/s/ David M. Hammer
Circuit Court Judge
Ref. Code: 20MGUB9C

E-FILED | 12/23/2020 12:06 PM
CC-19-2019-C-34
Jefferson County Circuit Clerk
Laura Storm

In the Circuit Court of Jefferson County, West Virginia

Debra S. Welch,
Plaintiff,

vs.

West Virginia University Hospitals-East, Inc. d/b/a University Healthcare,
City Hospital, Inc. d/b/a Berkeley Medical Center,
The Charles Town General Hospital d/b/a Jefferson Medical Center,
Defendants

Case No. CC-19-2019-C-34

ORDER GRANTING CLASS CERTIFICATION

Now before the Court is *Plaintiffs' Motion for Class Certification*. The Court has reviewed Plaintiffs' Motion, the *Response in Opposition* filed by Defendants, West Virginia University Hospitals -- East, Inc., City Hospital, Inc., and The Charles Town General Hospital, (collectively, "Defendants" or "WVUHE"), and Plaintiffs' *Reply in Support*. Having considered the submissions of all Parties, the record before the Court, the relevant law, and arguments of counsel, the Court FINDS and CONCLUDES as follows:

I. PROCEDURAL HISTORY

1. On or about February 18, 2019, Plaintiff Debra S. Welch, individually and on behalf of all others similarly situated, served WVUHE with her initial Complaint. On September 25, 2019, Plaintiff Welch served her Motion for Class Certification and its supporting memorandum.
2. Before the Court could rule on Plaintiff Welch's Motion for Class Certification, she moved the Court for leave to amend the Complaint. The Court granted the Motion, and on March 20, 2020, Plaintiffs filed the Amended Complaint, adding Eugene A.

Roman, both individually and on behalf of an allegedly similarly-situated subclass of individuals.

3. On August 17, 2020, Plaintiffs filed a Motion for Class Certification, seeking to certify a class consisting of "All West Virginia citizens whose personal information was accessed in the data breach identified by the Defendant in its February 23, 2017 correspondence to Debra Welch," represented by Plaintiff Welch. Plaintiffs also seek to certify a subclass consisting of "[t]he 109 West Virginia citizens whose misinformation was found in Angela Roberts and her co-conspirator (sic) possession." Compl. ¶¶ 39, 40.

II. CASE BACKGROUND

Plaintiffs allege that, as a result of the Defendants' failure to implement and follow basic security procedures and to train properly and supervise its employees, the sensitive and medical information of nearly seven thousand five hundred (7,500) individuals was breached. The Plaintiffs submit that the Defendant treated each of the individuals in this medical data breach the same, sent them nearly identical data breach notice letters, and offered them all the same credit monitoring services as a result of the breach. Additionally, the Plaintiffs assert that their physician-patient confidential relationship has been invaded as a result of Defendants' conduct. The facts established in this case indicate that the Defendants had a medical data breach, involving the same employee, and breached protected health information of the proposed class. After this breach, the Defendant notified the proposed class with a standard form letter.

Of the nearly seven thousand five hundred (7,500) individuals whose information was breached, Mr. Roman, as well as 109 other individuals, suffered actual identity theft due to the Defendants' conduct. Mr. Roman and the proposed subclass of individuals' information was found in the possession of Ms. Roberts' accomplice. Ms. Roberts used her position with the Defendants to steal 109 individuals' information for "Wayne's

business." *See*Exhibit G: "Redacted Spreadsheet," attached to *Plaintiffs' Motion for Class Certification.*

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. This is a putative medical data breach class action where it is alleged that the Defendants breached the private sensitive information of nearly seven thousand five hundred (7,500) patients during the defined class period. *See* "Class Size Admission," provided with *Plaintiffs' Motion for Class Certification* as Exhibit A.[1]

2. It is further alleged that the Defendant's employee repeatedly breached the medical information of thousands of patients.

