West Virginia residents.

identifiable victims of identity theft. The other 7,332 individuals who comprise the proposed class suffered no disclosure of their data and no injury.[4]

In granting Plaintiffs' Motion for Class Certification, the circuit court committed the following clear errors of law. First, the circuit court misapplied the law when it certified a class where the named Plaintiff and other individuals suffered no injury-in-fact and therefore do not have standing to maintain a claim against WVUHE. Despite Plaintiffs' assertion to the contrary, all of Ms. Roberts' access of patient files was not wrongful. Rather, Ms. Roberts only accessed patient accounts she had a legitimate business need to access. The lawful access or review of confidential information alone does not constitute a breach of duty. In order to establish any breach, Plaintiffs must show that the privacy of their confidential information was violated or that a wrongful divulgence took place. Neither named Plaintiff, like virtually all of the proposed class members, has evidence establishing this occurred with their information.

Second, the circuit court misapplied settled law by certifying a class under Rule 23 where 98.5% of the proposed class members – including a named Plaintiff – suffered no breach and sustained no injury. Specifically, the circuit court erred in concluding that Plaintiffs established commonality where no injury can be established on a class-wide basis through common evidence; erred in concluding that the named Plaintiffs represent claims typical of the class where neither named Plaintiff has any evidence of breach or injury; and erred in concluding that common issues predominate over individual ones where the overwhelming majority of the proposed class

[4] An obvious question is whether Petitioners are conceding that a class could properly be certified of the 10 individuals whose information was found in the Roberts apartment and who suffered some attempt at identity theft. It is important to note that even that group of class members suffer from the same lack of commonality, typicality and predominance described, *infra*. Additionally, a class of 10 members would not satisfy the numerosity requirement of Rule 23.

members are uninjured. Due to these numerous errors, Petitioners will be irreparably harmed if the Court does not issue the requested Writ.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Petitioners respectfully request oral argument under Rule of Appellate Procedure 20. This Petition involves an increasingly litigated question in class action law and an issue of first impression in West Virginia – whether a purported class can be certified where almost all class members suffered no breach and no injury. Additionally, the circuit court's ruling granting class certification misapplies the governing law as to standing and the commonality, typicality, and predominance elements required in all class actions, as discussed more fully below. For these reasons, oral argument is both necessary and appropriate.

V. ARGUMENT

A. A Writ of Prohibition is appropriate because the circuit court's class certification order is clearly erroneous as a matter of law, and Petitioners will be irreparably harmed if forced to litigate an improperly certified class action.

This Court should grant this Petition because WVUHE will be irreparably harmed if it is forced to litigate a class action that the circuit court certified in contravention of this Court's precedent. This Court has consistently held that "an order awarding class action standing is . . . reviewable, but only by a writ of prohibition." *State ex rel. Surnaik Holdings of WV, LLC v. Bedell*, No. 19-1006, 2020 WL 7223178, at *6 (W. Va. Nov. 20, 2020); *State ex rel. W. Virginia Univ. Hosps., Inc. v. Gaujot*, 242 W. Va. 54, 61, n.12, 829 S.E.2d 54, 61 n.12 (2019); Syl. Pt. 2, in part, *McFoy v. Amerigas, Inc.*, 170 W.Va. 526, 527, 295 S.E.2d 16, 17 (1982). As this Court has long recognized, "writs of prohibition offer a procedure . . . preferable to an appeal for challenging an improvident award of class standing." *State ex rel. Mun. Water Works v. Swope*, 242 W. Va. 258,

263–64, 835 S.E.2d 122, 127–28 (2019) (quoting *State ex rel. Chemtall Inc. v. Madden*, 216 W. Va. 443, 450, 607 S.E.2d 772, 779 (2004)).

The West Virginia Constitution confers original jurisdiction upon the Supreme Court of Appeals regarding extraordinary remedies, such as Writs of Prohibition. *See* W. VA. CONST. art VIII, § 3. A Writ of Prohibition "shall lie as a matter of right in all cases of usurpation and abuse of power, when the inferior court . . . exceeds its legitimate powers." W. VA. CODE § 53-1-2. When determining whether to entertain and issue a writ of prohibition in cases where it is claimed that the lower court exceeded its legitimate powers, this Court examines the five *Hoover* factors:

> (1) whether the party seeking the writ has no other adequate means, such as direct appeal, to obtain the desired relief; (2) whether the petitioner will be damaged or prejudiced in a way that is not correctable on appeal; (3) whether the lower tribunal's order is clearly erroneous as a matter of law; (4) whether the lower tribunal's order is an oft repeated error or manifests persistent disregard for either procedural or substantive law; and (5) whether the lower tribunal's order raises new and important problems or issues of law of first impression.

Syl. Pt. 4, *State ex rel. Hoover v. Berger*, 199 W. Va. 12, 483 S.E.2d 12 (1996). Although none of the factors are dispositive, this Court noted that the third factor, the existence of clear error as a matter of law, "should be given substantial weight." *Id.* In this case, however, all five factors—including the crucial third factor—weigh overwhelmingly in favor of granting the Petition for Writ of Prohibition.

