IN THE CIRCUIT COURT OF MONONGALIA COUNTY, WEST VIRGINIA

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

Plaintiffs,

v.

Civil Action No. 13-C-53
Judge Phillip D. Gaujot

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

Defendants.

ORDER DENYING DEFENDANTS, WEST VIRGINIA UNITED HEALTH SYSTEM, INC. AND WEST VIRGINIA UNIVERSITY HOSPITALS, INC.'S, "MOTION FOR RECONSIDERATION" AND GRANTING PLAINTIFFS' MOTION FOR APPROVAL OF CLASS NOTICE

On May 13th, 2021, the parties came before the Court, via videoconference, to argue Defendants' Motion for Reconsideration and Plaintiffs' Motion for Approval of Class Notice. Appearing on behalf of the Plaintiffs were David E. Goddard, Christopher J. Regan, Laura P. Pollard, and David J. Romano. Appearing on behalf of the Defendants was Marc E. Williams.

The Court provided a summary of the arguments set forth in the parties' briefs on the Defendants' Motion for Reconsideration. Oral argument from each party was then heard.

Based upon the voluminous court record, the written submissions of the parties, and the arguments of counsel, the Court concluded that Defendants' Motion for Reconsideration should be **DENIED**. Having determined that the class is properly certified in this matter, the Court also **GRANTED** Plaintiffs' Motion for Approval of Class Notice.

FINDINGS OF FACT

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

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

3. On June 4th, 2013, Plaintiff Joseph Michael Jenkins ("Jenkins") filed his Complaint in the Circuit Court of Harrison County. On June 27th, 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.

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

5. Plaintiffs Thomack and Jenkins filed their Consolidated Amended Complaint on January 9th, 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.

6. On January 29th, 2014, Defendants filed their joint Answer to Plaintiffs' Consolidated Amended Complaint.

7. After briefing the issue of class certification, this Court entered an order on April 16th, 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.

8. On June 25th, 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 26th, 2014, the West Virginia Supreme Court of Appeals denied the Petition.

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

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

11. On July 21st, 2017, Defendants filed their first Motion to Decertify Class. The arguments raised in the Motion to Decertify included several of the same arguments Defendants had previously relied upon in opposing class certification in the first place, including that the class was not ascertainable and that the claims lacked commonality. Defendants additionally argued that the May 24th, 2017 West Virginia Supreme Court of Appeals' decision in *State ex rel. Healthport Technologies, LLC v. Stucky*, No. 17-0038, 2017 WL 2332876 mandated decertification because it caused Plaintiffs to lack standing to pursue their claims.

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

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

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

15. On October 1st, 2018, Defendants filed their Petition for Writ of Prohibition with the WVSCA, challenging class certification on the basis of commonality, ascertainability, and standing.

16. Following briefing and oral argument, the WVSCA entered its opinion in *State ex. rel. W. Virginia Univ. Hosps., Inc. v. Gaujot*, 829 S.E.2d 54 (W. Va. 2019). The WVSCA found that "on the record before us, it does not appear that the circuit court has addressed the question of

commonality with sufficient factual findings and conclusions" to determine that the Order Denying Motion to Decertify Class included the requisite analysis. *Id.* at 64.

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

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

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

3. Specifically, Plaintiffs took the deposition of Melissa Martin, Director of Health Information Management for West Virginia University Hospitals, who had previously signed the affidavit which was relied upon by the WVSCA in its decision.

4. The version of W. Va. Code § 16-29-2 which was in effect during the timeframe defined in the class definition in this matter read as follows, in relevant part:

> (a) The provider shall be reimbursed by the person requesting in writing a copy of the records at the time of delivery for all reasonable expenses incurred in complying with this article; Provided, that the cost may not exceed seventy-five cents per page for the copying of any record or records which have already been reduced to written form and a search fee may not exceed ten dollars.