3. The Defendants hired this employee, Angela Roberts, on February 17, 2014 to work as a Registration Specialist at the Berkeley Medical Center and Jefferson Medical Center. Prior to the start of Ms. Roberts' employment, a background check was performed on Ms. Roberts and that check revealed no issues with Ms. Robert's employment.

4. Ms. Roberts' duties as a Registration Specialist required her to access Protected Health Information ("PHI") that WVUHE stored in its electronic record system in order to schedule patients for appointments with medical providers at the Medical Centers. Indeed, during the medical breach at issue, Ms. Roberts accessed every single proposed class member's medically protected information by using the Defendant's computer and data systems. *See* "Deposition of Angela Roberts." *See* also, Exhibit B: "Data Breach Notices" provided with *Plaintiffs' Motion for Class Certification.*

4. Although Ms. Roberts did not have unfettered access to PHI, WVUHE created a profile for Ms. Roberts that gave her role-based access to patient records so Ms. Roberts could perform her job duties.

5. As part of her training as a Registration Specialist, Ms. Roberts was

trained regarding proper access of records under the Health Insurance Portability and Accountability Act ("HIPAA"), and Ms. Roberts completed a form stating she agreed to abide by HIPAA. During her employment at WVUHE, Ms. Roberts completed mandatory yearly HIPAA training.

6. In March of 2016, Ajarhi Roberts (unrelated) began a romantic relationship with Ms. Roberts.

7. During the course of that relationship, Ms. Roberts determined to use her position as a Registration Specialist for the hospital to steal information that Mr. Roberts could use to attempt to forge credit cards or commit bank fraud.

8. Ms. Roberts' *modus operandi* was to wait until a patient contacted her and then she would legitimately access the patient's records to perform her job duties. However and critical to this ruling, she simultaneously "cased" those same records to ascertain whether that patient might also be a lucrative target of her identity theft conspiracy with Mr. Roberts. If so, she would contemporaneously write down the customer's information on a separate sheet of paper or would print the customer's driver's license. Ms. Roberts testified in her deposition that every single medical file she reviewed was done for the purposes of "**a real mix of both a business and Wayne's business**." *See* "Deposition of Angela Roberts," Page 63, line 6-12 (emphasis added). Thus, her motives for accessing patients' records were, by her own admission, mixed; she had both legitimate and illegitimate motives in every instance of access.

9. Ms. Roberts received uniformly positive reviews from the Defendants for her work.

10. Ms. Roberts testified that she was never supervised by her employer and could still be improperly accessing medical record files if it was not for the actions of the Federal Bureau of Investigation (FBI) and the Berkeley County Sheriff's Department who informed WVUHE of this data breach. *See* previously provided Exhibit D: "Email

Correspondence regarding Investigation of Breach" and Exhibit B: "Data Breach Notices," attached to *Plaintiffs' Motion for Class Certification.* Ms. Roberts testified

> Q: Angela, if there was created a culture, if they had a culture of concern in that call center, would it have been more difficult or impossible for you to have done this?
> A: Yes. I would have been more worried of someone taking a chance of someone being behind me or walking around, and that just never happened. That wasn't how things are done in there.
> Q: If you were supervised to a good, if you were supervised, would you have been able to still do what you did?
> A: No. I don't feel I would have. I would have been, the presence would have made me way too nervous to do that.
> Q: Did they [defendant] have cameras or people walking by at least looking over people's shoulder, or employees' shoulders to see what was happening or what was going on?
> A: No.
>
> ...
>
> Q. And would you agree with me that your employer failed to supervise you to the extent that you were never figured out, that they never figured out what you were doing or what was going on?
>
> A. Yes.
>
> Q. And I think you told Mr. Hancock, hey, it wasn't until the FBI came to your house that and the FBI went to the hospital that anybody at the hospital knew anything, right?
>
> A. Yes, that was the first.

See "Deposition of Angela Roberts," pages 64-67.

11. In December 2016, law enforcement officers conducted a lawful search of Mr. Roberts' home. During this search they discovered evidence of the medical breach at issue in this case including the 113 names identified in Exhibit G: "Redacted Spreadsheet," attached to *Plaintiffs' Motion for Class Certification*.