First, Petitioners have no other avenue of attacking the circuit court's grant of Plaintiffs' Motion for Class Certification absent a Writ of Prohibition. As noted above, an order awarding class action standing is also reviewable "only by a writ of prohibition." Syl. Pt. 2, *McFoy v. Amerigas, Inc.*, 170 W.Va. 526, 527, 295 S.E.2d 16, 17 (1982). If this Court declines to issue a Writ of Prohibition, Petitioners will have no other method to address the circuit court's improperly

certified class and will only be able to obtain appellate review after trial. Accordingly, the first factor weighs in favor of issuing a Writ of Prohibition.

Second, Petitioners will be irreparably harmed if they are forced to litigate the circuit court's improperly certified class. Writs of Prohibition are "preventative remed[ies]. One seeking relief by prohibition in a proper case is not required . . . to . . . wait until the inferior court or tribunal has taken final action in the matter in which it is proceeding or about to proceed." Syl. Pt. 5, *State ex rel. City of Huntington v. Lombardo*, 149 W.Va. 671, 413 S.E.2d 535, 536 (1965) A Writ should be issued in this case so that Petitioners are not forced to suffer the irreparable harm of litigating an improperly certified class. Accordingly, the second factor weighs in favor of issuing a Writ of Prohibition.

The third, fourth, and fifth factors also weigh in favor of granting a Writ. The circuit court's Order is clearly erroneous as a matter of law and manifests disregard for substantive law as it improperly applies Rule of Civil Procedure 23, including the most recent statements from this Court on the requirements of that rule. In addition, this Petition involves an increasingly litigated question in class action law and an issue of first impression in West Virginia – whether a purported class can be certified where the vast majority of class members, including the named Plaintiff, have suffered no breach and no injury. Accordingly, as Petitioners' following arguments show, the third, fourth, and fifth factors weigh in favor of issuing a Writ of Prohibition.

As demonstrated, the factors of the *Hoover* test weigh overwhelmingly in favor of granting a Writ of Prohibition. Accordingly, Petitioners request this Court issue a rule to show cause why a Writ of Prohibition should not be issued. Further, Petitioners ask that, after there has been an opportunity to show cause, a Writ of Prohibition be issued prohibiting the Honorable David M.

Hammer from conducting any further proceedings in this class action until the Order granting Plaintiffs' Motion for Class Certification has been vacated.

B. The circuit court erred in certifying a class that includes named Plaintiffs and other individuals who suffered no injury-in-fact and, therefore, do not have standing to maintain a claim.

If a class representative lacks standing to pursue a claim, then the class may not be maintained. *See, e.g., Scarborough v. Austin*, 968 F.2d 1211, at *1 (4th Cir. 1992) (table opinion) (noting that "a named plaintiff must have standing to represent the class at both the time the complaint is filed and the point at which the class is certified" and that a "lack of standing dooms the class claims"). In order to illustrate that she has standing to pursue her claims, a party must first establish that she has "suffered an 'injury-in-fact'—an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent and not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct forming the basis of the lawsuit. Third, it must be likely that the injury will be redressed through a favorable decision of the court." Syl. Pt. 5, *Findley v. State Farm Mut. Auto. Ins. Co.*, 213 W.Va. 80, 94, 576 S.E.2d 807, 821 (2002).

To satisfy the first element, the existence of an injury-in-fact, a plaintiff must affirmatively establish that

> she suffered "an invasion of a legally protected interest" that is "concrete and particularized. For an injury to be "particularized," it "must affect the plaintiff in a personal and individual way." To be a "concrete" injury, "it must actually exist." The injury must also be actual or imminent, not conjectural or hypothetical.

State ex rel. Healthport Techs., LLC v. Stucky, 239 W. Va. 239, 243, 800 S.E.2d 506, 510 (2017) (citations omitted). If a plaintiff's alleged injuries "rest[] upon contingent future events that may not occur as anticipated, or indeed may not occur at all," then the plaintiff is incapable of

demonstrating an injury in fact. *Id.* (quoting *Texas v. United States*, 523 U.S. 296, 300 (1998)). Moreover, alleged emotional damages are insufficient to confer standing because "[d]amages for mental and emotional disturbances caused by tort may be recovered only where such disturbances accompany or follow actual physical injury, caused by impact or occurrence of tort." § 35:14. *Mental anguish, humiliation, emotional distress, injury to feelings*, Trial Handbook for West Virginia Lawyers (citing *Bishop v. Byrne*, 265 F. Supp. 460 (S.D.W. Va. 1967)).

i. Lawful access or review of confidential information does not constitute a breach of duty, which occurs only when confidential information is wrongfully divulged to unauthorized parties.

Plaintiffs' theory of liability is based on several incorrect assumptions, the most egregious of which is that Ms. Roberts' every access of patient information was wrongful. This is untrue. West Virginia recognizes that patients have "a cause of action for breach of the duty of confidentiality against a treating physician who wrongfully divulges confidential information." Syl. Pt. 4, *Morris v. Consolidation Coal Co.*, 191 W. Va. 426, 446 S.E.2d 648 (1994). The question is, however, "what is a breach?"