W. Va. Code § 16-29-2(a) (effective for the entire period of the class, between January 18, 2008 and June 5, 2014).

5. The version of W. Va. Code § 16-29-2 which went into effect immediately after the end of the class definition in this matter reads as follows, in relevant part:

(a) A person requesting records from a provider shall place the request in writing and pay a reasonable, cost-based fee, at the time of delivery. Notwithstanding any other section of the code or rule, the fee shall be based on the provider's cost of: (1) Labor for copying the requested records if in paper, or for placing the records in electronic media; (2) supplies for creating the paper copy or electronic media; and (3) postage if the person requested that the records be mailed.

. . .

(b) The labor for copying under this section shall not exceed twenty-five dollars per hour and shall be adjusted to reflect the consumer price index for medical care services such that the base amount shall be increased by the proportional consumer price index in effect as of October of the calendar year in which the request was made, rounded to the nearest dollar.

W. Va. Code Ann. § 16-29-2(a) (effective June 6, 2014 to July 5, 2017).

23. The two versions of the statute set forth the same restrictions regarding the charges that a hospital or other facility may place on producing a patient's medical record (that is, the fees must be reasonable and based upon the expenses actually incurred).

24. Ms. Martin's deposition testimony makes clear that the labor involved in having a WVUH technician review the medical records prior to production was identical under both versions of the statute:

Q. "Depending on the type of record. After the records are reproduced electronically, a WVUH technician manually inspects the document bundle to ensure that the production complies with the scope of the request and that no images are duplicates or illegible." Can you explain to me what you mean about the WVU technician manually inspecting the documents?

A. **So the WVUH technician would review the records to make sure that we're providing the minimum necessary required by the privacy regulations. They also evaluate and make sure that the record is complete based on the request, and that if there's any protected information, behavioral health information, that that's reviewed, and if the request does not provide the additional authorization for protected information, then we would remove that and not provide that to the requestor.**

Q. And these efforts by the WVU technician would have been done under both of the two different versions of the statute we've talked about here today, correct?

A. **Correct.**

Q. So during the relevant timeframe from January of 2008 to June of 2014, someone would have looked at all records to make sure that they were compliant and not overly inclusive, no duplicates and the quality was fair, ok?

A. That's correct.

Q. And the same thing from June 6, 2014 and after, a WVU technician would have likewise inspected all of the documents to make sure that they were correct, legible, make sure they were not overly inclusive, and to make sure that there were no duplicates, fair?

A. Correct.

Deposition Transcript of Melissa Martin, at pp. 59-61.

25. Plaintiffs obtained invoices showing the actual amount charged by Defendants for medical records produced between June 5th, 2014 and July 31st, 2014, under the later version of the statute.

26. WVUH admits, and the Court finds for purpose of Defendants' Motion, that WVUH charged every member of the class 40 cents per page plus a $10.00 search fee regardless of the amount of time or cost to produce the records; thus, the Court also finds that the charges imposed by WVUH were uniform and consistent for all Class members without any individual determination of actual cost as required by the Statute in force during the relevant Class time period.

27. The Plaintiffs assert and the Court finds that the invoices produced in response to discovery relating to the first two months under the new statute (from June 6th, 2014 through July 31st, 2014) were based upon a system created by W\TU}IS, which it described as a "time study." That system was W\TU}IS's attempt to accurately capture its actual costs incurred in producing medical records from the same medical records system that was used during the relevant class time period.

28. The discovery also demonstrated, and the Court finds, that the system developed by the time study is "transferrable" to the class period. As described by W\TUHS's corporate representative Christine Metheny pursuant to W. Va. R. Civ. P. 30(b)(7),:

Q: Okay, and do you have any reason to believe that the time study, the results of the time study, would be invalid or would be transferrable to the same process say a year earlier?
A: Yes.
Q: Yes, you believe it would be transferrable?
A: Yes, I do.
Q: Okay do you have any reason to believe it would not be transferrable all the way up to say, 2010?
MR. WILLIAMS: All the way back?
Q: All the way back, that's what I mean.
A: Yes.
Q: Yes, you think it would be?
A: Based on the processes and systems in place, yes.