12. Both the Plaintiff and Defendants agree that information relating to the named Plaintiff Mr. Roman was found in Mr. Roberts' apartment during the police search.

13. Debra Welch's information was not located in Mr. Roberts' home during the search.

14. Both Ms. Roberts and Ajarhi "Wayne" Roberts pled guilty for the crimes committed in the course of their identity theft conspiracy.

15. It is undisputed that the "Wayne" referenced in deposition testimony, *supra*, served a sentence in federal prison for his criminal involvement in the medical data breach at issue in this case. *See*Exhibit F: "Indictment" attached to *Plaintiffs' Motion for Class Certification.*

16. After being alerted to the police investigation, WVUHE undertook its own investigation and examined every record accessed by Ms. Roberts as part of her job.

17. WVUHE determined that Ms. Roberts accessed the PHI of 7,445 people. WVUHE sent a letter to each of those 7,445 people and offered one year of free credit monitoring.

18. WVUHE used a prepared telephone script to handle calls from recipients of its letter regarding the breach. *See*Exhibit C: "Email Correspondence Regarding Script from WVUHE" and Exhibit D: "Email Correspondence Regarding Breach Investigation," attached to *Plaintiffs' Motion for Class Certification.*

19. Both named Plaintiffs, Debra Welch and Eugene Roman, along with the entirety of the proposed class, had their private medical information viewed, at least in part, for "Wayne's business."

20. Plaintiffs' *Amended Complaint* asserts causes of action for alleged Breach of the Duty of Confidentiality, Unjust Enrichment, Prima Facia Negligence, Breach of Contract (express and implied), Negligent Supervision, Negligence and Violation of the West Virginia Consumer Code. Plaintiffs seek compensatory damages for credit and identity protection and monitoring, as well as damages for alleged annoyance, embarrassment, emotional distress, and any costs associated with any identity theft. Plaintiffs also seek restitution of an amount of the fees charged by the Defendants for services rendered. Plaintiffs also see equitable relief including an order for credit

monitoring, maintenance of credit insurance for Plaintiffs, and an order requiring WVUH to establish a specific device encryption security program.

21. The named Plaintiffs share a vested interest with the rest of the proposed class to pursue these claims. *See* "Deposition of Angela Roberts, page 63, line 6-12." *See* also, Exhibit B: "Breach Notices."

22. The Defendants failed to monitor or detect this massive data breach as it occurred. It is indisputable that it was the Federal Bureau of Investigation (FBI) and Berkeley County Sheriff's Department who informed Defendants of this data breach. *See* previously provided Exhibit D: "Email Correspondence regarding Investigation of Breach" and Exhibit B: "Data Breach Notices," attached to *Plaintiffs' Motion for Class Certification.*

23. The conduct at issue in this case involves allegations of wrong committed by a large-scale enterprise and "[i]n general, class actions are a flexible vehicle for correcting wrongs committed by large-scale enterprise[.]" *In re West Virginia Rezulin Litigation*, 214 W. Va. 52, 62, 585 S.E.2d 52, 62 (2003) (quoting *McFoy v. Amerigas, Inc.* 170 W. Va. 526, 533, 295 S.E.2d 16, 24(1982)).

24. The class proposed class definition is

> All West Virginia citizens **whose personal information was accessed in the data breach** identified by the Defendant it its February 23, 2017 correspondence to Debra Welch.[2]

In the brief opposing certification, the defendant challenged certification based upon a different class definition:

> Plaintiffs' class is defined as "[a]ll West Virginia citizens **whose personal information was stolen in the data breach** identified by the Defendant in its February 23, 2017 correspondence to Debra Welch." However, not every one of the seven thousand four hundred and forty-five individuals whose data was accessed by Ms. Roberts during her time employed by Defendants **had their personal information actually stolen.[3]**

25. Rule 23 of the West Virginia Rules of Civil Procedure establishes a two-

step procedure to determine if a class action is appropriate. W.V.R.C.P., Rule 23.