When determining whether a breach has occurred, West Virginia courts can turn to the Health Insurance Portability and Accessibility Act of 1996 ("HIPAA"). *See R.K. v. St. Mary's Med. Ctr., Inc.*, 229 W. Va. 712, 720, 735 S.E.2d 715, 723 (2012) (holding that HIPAA may be used to supply the standard of care for certain tort claims, such as an invasion of privacy claim or a *Morris* claim for breach of confidentiality.) HIPAA specifically allows medical records to be used to carry out treatment, payment, or health care operations. *See, e.g.*, 45 C.F.R. § 164.506 (a subsection of subpart E"). Under HIPAA, a "breach" only occurs—in other words, an access is only wrongful—when the "acquisition, access, use, or disclosure of protected health information [is] in a manner not permitted under subpart E of this part which compromises the security or

privacy of the protected health information." 45 C.F.R. § 164.402 titled "Definitions" (emphasis added). If an access is in support of providing healthcare, it is not wrongful. This is reflected in West Virginia law, which states that a breach of the duty of confidentiality occurs only when a healthcare provider "wrongfully divulges" confidential information. *See* Syl. Pt. 4, *Morris*. It is not the accessing, but the divulging of information that triggers liability.

In order to establish a breach under federal or state law, Plaintiffs must show that the security or privacy of the confidential information was violated, or that a wrongful divulgence took place. A wrongful divulgence requires that confidential information be provided to a third party that is not authorized to receive it. *See Tabata v. Charleston Area Med. Ctr., Inc.*, 233 W. Va. 512, 759 S.E.2d 459 (2014) (health care provider wrongfully divulged information by accidentally posting patient health information publicly on the internet); *Morris v. Consolidation Coal Co.*, 191 W. Va. 426, 446 S.E.2d 648 (1994) (health care provider wrongfully divulged patient information in *ex parte* communication with patient's employer); *R.K. v. St. Mary's Med. Ctr., Inc.*, 229 W. Va. 712, 735 S.E.2d 715 (2012) (health care provider's employee accessed patient's psychiatric records without authorization and wrongfully disclosed patient information to patient's estranged wife); *Barber v. Camden Clark Mem'l Hosp. Corp.*, 240 W. Va. 663, 815 S.E.2d 474 (2018) (health care provider wrongfully disclosed patient's mental health records to workers compensation claims handler pursuant to subpoena without patient's written authorization).

Here, Plaintiffs are entirely unable to prove, either under HIPAA or under West Virginia common law, that any breach of duty occurred or that Ms. Roberts' access of their information was "always" wrongful. Rather, Ms. Roberts' every access of patient information was for a legitimate business need. App. 1260 (pg. 46:5–14.) She only accessed the patient records she needed to schedule appointments. Because her access was to schedule appointments, Ms. Roberts'

access did not violate HIPAA or any duty imposed by state law. Rather, Ms. Roberts' interactions with patient information only became "wrongful" in the rare instances she wrote down and removed patient information to provide it to Mr. Roberts for use in his bank fraud scheme. In order to establish that Ms. Roberts' conduct was wrongful, Plaintiffs need to point to evidence that Ms. Roberts' provided their confidential information to someone who was not authorized to receive it.

Further, any argument by Plaintiffs that Ms. Roberts' access was always wrongful because she supposedly had a "dual purpose" while accessing any patient's records fails. Again, under HIPAA, an access is wrongful if it is "in a manner not permitted under subpart E of this part which compromises the security or privacy of the protected health information." 45 C.F.R. § 164.402 (emphasis added). Similarly, under West Virginia law, it is the wrongful divulgence of information that gives standing to sue. Merely thinking about the possibility of violating HIPAA while otherwise lawfully reviewing a medical record does not compromise the security or privacy of information. Merely thinking about wrongfully divulging confidential information is not, itself, a divulgence. These only occurred when Ms. Roberts wrote down and removed the information from Petitioners' facilities.

ii. The named Plaintiffs, like the vast majority of the proposed class, have no evidence that the privacy of their confidential information was violated or that a wrongful divulgence took place.

Neither Plaintiff Welch nor Plaintiff Roman have any evidence establishing that Ms. Roberts ever disclosed their confidential information. To the contrary, affirmative evidence in the record establishes that Ms. Roberts did not divulge either Plaintiffs' information.

It is undisputed that Plaintiff Welch was not among the 113 individuals whose data was located in Mr. Roberts' home. During her own deposition, Plaintiff Welch testified that she cannot

identify any evidence that anyone ever attempted to steal her identity or otherwise use her personal information. Plaintiffs' first set of discovery responses similarly evince that Plaintiff Welch suffered no breach and, therefore, no harm in this case. When asked to recite her damages, Plaintiff Welch articulated no damages whatsoever, claiming generic emotional distress and diminution of value in her contract with WVUHE, potential "future expenses for credit monitoring," and other vague future costs. *See* App. 850–51. In fact, Plaintiff Welch admitted in her deposition that her damages were the result of her speculation about future costs.[5] App. 1382 (pg. 59:9–14).