Deposition Transcript of Christine Metheny, at p. 60.

29. This Court also finds that the affidavit of Melissa Martin originally submitted in Defendants' Response in Opposition to Plaintiffs' Motion for Class Certification and was again relied upon by Petitioners in support of their Motion to Decertify Class, is wholly inconsistent with the facts presented to the Court after Ms. Martin's deposition and the production of the invoices for the time period from June 6, 2014 through July 31, 2014, which were based on W\TUHS's "time study." The Court makes these findings preliminarily regarding class certification and not as irrefutable facts as these factual issues may be contested at trial. However, for purposes of class certification, the Court finds that the preponderance of evidence clearly leads to the preliminary conclusion that these issues are common to all of the Class members and that W\TUH's assertion that each Class member's damages will require individual damage assessment is without merit; of course this Court always retains the authority to manage the case pursuant to Rule 23 including decertifying the Class if such would become necessary, but the Court at this stage of the

proceedings is confident that the facts presented clearly demonstrate commonality of issues for both liability and damages sufficient to warrant class certification which is likely the only mechanism for the Plaintiffs to see their day in court due to the relatively small amount of damages suffered by each Class member, which is one of the primary purposes of Rule 23. *Gunnells v. Healthplan Servs., Inc.*, 348 F.3d 417 (4th Cir. 2003) ("class certification will provide access to the courts for those with claims that would be uneconomical if brought in an individual action"); *Mey v. Venture Data, LLC,* No. 5:14-CV-123, 2017 WL 10398569, at *13 (N.D.W. Va. June 6, 2017) (citing *Gunnells* and *Amchem Prod.*); *Amchem Prod., Inc. v. Windsor*, 521 U.S. 591, 617, 117 S. Ct. 2231, 2246, 138 L. Ed. 2d 689 (1997) ("The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights." (quoting *Mace v. Van Ru Credit Corp.,* 109 F.3d 338, 344 (1997)); *State ex rel. Dunlap v. Berger*, 211 W.Va. 549, 562, 567 S.E.2d 265, 278 (2002) (favorably quoting the purpose of Rule 23 cited above in *Amchem*).

30. As argued by Plaintiffs during the hearing on Defendants' Motion to Decertify Class, how could Invoice Number 72081, which included 11,991 pages/images, be produced with only one minute of labor, if, as Ms. Martin stated in her affidavit, WVUHS employees must look through the entire production to ensure no documents are duplicates or illegible, and to ensure the production complies with the scope of the request. As Ms. Martin stated in her affidavit:

> 17. For most electronic records, once they are located, they are extracted and copied into a production system called Centricity or Infinitt, depending on the type of record. After the records are reproduced electronically, a WVUH technician manually inspects the document bundle to ensure that the production complies with the scope of the request and that no images are duplicates or illegible.
>
> 18. Ensuring that the production complies with the scope of the request is particularly important and can be very time consuming. For example, a general release authorizing the production of medical records is not adequate to permit the production of psychiatric or mental health records pursuant to 45 C.F.R. § 164.508. Psychiatric and mental health care treatment is not necessarily documented in a discreet part of a patient's medical records. Therefore, technicians read the medical records collected in the production system to identify psychiatric, mental health, or other records not covered by the written request for records.

See Melissa Martin Affidavit, signed on March 20th, 2014.

31.. On September 17th, 2019, Defendants filed their Renewed Motion to Decertify Class. Plaintiffs filed their Response in Opposition to Defendants' Renewed Motion to Decertify Class on October 24th, 2019. Defendants filed their Reply on November 7th, 2019, then filed a Supplement to their motion on January 24th, 2020.

32. On January 22nd, 2020, the parties appeared for a hearing to present arguments on the Defendants' Renewed Motion to Decertify Class.