26. First, pursuant to Rule 23(a), a class action is appropriate when: (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class. W.V.R.C.P., Rule 23(a); *See also In re West Virginia Rezulin Litigation,* 214 W.Va. at 64, 585 S.E.2d at 64.

27. Second, an action that satisfies the four Rule 23(a) requirements may be maintained as a class action if the conditions set forth in one of the Rule 23(b) subsections are also satisfied. W.V.R.C.P., Rule 23(b).

28. Here, the named Plaintiffs seek certification as a result of an alleged medical information breach pursuant to Rule 23(b)(3). Under Rule 23(b)(3), an action may be maintained as a class action if the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. W.V.R.C.P., Rule 23(b)(3).

29. "Whether the requisites for a class action exist rests within the sound discretion of the trial court." Syl. Pt. 5, *In re West Virginia Rezulin Litigation, supra,* quoting *Mitchem v. Melton,* 167 W.Va. 21, 227 S.E.2d 895 (1981).

30. The proponent of certification bears the burden of showing that the action is proper for class certification. *See e.g. Eisenberg v. Gagnon,* 766 F.2d 770 (3rd Cir. 1985); *Ballard v. Blue Cross*, 543 F.2d 1075 (4th Cir. 1976); *In re A.H. Robins Co., Inc.,* 880 F.2d 709 (4th Cir. 1989); *cert. den.,* 493 U.S. 959 (1989); *Doe v. Charleston Area Medical Center, Inc.,* 529 F.2d 638 (4th Cir. 1975).

31. If the putative class claiming a medical information breach satisfies the

prerequisites of Rule 23, then the "...case should be allowed to proceed on behalf of the class proposed by the party." Syl. Pt. 8, *In re West Virginia Rezulin Litigation, supra.*

32. Finally, to the extent that the Defendants assert that there are individualized damages questions, those can be addressed in subsequent proceedings. *See In re IKO Roofing Shingle Prods. Liab. Litig.,* 757 F.3d 599, 603 (7th Cir. 2014)(Easterbrook, J.)(fashioning a class remedy to award class members damages in a manner requiring "buyer-specific hearings" would not "run[] afoul of" *Comcast Corp v. Behrend,* 133 S. Ct. 1429 (2013)); *Central Wesleyan v. W. R. Grace & Co.,* 6 F.3d 177, 188 (4th Cir. 1993) (affirming conditional certification of a nationwide class of colleges and universities with asbestos in their buildings despite the "daunting number of individual issues," including the ability of each college to prove liability, differing statutes of limitation, differing asbestos products and exposures, present in the case).

33. The Court is cognizant of recent jurisprudence from the West Virginia Supreme Court of Appeals (WVSCA) regarding the Rule 23 factors and recognizes that class certification decisions are not "perfunctory." *State ex rel. W. Virginia Univ. Hosps., Inc. v. Gaujot,* 242 W. Va. at 62, 829 S.E.2d at 62 (2019). In ruling on a motion for class certification, "[t]he circuit court must give careful consideration to whether the party has met the 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.*

34. Given the heavy burden required for class certification, the Supreme Court of Appeals stressed 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.* (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.*

35. 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. Syl. Pt. 11, *In re West Virginia Rezulin Litig.*, 214 W.Va. 52, 57, 585 S.E.2d 52, 57 (2003).

36. However, "not everything that may be loosely called a 'question of fact' is sufficient to meet Rule 23's 'threshold' of commonality." Syl. Pt. 2, *Gaujot*, 242 W. Va. 54, 829 S.E.2d 54. Rather, 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." *Id.* (quoting *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 369 (2011)). 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[.]" *Id.*

37. Regarding medical data breaches, specifically, in *Tabata*, the WVSCA found an abuse of discretion and reversed a Circuit Court's refusal to certify a medical breach class on the grounds that the petitioners lacked a concrete and particularized injury. *Tabata v. Charleston Area Med. Ctr., Inc.*, 233 W. Va. 512, at 461.