Plaintiff Welch's alleged injury falls well short of the injury alleged in *State ex rel. Healthport Techs., LLC v. Stucky*, 239 W. Va. 239, 243–44, 800 S.E.2d 506, 510–11 (2017), a case in which this Court determined that standing did not exist. In *Healthport*, the plaintiff sought to recover for alleged excessive charges health care providers assessed for his medical records. *Id.* The plaintiff, however, had not paid for his medical records out of pocket; instead, his attorney bore the initial cost of the medical records because they were procured in the course of litigation. *Id.* Although the plaintiff agreed to reimburse his attorney if he prevailed in his case, the fact that the plaintiff "may become contractually liable to his lawyers for this allegedly unlawful expense at a future date, [rendered his] loss is contingent and conjectural." *Id.* Based on that conjectural loss, the Court determined that the plaintiff lacked standing to pursue a claim. *Id.*

[5] To this point, Ms. Roberts apparently accessed Plaintiff Welch's medical record as part of her job no later than January 2017. Yet, over four years later, Plaintiff Welch has uncovered no evidence that any of her information has been misused or that she has suffered identity theft, nor, for that matter, that Ms. Roberts even disclosed her information. "[A]s the breaches fade further into the past," Plaintiff Welch's threatened injuries become more and more speculative. *See, e.g.*, *Chambliss v. Carefirst, Inc.*, 189 F.Supp.3d 564, 570 (D. Md. 2016); *In re Zappos.com*, 108 F.Supp.3d 949, 958 (D. Nev. 2015) ("[T]he passage of time without a single report from Plaintiffs that they in fact suffered the harm they fear must mean something.").

Plaintiff Welch's claim is far more conjectural than the injury alleged in *Healthport*. In *Healthport*, the plaintiff had a contract that exposed him to potential alleged future damages, whereas Plaintiff Welch adduced no evidence that her data was misappropriated by Ms. Roberts or that Ms. Roberts' actions affected her at all. Put simply, Plaintiff Welch has adduced no evidence—beyond the fact that WVUHE sent her a letter indicating that Ms. Roberts accessed her records in the course of her employment and that WVUHE was offering her precautionary credit monitoring—that she suffered anything beyond a conjectural injury contingent on the misuse of data that she is not even sure was misappropriated. This does not constitute an injury in fact.

Similarly, Plaintiff Roman testified that he had never interacted with Ms. Roberts and that some of his information found in Mr. Roberts' apartment was not provided to the hospital. App. 1450 (pg. 38:3–15); 1452 (pg. 40:6–20); 1454–55 (pgs. 42:20–43:7); 1512 (pg. 100:2–22). During law enforcement's investigation of the Roberts' criminal enterprise, the police found many sources of information, some slips of paper written by Ms. Roberts, some written by someone else, and stolen utility bills or other documents containing personal identifying information that was never provided to WVUHE. App. 773 (pg. 23:7–10). In short, neither of the named Plaintiffs has any evidence establishing their information was taken from Petitioners or divulged. Rather, their inclusion in this class is based solely on being a recipient of a letter indicating that their information "might have been" compromised.

C. The circuit court erred in certifying a class under West Virginia Rule of Civil Procedure 23 where 98.5% of the proposed class suffered no breach and sustained no injury.

To certify a class under Rule 23 of the West Virginia Rules of Civil Procedure, a circuit court must determine that the party seeking class certification has satisfied all four prerequisites contained in Rule 23(a) – numerosity, commonality, typicality, and adequacy of representation.

W. Va. R. Civ. P. 23(a); Syl. Pt. 4, *State ex rel. Surnaik Holdings of WV, LLC v. Bedell*, No. 19-1006, 2020 WL 7223178 (W. Va. Nov. 20, 2020). When class action certification is being sought pursuant to Rule 23(b)(3), a class action may be certified only if the circuit court is satisfied that the predominance and superiority prerequisites of Rule 23(b)(3) have also been satisfied. Syl. Pt. 7, *Bedell*, 2020 WL 7223178, at *2. Evaluation of the Rule 23 factors and class certification decisions are not "perfunctory. The plaintiff . . . who proposes certification bears the burden of proving that certification is warranted." *State ex rel. W. Virginia Univ. Hosps., Inc. v. Gaujot*, 242 W. Va. 54, 829 S.E.2d 54, 62 (2019).