33. During oral argument on Defendants' Renewed Motion to Decertify Class, Plaintiffs provided a spreadsheet which summarized each invoice produced by WVUHS for the time period between June 6th, 2014 and July 31st, 2014, showing 165,617 pages were produced, with the total amount billed to produce those pages shown as $732.95, and if WVUHS produced the same number of pages under the forty (40) cents per page plus a $10.00 search fee formula it

used during the class period, the total amount WVUHS would have charged would have been $69,766.80, or a difference of $69,033.85 (or more than 95 times as much as it charged using the system developed based on WVU}IS's time study).

34. Additional facts presented and considered by this Court in ruling on Defendants' Renewed Motion to Decertify Class included the affidavit of Plaintiffs' expert, Kathryn S. Crous, that the average charge for all of the invoices produced by WVUHS for the time period from June 6th, 2014 to July 31st, 2014 created a simple mechanism to determine the amount of WVU}IS's overcharges during the relevant Class time period.

35. Based upon the presented documentation and assertions presented by counsel to the Court on October 30th, 2020, the Court entered an eighteen (18) page Order Denying Defendants' Renewed Motion to Decertify Class, setting forth the factual and legal bases in support of the ruling.

36. The Court also entered an Order Amending Class Definition on October 30th, 2020, setting forth the class definition as:

> Any person, who, from January 18, 2008 until June 5, 2014,
>
> (1) requested in writing copies of patient medical records from Defendant, West Virginia University Hospitals, Inc., including the patient or any person who was an authorized agent or authorized representative of the patient; and
>
> (2) paid the fees charged by the Defendant to obtain such requested medical records; and
>
> (3) provided however, that attorneys who paid for a client's medical records in connection with investigation of claims and/or litigation on behalf of that client, but were never repaid for those costs, are specifically excluded from class membership.

37. On March 1st, 2021, Defendants filed a Motion for Reconsideration of the Order Denying Defendants' Renewed Motion to Decertify Class, asserting that the Court had failed to

follow the instructions set forth by the West Virginia Supreme Court of Appeals in *State ex. rel. W. Virginia Univ. Hosps., Inc. v. Gaujot*, 829 S.E.2d 54 (W. Va. 2019) regarding Rule 23 analysis, and that the WVSCA's opinion in *State ex rel. Surnaik Holdings of WV, LLC v. Bedell*, No. 19-1006, 2020 WL 7223178 (Nov. 20, 2020) provided grounds for reconsideration as well.

38. *State ex rel. Surnaik Holdings of WV, LLC v. Bedell*, No. 19-1006, 2020 WL 7223178 (Nov. 20, 2020) was decided after the Court entered its Order Denying Defendants' Renewed Motion to Decertify Class.

39. Defendants contend that the Court's Order Denying Defendants' Renewed Motion to Decertify Class fails to appropriately address the commonality element, fails to address the element of ascertainability under the *Surnaik* decision, and leads to a potential ethical issue wherein attorneys may become members of the class and obtain a personal interest in their clients' cases.

40. Defendants represented to the Court during oral argument on their Motion for Reconsideration that they will present testimony from an expert which will contradict the expert opinions proffered by the Plaintiffs and will show that Defendants lose money on the production of patient medical records. Defendants have not produced any such evidence in this matter to date and therefore this Court cannot consider it. Moreover, even if such opinion would be provided it would be a contested fact/opinion for the fact finder to resolve, not a basis to decertify the Class. The Class members are entitled to have their day in court when there are contradictory facts to be decided like any other litigant. Of course, all Parties will have an opportunity to present any uncontested issues to the Court by way of summary judgment motions if appropriate, but such is not appropriate at this stage of the proceedings.

41. No additional evidence has been produced to the Court in this matter since the entry of the October 30th, 2020 Order Denying Defendants' Renewed Motion to Decertify Class.

6. Defendants also contend that the plaintiff class in this matter cannot be ascertained.

7. Plaintiffs argue that the plaintiff class does not have to be ascertained at the time of class certification, so long as it is ascertainable, and that it may be ascertained through the use of the class claims process.