38. As set forth below, the Court **CONCLUDES** that the Plaintiffs have met the requirements of Rule 23(a) and 23(b)(3) to maintain this case as a class action.

Rule 23(a)(1) - Numerosity

39. The Defendants do not dispute numerosity or that the class consists of nearly 7,500 individuals.

40. Rule 23(a)(1) of the *West Virginia Rules of Civil Procedure* requires that the class be so numerous that joinder of all members is impracticable. Syl. Pt. 9, *In re West Virginia Rezulin Litigation, supra.*

41. This does not mean that joinder is impossible. *Id.* ("The test for

impracticability of joining all members does not mean 'impossibility' but only difficulty or inconvenience of joining all members."); *Christman v. American Cyanamid Co.,* 92 F.R.D. 441, 451 (N.D. W.Va. 1981).

42. Impracticability of joinder is not determined by a numerical test alone. *Christman,* 92 F.R.D. at 451 (citing *Ballard v. Blue Shield of Southern West Virginia*, 543 F.2d 1980 (4th Cir. 1976, *cert. den.,* 430 U.S. 922 (1977)).

43. Pertinent factors to be considered include "the estimate size of the class, the geographic diversity of class members, the difficulty of identifying class members, and the negative impact of judicial economy if individual suits were required." *Id.*

44. When the putative class members are as few as forty (40) members, there is a presumption that joinder is impracticable. A. Conte and H. Newberg, 1 NEWBERG ON CLASS ACTIONS § 3:5 AT 247 (4th Ed. 2002).

45. Courts have certified class actions where there have been a relatively small number of members including less than twenty (20). *In re West Virginia Rezulin Litigation*, 214 W.Va. at 65, 585 S.E.2d at 65.

46. In the Fourth Circuit Court of Appeals, eighteen (18) has been held sufficient. *Cypress v. Newport News General & Nonsectarian Hospital Ass'n*, 375 F.2d 648, 653 (4th Cir. 1967). *See also Manning v. Prevention Consumer Discount Co.,* 390 F.Supp. 320, 324 (E.D. Pa. 1975)(15 members sufficient); *Riordan v. Smith Barney*, 113 F.R.D. 60 (N.D. Ill. 1986)(10-29 members sufficient); *Sala v. National Railroad Passenger Corp.,* 120 F.R.D. 494, 497 (E.D. Pa. 1988)(40-50 members sufficient); *Arkansas Educ. Ass'n v. Board of Educ.,* 446 F.2d 763 (8th Cir. 1971)(17-20 members sufficient); *Fidelis Corp. v. Litton Industries, Inc.,* 293 F. Supp. 164 (S.D.N.Y. 1968)(35-70 members sufficient).

47. Accordingly, the Court **CONCLUDES** that the class is so numerous, with seven thousand four hundred and forty-five (7,445) individuals, that joinder of all

members is clearly impractical.

48. Thus, the Court **CONCLUDES** that the proposed class satisfies Rule 23(a)(1).

Rule 23(a)(2) - Commonality

49. The Defendants themselves used the "commonality" language when discussing this data breach among fellow employees shortly after the breach became known. *See* Exhibit D: "Email Correspondence regarding Breach Investigation."

50. Rule 23(a)(2) requires that there be either questions of law OR fact common to the members of the proposed class. W.V.R.C.P. 23(a)(2).

51. The Class Representatives have set forth multiple questions of law and fact which include whether Defendants failed to supervise employee Roberts; whether the Defendant should be vicariously liable for its employee's breach of private medical information; whether the class members can obtain relief for the breach of confidentiality claim; whether the class members possess standing; and, lastly, whether the class members have a claim for invasion of privacy.

52. The United States Supreme Court has stated that class relief is "particularly appropriate" when the "issues involved are common to the class as a whole" and when they "turn on questions of law applicable in the same manner to each member of the class." *Califano v. Tamasaki*, 442 U.S. 682, 700-01 (1979).