Given the heavy burden required by class certification, this Court has repeatedly emphasized that "[t]he circuit court must give careful consideration to whether the party has met that burden [and] '[a] class action may only be certified if the trial court is satisfied, *after a thorough analysis*, that the prerequisites of Rule 23(a) of the West Virginia Rules of Civil Procedure have been satisfied.' " *Id.* (emphasis in original) (quoting Syl. Pt. 8, *State ex rel. Chemtall Inc. v. Madden*, 216 W. Va. 443, 607 S.E.2d 772 (2004)). Failure to conduct the exacting analysis required by Rule 23 "amounts to clear error" and "is also an abuse of discretion." *Id.* (citation omitted). Therefore, "[t]he circuit court must approach certification decisions in a conscientious, careful, and methodical fashion." *Id.*

Although a class may be divided into subclasses when appropriate, *see* W. Va. R. Civ. P. 23(c)(4)(B), if a subclass is "requested by the moving party or ordered by the court, it is generally settled that each subclass must independently satisfy class action criteria[.]" *Chemtall*, 216 W. Va. at 456, 607 S.E.2d at 785 (citations omitted).

i. The proposed class is incapable of generating common answers to the question of WVUHE's liability where no liability or injury can be established on a class-wide basis through common evidence.

Pursuant to Rule 23(a)(2), the party seeking class certification must show that there are questions of law or fact common to the class. W. Va. R. Civ. P. 23(a)(2); *Gaujot*, 242 W. Va. at 62, 829 S.E.2d at 62. However, as this Court definitively ruled in *Gaujot*, "not everything that may be loosely called a 'question of fact' is sufficient to meet Rule 23's 'threshold' of commonality." *Gaujot*, 242 W. Va. 62, 829 S.E.2d 62. Instead, the identified common question "must be a *dispute*, either of fact or of law, *the resolution of which* will advance the determination of the class members' claims." Syl. Pt. 2, *Gaujot*, 242 W. Va. 54, 829 S.E.2d 54 (emphasis in original) (quoting *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 369 (2011)). Put simply, it is not enough to assert a common legal or factual issue – the common legal or factual issue "must be of such a nature that it is capable of classwide resolution[.]" Syl. Pt. 3, *Gaujot*, 242 W. Va. 54, 829 S.E.2d 54 (quoting *Wal-Mart*, 564 U.S. 338 at 350); *see also State ex rel. Erie Ins. Prop. & Cas. Co. v. Nibert*, No. 16-0884, 2017 WL 564160, at *6 (W. Va. Feb. 13, 2017) ("What matters to class certification . . . is not the raising of common questions – even in droves – but, rather the capacity of a classwide proceeding to generate common answers apt to drive the resolution of the litigation.").

As in *Gaujot*, the determination of commonality in this case necessarily requires a review of the liability and alleged harm suffered by the plaintiffs. But instead, Plaintiffs continued to ignore this Court's decision in *Gaujot* and pointed to a hodgepodge of random facts arguing for a resolution en masse. For example, Plaintiffs argued that the commonality requirement is satisfied in this case because a non-attorney WVUHE employee used the term "commonality" in a non-legal context to describe the ongoing law enforcement investigation, because WVUHE used a "script" when responding to individuals who called in response to the letter WVUHE sent regarding Ms. Roberts' conduct, because WVUHE sent out a similar letter to everyone whose

records were accessed by Ms. Roberts, and because the class members assert the claims are linked to the conduct of a former WVUHE employee. App. 563–67.

None of the random facts relied on by Plaintiffs, however, present a common question capable of resolution on a class-wide basis. Instead, Plaintiffs' identified facts amount to little more than allegations that the named Plaintiffs and other members of the proposed class have suffered the same harm, which is not only patently untrue, but which this Court has recognized is not enough to satisfy commonality. *See Gaujot*, 242 W. Va. 54, 829 S.E.2d 54, 62 (2019) (recognizing that "it is not enough for Mr. Thomack and Mr. Jenkins to allege that they and others like them are victims of the same statutory violation" to satisfy commonality). The facts of this case plainly illustrate Plaintiffs fail to present a "contention . . . of such a nature that it is capable of class-wide resolution." Syl. Pt. 3, *Gaujot*, 242 W. Va. at 54, 829 S.E.2d at 54 (quoting *Wal-Mart*, 564 U.S. at 350) (internal quotation marks omitted).

Plaintiffs allege WVUHE had the duty to safeguard and keep confidential Plaintiffs' personal information. Therefore, under Plaintiffs' theory, liability hinges on whether Plaintiffs' personal information was compromised by disclosure to unauthorized third parties. In order to conduct a sufficiently thorough analysis of Rule 23(a)'s commonality requirement, the circuit court was required to analyze whether Petitioners' liability, as alleged by Plaintiffs, is appropriate for classwide resolution. *See Swope*, 835 S.E.2d 122, 131. Further, under *Gaujot*, the circuit court was required to evaluate the merits of Plaintiffs' claims to the extent necessary to assess the prerequisites for certification under Rule 23, including the commonality requirement. Syl. Pt. 8, *Gaujot*, 242 W. Va. at 54, 829 S.E. 2d at 54.