8. Defendants argue that the class definition presents issues of standing and creates the potential for the attorneys to obtain a personal interest in their clients' cases.

9. Plaintiffs' counsel assert that the class definition excludes such attorneys pursuant to *State ex rel. Healthport Technologies, LLC v. Stucky*, 239 W.Va. 239, 800 S.E.2d 506 (2017),thereby avoiding any ethical issues, and that it has already been conclusively established that the Plaintiff class representatives in this matter have standing as they have suffered an injury in fact as they repaid their attorneys who had acted as their authorized agent in acquiring the medical records to provide them with legal advice; this Court finds that for purposes of certifying the Class such facts have been established and any additional facts may be produced during the maturing of this case for trial.

CONCLUSIONS OF LAW

1. West Virginia does not explicitly recognize a "motion for reconsideration." *Ryder v. Ryder*, No. 18-0865, 2020 WL 1674226, at *3 (W. Va. Apr. 6, 2020).

2. A Rule 60(b) motion to reconsider is "simply not an opportunity to reargue facts and theories upon which a court has already ruled." *See, e.g., Jividen v. Jividen*, 212 W. Va. 478, 481, 575 S.E.2d 88, 91 (2002), quoting *Powderidge Unit Owners Association v. Highland Properties, Ltd.*, 196 W.Va. 692, 705-06, 474 S.E.2d 872, 885-86 (1996) (footnote and citations omitted).

3. The October 30th, 2020 Order Denying Defendants' Renewed Motion to Decertify Class dedicates numerous pages to the facts and evidence pertaining to the analysis undertaken on the commonality requirement, and applying West Virginia law regarding the commonality analysis, including pursuant to the WVSCA's instructions in *State ex rel. West Virginia University Hospitals, Inc. v. Gaujot*, 242 W.Va. 54, 829 S.E.2d 54 (2019), to find that the commonality requirement is met in this matter.

4. No changes in fact or law have been presented to this Court which would merit reconsideration of the findings made by the Court in its prior Order rejecting WVUH's Motion to Decertify the Class, and in this Order that the commonality requirement has been established by adequate facts to a preponderance in this case.

5. "Because the West Virginia Rules of Civil Procedure are practically identical to the Federal Rules, we give substantial weight to federal cases, especially those of the United States Supreme Court, in determining the meaning and scope of our rules." *State ex rel. Surnaik Holdings of WV, LLC v. Bedell*, No. 19-1006, 2020 WL 7223178 (Nov. 20, 2020), at fn. 8, citing *Burns v. Cities Serv. Co.*, 158 W. Va. 1059, 217 S.E.2d 56 (1975); *Aetna Casualty & Sur. Co. v. Federal Ins. Co. of New York*, 148 W. Va. 160, 133 S.E.2d 770 (1963)." *Painter v. Peavy*, 192 W. Va. 189, 192 n.6, 451 S.E.2d 755, 758 n.6 (1994). As the Fourth Circuit of Appeals recently stated:

> With the statute properly in view, the appellant's challenge to this class falls away. Appellant's core argument seems to be that this class includes a large number of uninjured persons. Other courts to address the question of uninjured plaintiffs have done so through the lens of predominance, asking whether the differences among the class members are so great that individual adjudication subsumes the class-wide issues. For its part, the district court took up the issue through the lens of ascertainability. Regardless of which approach is used, the issue has no bearing on this case. Because the private right of action is not as narrow as Dish and its amici suggest, there is simply not a large number of uninjured persons included within the plaintiffs' class.

> With this red herring cast aside, the class certified by the district court easily meets the demands of Rule 23. First, the class members are ascertainable. As we previously explained, class litigation should not move forward when a court cannot identify class members without "extensive and individualized fact-finding or 'mini-trials.'" *EQT Prod. Co.*, 764 F.3d at 358. The goal is not to "identify every class member at the time of certification," *id.*, but to define a class in such a way as to ensure that there will be some "administratively feasible [way] for the court to determine whether a particular individual is a member" at some point."

Krakauer v. Dish Network, L.L.C., 925 F.3d 643, 657–58 (4th Cir.), *cert. denied*, 140 S. Ct. 676, 205 L. Ed. 2d 440 (2019) (internal citations omitted).

6. If a class is "objectively defined" "with sufficient specificity so that it is administratively feasible for the court to ascertain whether a particular individual is a member," then the requirements are met. *State ex rel Metropolitan Life Ins. Co. v Starcher*, 196 W. Va. 519, 474 S.E.2d 186 (1996) (Syl. Pt. 2 & 3); *see also* Newberg on Class Actions § 3:2 (2002).

7. As addressed in *Krakauer* and *State ex rel Metropolitan Life Ins. Co.*, there is no requirement that all class members be ascertained at the time of class certification, the ascertainability requirement simply requires the Court to determine whether a class may be defined in a manner that can allow for identification of specific class members in an "administratively feasible way" at some point prior to resolution of the case.

8. The class definition in this matter provides sufficient parameters for ascertaining class members regarding both liability and damages and this Court finds that the Defendants' assertion that an individual assessment of each class member's damages will be necessary has not been demonstrated under the facts presented to this Court; the liability is absolutely common to the entire Class as the Statute applied to all persons requesting medical records during the relevant Class time period and the damages suffered by the Class, while not the same for each Class member, are common and ascertainable as the facts at this stage of the proceeding demonstrate that the WVUH Defendants cannot determine the actual cost of each individual medical record

request as the Statute required since WVUH did not keep, or attempt to determine, such costs;[1] however the Defendants' expert analysis set forth in the "time study" concluded that such individual charges would be the same as those charged under the subsequent version of the statute, thus providing a means of proving such individual cost; of course such is subject to further development of this case as it matures to trial; finally the claims process, as further supported by spreadsheets produced in this matter identifying patients of the Defendants that identify requests for medical records production during the class time period also are cogent evidence for this Court to find that ascertainablity has been demonstrated as all of the Class requesters should be identifiable by these records produced by the Defendants.

9. The claims process can be an appropriate mechanism to ascertain class members for purposes of settlement or trial of class action lawsuits.

10. Plaintiffs have submitted a proposed class notice and claims process in this matter, which would serve to ascertain the class members of this matter prior to settlement or trial.

11. Rule 23's requirement of ascertainability has been met in this matter for purposes of class certification, and no reconsideration of class certification on the element of ascertainability is warranted.

12. Federal courts, in cases with far less commonality and ascertainability than in this case before the Court, have recognized the importance of class action lawsuits as the mechanism by which individuals who have been wronged on a broad scale or in a systematic matter can obtain recourse and justice that they would be unable to obtain as individual plaintiff even when individual damage proceedings are necessary which is unlikely in this case. *See, e.g., Butler v. Sears, Roebuck & Co.*, 727 F.3d 796, 801 (7th Cir. 2013) ("It would drive a stake through the heart

---

[1] *See* discussion regarding *Bigelow v. RKO Radio Pictures*, 327 U.S. 251, 66 S.Ct. 574, 90 L.Ed. 652 (1946) set forth in this Court's Order Denying Defendants' Renewed Motion to Recertify Class.

of the class action device, in cases in which damages were sought rather than an injunction or a declaratory judgment, to require that every member of the class have identical damages. If the issues of liability are genuinely common issues, and the damages of individual class members can be readily determined in individual hearings, in settlement negotiations, or by creation of subclasses, the fact that damages are not identical across all class members should not preclude class certification. Otherwise defendants would be able to escape liability for tortious harms of enormous aggregate magnitude but so widely distributed as not to be remediable in individual suits."); *Carnegie v. Household Int'l., Inc.*, 376 F.3d 656, 661 (7th Cir. 2004) ("The *realistic* alternative to a class action is not 17 million individual suits, but zero individual suits . . ."); *Gunnells v. Healthplan Servs., Inc.*, 348 F.3d 417 (4th Cir. 2003) ("class certification will provide access to the courts for those with claims that would be uneconomical if brought in an individual action"); *Mey v. Venture Data, LLC,* No. 5:14-CV-123, 2017 WL 10398569, at *13 (N.D.W. Va. June 6, 2017) (citing *Gunnells* and *Amchem Prod.*); *Amchem Prod., Inc. v. Windsor*, 521 U.S. 591, 617, 117 S. Ct. 2231, 2246, 138 L. Ed. 2d 689 (1997) ("The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights." (quoting *Mace v. Van Ru Credit Corp.*, 109 F.3d 338, 344 (1997)).