Despite the undisputed record on these facts, the circuit court erroneously concluded that "all class members had their sensitive medical data exposed" merely because Ms. Roberts had at

some point accessed their electronic medical records in the course of her job duties as a Registration Specialist. App. 15, at ¶ 62. But contrary to the circuit court findings, and discussed above, Ms. Roberts' mere access of those records did not "expose[] each class member to imminent, impending loss[.]" App. 13, at ¶ 57. Rather, the record on class certification confirmed that only 113 individuals' data was located in Mr. Roberts' home, and of those 113, only 10 persons (or 0.1% of the class) allegedly suffered some form of credit card fraud. Notwithstanding the circuit court's erroneous assumptions, the remaining 7,332 members of the proposed class experienced no "exposure" of their data and, therefore, suffered no harm arising from Ms. Roberts' access of their records during the course of her employment.

The circuit court did not address how the proposed class is capable of generating common answers to the question of WVUHE's liability in the face of undisputed evidence that the vast majority of the class (including Plaintiff Welch) suffered no disclosure of their data as the result of Ms. Roberts' legitimate access of their medical records. Because the circuit court certified a class where 98.5% of the class members suffered no disclosure of their data and no injury, there is no common question that can be answered through common proof to establish liability or damages, and the circuit court committed a clear error of law when it certified the class and subclass.

ii. To the extent any plaintiff in the proposed class has standing, the named Plaintiffs do not represent claims "typical" of the class because neither Plaintiff has any evidence establishing their information was wrongfully divulged from WVUHE facilities.

The typicality requirement of Rule 23(a)(3) requires that the "claims or defenses of the representative parties [be] typical of the claims or defenses of the class." Syl. Pt. 8, in part, *State ex rel. Mun. Water Works v. Swope*, 242 W. Va. 258, 835 S.E.2d 122 (2019); *Perrine v. E.I. du Pont de Nemours & Co.*, 225 W. Va. 482, 524, 694 S.E.2d 815, 857 (2010) (citation omitted). A representative party's claim is "typical" if it "arises from the same event or practice or course of

conduct that gives rise to the claims of other class members, and if his or her claims are based on the same legal theory." *Id.* "[M]ere anticipation that all class members will benefit from the suit . . . is not enough." *Perrine*, 225 W. Va. at 524, 694 S.E.2d at 857 (alternation in original). Importantly, typicality requires that the named plaintiff's harm be of the "same type" of harm suffered by other members of the class. *Id.* (citation omitted).

Here, Plaintiffs seek to represent a class and subclass of individuals whose claims are fundamentally different than their own. First, Plaintiff Welch cannot satisfy the typicality requirement for the overall class because her claims neither arise from the course of conduct giving rise to the asserted class nor resulted in the same harm to other class members. As discussed above, Plaintiff Welch purportedly represents all West Virginians "whose personal information was accessed in the data breach identified by [WVUHE] in its February 23, 2017 data breach notices." App. 25. However, not every person whose medical record was ever accessed by Ms. Roberts had their personal information breached. Rather, only 1.5% of the proposed class members' data was found in Mr. Roberts home, and the other 98.5% of the class members (including Plaintiffs Welch and Roman) have no evidence that their data was ever wrongfully divulged. As such, those individuals lack standing to bring claims arising from "the data breach."

To the extent any plaintiff in the proposed class has standing, Plaintiff Welch, of course, does not represent claims "typical" to that class because she has merely adduced evidence that her data was accessed by Ms. Roberts in the scope of her legitimate job duties. Plaintiff Welch has produced no evidence of actual harm—simply speculative future damages and emotional damages. Thus, Plaintiff Welch is someone who received the WVUHE letter but never suffered any breach or loss. Accordingly, because Plaintiff Welch has adduced no evidence that her personal information was wrongfully divulged, her claims fail to satisfy Rule 23's typicality requirement.

Similarly, Plaintiff Roman's claims are not typical of the members of the subclass. Plaintiff Roman purportedly represents "[t]hose 109 individuals whose information was found in the possession of Ms. Roberts' accomplice." App. 25. However, Plaintiffs produced no evidence regarding how Plaintiff Roman's information ended up in Mr. Roberts' possession. Rather, Plaintiff Roman testified that he did not provide some of his information found in Mr. Roberts' apartment, such as his social security number. App. 1452 (pg. 40:6–20), 1454–55 (pgs. 42:20–43:7). Additionally, Plaintiff Roman claims that he was the victim of someone taking out a credit card in his name, which is inconsistent with most of the putative class members' claims that they merely received WVUHE's letter. The record indicates that only ten individuals whose information was in Mr. Roberts' apartment were readily identifiable victims of identity theft, and only three had actually sustained any loss. *See* App. 797 (pg. 26:12–16.) Ironically, Plaintiff Roman does not even remember getting any letter from WVUHE related to the data breach, yet the receipt of this letter by class members is a key allegation in Plaintiffs' Amended Complaint and its receipt is the defining parameter for the class.

Plaintiffs argued to the circuit court that the typicality requirement is satisfied because another court determined that typicality existed in *Mallion, et al. v. Charleston Area Medical Center*, a data breach case handled by their counsel. However, *Mallion* involved an employee who definitively breached the information of over 70 individuals. This case, by comparison, involves an overwhelming number of individuals whose data was not breached at all – including Plaintiff Welch. Other putative class members, by comparison, might have actually had their data divulged by Ms. Roberts, or they may have had their personal information stolen from elsewhere.

Nor is typicality satisfied because Petitioners have a common defense against the proposed class's WVCCPA claims. The vast majority of the class members have no ascertainable loss, a

defense that necessitates an individualized inquiry into the variety of circumstances surrounding Ms. Roberts' access, including, most importantly, whether she actually misappropriated data when accessing that particular patient's electronic records. Even in instances where personal information of a proposed class member was found in Mr. Roberts' apartment, individualized fact finding is necessary to determine the source of that information, whether that information was misused, and whether any damages resulted. Because Petitioners' central defense necessarily requires an evaluation of the variety of circumstances surrounding each individual patient, no class member's claim is typical of that asserted by any other class member.

iii. Common issues subject to class-wide proof do not predominate over individual issues where 98.5% of the proposed class members have no evidence of any injury.

In addition to satisfying the Rule 23(a) requirements, a party seeking certification must also satisfy at least one of the subdivisions of Rule 23(b). *Perrine v. E.I. du Pont de Nemours & Co.*, 225 W. Va. 482, 525, 694 S.E.2d 815, 858 (2010) ("To be maintainable as a class action, a suit must meet not only the prerequisites of Rule 23(a), but also the additional requirements of one of the subparts of Rule 23(b)."). Rule 23(b)(3) requires a showing of "predominance" and "superiority" which means: (1) the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and (2) a class action is superior to other available methods for the fair and efficient adjudication of the controversy. W. Va. R. Civ. P. 23(b)(3).

"[S]atisfying the predominance requirement is much more demanding than the general commonality requirement under Rule 23(a)." *Bedell*, 2020 WL 7223178, at *7 (citing *Comcast Corp. v. Behrend*, 569 U.S. 27, 34 (2013) ("If anything, Rule 23(b)(3)'s predominance criterion is even more demanding than Rule 23(a)); *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 623-

624 (1997)); *Lienhart v. Dryvit Sys., Inc.*, 255 F.3d 138, 146 n.4 (4th Cir. 2001) ("In a class action brought under Rule 23(b)(3), the commonality requirement of Rule 23(a)(2) is subsumed under, or superseded by, the more stringent Rule 23(b)(3) requirement that questions common to the class predominate over other questions.")). To establish predominance, plaintiffs must show that common issues subject to generalized, class-wide proof are more prevalent or important than the non-common, individual questions in the case. *See Bedell*, 2020 WL 7223178, at *8 (quoting *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1045 (2016)).

Here, after reciting a series of block quotes from *Rezulin*, the circuit court concluded that Rule 23(b)'s predominance requirement was met because "this case involves the same employee who received the same training, the same allegations of failed supervision, the breach of all . . . individual's records using the same computer system, all maintained by the Defendant and, finally, all the individuals present the same legal questions." App. 24, at ¶ 117. However, the circuit court's continued reliance on *Rezulin* in this context is misplaced.[6] In *Bedell*, this Court explicitly modified *Rezulin* to the extent it "suggest[ed] that there is not much difference between commonality and predominance and that no rigid test is necessary[.]" 2020 WL 7223178, at *12. In reaching its conclusion that common questions predominate in this case, the circuit court neither "identif[ied] the parties' claims and defenses and their respective elements," nor "determined whether these issues are common questions or individual questions by analyzing how each party will prove them at trial," as required under *Bedell*. Syl. Pt. 7, *Bedell*, 2020 WL 7223178, at *12.

[6] At the time that the Motion for Class Certification was pending, this Court issued its ruling in *Bedell*. Even though briefing had been completed on the Motion for Class Certification, Plaintiffs advised the trial court of the new decision, so that its finding could be considered in deciding the motion. App. 1171–73 (attaching the *Bedell* decision).

App. 22, at ¶¶ 111–20 (failing to examine any of the essential elements of the causes of action and failing to discuss discuss whether those elements are capable of generalized proof).

Notwithstanding the circuit court's cursory analysis, common issues do not predominate where almost all class members are uninjured. While a *de minimis* number of uninjured class members will not necessarily preclude class certification, Rule 23(b)(3) still requires that common questions predominate over individual inquiries, and courts routinely deny class certification when the number of uninjured class members exceed *de minimis* limits. *See, e.g.*, *In re Rail Freight Fuel Surcharge Antitrust Litig.*, 292 F. Supp. 3d 14 (D.D.C. 2017) (denying class certification based on number of uninjured class members and concluding that 12.7% of the class is "beyond the outer limits of what can be considered *de minimis* for purposes of establishing predominance"), *aff'd* 934 F.3d 619 (D.C. Cir. 2019); *In re Asacol Antitrust Litig.*, 907 F.3d 42, 45 (1st Cir. 2018) (concluding that class certification was improper where 10% of members were uninjured because individual inquiries would necessarily overwhelm common issues).