13. The same principle espoused in many federal cases analyzing class actions squarely applies to this matter – class actions are the appropriate mechanism to address situations where a defendant has harmed individuals on a broad and systematic basis, and the defendant would be permitted to escape liability for intentional, and often egregious, wrongful conduct simply because each individual harmed could not bring an individual lawsuit.

14. Nothing in the *Surnaik* opinion changes the Court's analysis of the Rule 23 elements, and the finding that the Plaintiffs have meet their burden on each Rule 23 requirement for class certification at this juncture of the case.

15. Plaintiff class representatives have both suffered an "injury in fact" and established standing to pursue the claims in the instant matter on behalf of the Plaintiff class. *State ex rel. Healthport Technologies, LLC v. Stucky*, 239 W. Va. 239, 800 S.E.2d 506 (2017) (finding that plaintiff did not have standing to pursue claims for being overcharged for medical records in violation of W.Va. Code § 16-29-1 *et seq.* until he had suffered an "injury in fact," which could not exist until he was required to reimburse his attorney for the costs of obtaining the records).

16. It is well settled law that "if a class representative has standing, the case is justiciable, and the proponent of the class suit need not demonstrate that each class member has standing." Newberg on Class Actions § 2:3(5th ed.); see also *Dreher v. Experian Info. Solutions, Inc.*, 856 F.3d 337 (4th Cir. 2017) ("In a class action matter, we analyze standing based on the allegations of personal injury made by the named plaintiff"), quoting *Beck v. McDonald*, 848 F.3d 262, 269-70 (4th Cir. 2017), citing *Doe v. Obama*, 631 F.3d 157, 160 (4th Cir. 2011); *see also Neale v. Volvo Cars of North Am., LLC*, 794 F.3d 353, 362 (3d Cir. 201 5); *Kohen v. Pacific v. Mgmt. Co. LLC*, 571 F.3d 672, 676 (7th Cir. 2009); *Milbourne v. JRK Residential Am.*, LLC, 2016 WL 1071564, at *6 (E.D. Va. Mar. 15, 2016) (Payne, J.); *Lewis v. Casey*, 518 U.S. 343, 395 (1996) (Souter, J., concurring).

17. No reconsideration of class certification is warranted on the grounds that Plaintiffs lack standing or that an ethical concern for THESE attorneys exists.

18. The Court **FINDS** that it has thoroughly and properly examined all of the required elements of Rule 23 in certifying this class action, and that no changes in the facts or law applicable

to this matter exist which would merit reconsideration of the Order Denying Defendants' Motion for Reconsideration or for decertifying the class.

19. The Court further **FINDS** that, because class certification is appropriate, the Plaintiff class is permitted to proceed toward establishing a class notice and class notice plan, as set forth in Plaintiffs' Motion for Approval of Class Notice.

For all of the reasons set forth herein, the Court **ORDERS** that Defendants' Motion for Reconsideration is **DENIED**, and Plaintiffs' Motion for Approval of Class Notice is **GRANTED**.

The objections and exceptions of the Defendants are noted.

The Clerk is **DIRECTED** to send certified copies of this Order to all counsel of record.

Entered this 27th day of July, 2021.

Honorable Phillip D. Gaujot

ENTERED: July 28, 2021
DOCKET LINE 447, Jean Friend, Clerk

STATE OF WEST VIRGINIA SS:

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

Jean Friend Circuit Clerk