Recent decisions addressing this issue indicate that no more than 5% to 6% of class members were uninjured is acceptable to support class certification. *See, e.g.*, *In re Lidoderm Antitrust Litig.*, 2017 WL 679367, at *12 (N.D. Cal. Feb. 21, 2017) (finding that three uninjured class members out of a class totaling fifty-five members (5.5%) is *de minimis*); *Vista Healthplan, Inc. v. Cephalon, Inc.*, 2015 WL 3623005, at *20 (E.D. Pa. June 10, 2015) (concluding that a proposed class with approximately 5% uninjured class members combined with the "substantial likelihood" that more class members were also uninjured "indicates that the prevalence of uninjured class members is more than *de minimis*"); *In re Nexium (Esomeprazole) Antitrust Litig.*, 297 F.R.D. 168, 179 (D. Mass. 2013), *aff'd sub nom.*, 777 F.3d 9 (1st Cir. 2015) (concluding that a proposed class with at least 5.8% uninjured class members did not defeat predominance).

As explained above, almost all of the class's members in this case suffered no breach and no injury. Specifically, at best only 113 individuals' data was located in Mr. Roberts' home, and thus, at most would potentially have a potential claim. This translates to approximately 1.5% of the proposed class. Further, with only 10 persons allegedly suffering some form of identity theft that percentage drops to 0.1% of the class. The presence of up to 7,435 uninjured class members in this case—99.9% of the class—is far beyond the outer limits of what can be considered *de minimis* for purposes of establishing predominance. *See Kohen v. Pac. Inv. Mgmt. Co. LLC*, 571 F.3d 672, 677 (7th Cir. 2009) ("a class should not be certified if it is apparent that it contains a great many persons who have suffered no injury at the hands of the defendant"). Therefore, for the same reasons that Plaintiffs cannot satisfy Rule 23(a)'s commonality requirement, they cannot possibly satisfy Rule 23(b)(3)'s "more stringent" requirement that questions common to the class "predominate over" other questions.

VI. CONCLUSION

The circuit court exceeded its legitimate powers and misapplied established West Virginia law by certifying Respondents' proposed class and subclass. Accordingly, Petitioners request this Court issue a rule to show cause why a Writ of Prohibition should not be issued and expeditiously order an automatic stay pursuant to Rule 16 of the West Virginia Rules of Appellate Procedure. Further, Petitioners ask that, after there has been an opportunity to show cause, a Writ of Prohibition be issued prohibiting the Honorable David M. Hammer from conducting any further proceedings in this class action until the Order granting Plaintiffs' Motion for Class Certification has been vacated.

DATED: February 9, 2021

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VERIFICATION

STATE OF WEST VIRGINIA,

COUNTY OF CABELL, to-wit:

I, Marc E. Williams, after being first duly sworn, depose and say that the facts contained in the foregoing Petition for Writ of Prohibition are true, except insofar as they are therein stated to be upon information and belief, I believe them to be true.

Marc E. Williams

Taken, subscribed and sworn before me, the undersigned Notary Public, this 9th day of February, 2021.

My commission expires May 30, 2024

Christianne L. Hobson

[Notary]

OFFICIAL SEAL
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My Commission Expires May 30, 2024

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

CASE NO. _____

WEST VIRGINIA UNIVERSITY HOSPITALS – EAST, INC., d/b/a BERKELEY MEDICAL CENTER; CITY HOSPITAL, INC., d/b/a BERKELEY MEDICAL CENTER; THE CHARLES TOWN GENERAL HOSPITAL, d/b/a JEFFERSON MEDICAL CENTER, Petitioners,

v.

THE HONORABLE DAVID M. HAMMER, JUDGE OF THE CIRCUIT COURT OF JEFFERSON COUNTY, WEST VIRGINIA, PRESDING JUDGE; DEBRA S. WELCH and **EUGENE A. ROMAN**, individually, and on behalf of all others similarly situated, Respondents.

Relief sought from an Order of the Circuit Court of Jefferson County (CC-19-2019-C-34) granting Plaintiffs' Motion for Class Certification

CERTIFICATE OF SERVICE

The undersigned counsel for Petitioner, hereby certified that on this 9th day of February 2021, a true copy of the foregoing "Petition for Writ of Prohibition" and "Appendix" were served upon the following individuals by Federal Express delivery:

Hon. David M. Hammer, Circuit Judge
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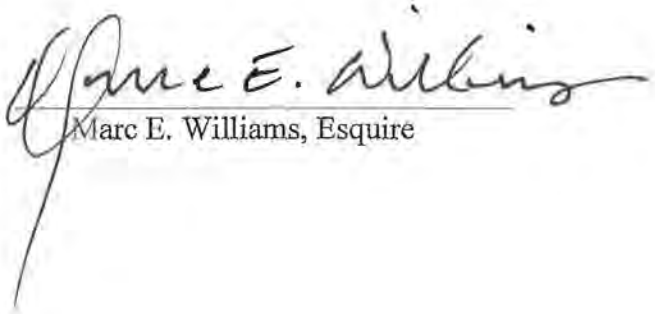

Marc E. Williams, Esquire