53. The West Virginia Supreme Court has similarly recognized:

> The commonality requirement of Rule 23(a)(2)...requires that the party seeking class certification show that 'there are questions of law or fact common to the class.' A common nucleus of operative fact or law is usually enough to satisfy the commonality requirement. The threshold of 'commonality' is not high, and requires only that the resolution of common questions affect all or a substantial number of class members.

Syl. Pt. 11, *In re West Virginia Rezulin Litigation,* 214 W.Va. at 56.

54. "Commonality requires that class members share a single common issue." *Id.* at 67. Moreover, "not every issue in the case must be common to all class members." *Id.*

55. In fact, "[t]he common questions need be neither important nor controlling, and one significant common question or law or fact will satisfy this requirement." *Id.*

56. The WVSCA has provided instruction regarding commonality in the context of medical data breaches and reasoned as follows:

> There are <u>common</u> questions such as whether the respondents' conduct breached the duty of confidentiality that a doctor owes a patient and whether the conduct invaded the privacy of the petitioners and the proposed class members. Having found the existence of a common nucleus of operative fact and law and common issues, we believe that the circuit court abused its discretion in determining that the petitioners failed to meet the commonality requirement for class certification.

Tabata v. Charleston Area Med. Ctr., Inc., 233 W. Va. 512, 519, 759 S.E.2d 459, 466 (2014)(emphasis supplied).

57. In this case, each putative class member's data was accessed, at least in part, for the malicious purpose of theft so that the conspirators could illegally profit from class members' identities. This exposed each class member to imminent, impending financial loss from the ongoing criminal conspiracy. Defendants object that only 10 people actually incurred a financial loss, but that is not the Plaintiffs' point. Unlike the circumstance where damage is visibly obvious, such as a car dented in a wreck or a roof crushed-in by a fallen tree limb, intangible property, such as protected health information, does not change in appearance after being breached. Harm occurs when, as here, Ms. Roberts "cased" class members' data because she improperly deprived that data of its essential character of being private. Perhaps an apt analogy would be to a physician who, during the course of medical procedures, illicitly photographs patients.[4] Of course, in each case the physician had a legitimate reason for the examination, but the physician also harbored an illegitimate motive in taking pictures

without permission. Even if the physician never tells his victims or anyone else of his voyeurism, the law would still find such conduct to be tortious and criminal because, although victims were not physically harmed, they nonetheless lost something of value - a loss of privacy arising from the actor's breach of trust.

58. The Defendant's argument further provides evidence that class treatment is proper in this case. The Defendant's analysis in *State ex rel. W. Virginia Univ. Hosps., Inc. v. Gaujot* supports certification because the resolution of legal issues such as standing, breach of contract, and negligent supervision, would resolve more than seven thousand (7,000) claims at a time.

59. There are multiple questions of law able to be resolved on a class-wide basis in this case including:

-Whether or not the defendant is vicariously liable for its employee's breach of private medical information for "Wayne's business?"

-Whether or not the defendant failed to supervise its employee?

-Whether or not the proposed class members can obtain relief for the claim of breach of confidentiality?

-Whether or not the proposed class members possess standing?

-Whether or not the propose class may bring contract claims for a diminished value of services?

-Whether or not the proposed class members have a claim for invasion of privacy for the improper access of their medical records?

60. The class definition of the Plaintiffs includes the class members that have had their sensitive medical information "cased" for the purpose of wrongdoing (accounting for the entirety of the seven thousand four hundred and forty-five class members); and those class members whose identity was found in the apartment of a criminal co-conspirator on account of the Defendants' failure to protect their information.

61. These two (2) groups of class members bring the same claims as a result of the Defendants' same alleged failures. The alleged invasions of privacy and breach

of confidentiality, like in *Tabata*, are the predominant and cohesive elements among the proposed class members.

62. The factual premises which led to their slightly differing damages - the Defendants' failure to protect their sensitive information and its misrepresentations that it would so protect such sensitive information - is an identical question of fact for each class member. Representations were made to all class members in an identical manner (i.e. a privacy policy), and all class members had their sensitive medical data exposed to wrongdoers in an identical fashion (via an employee of the Defendants). These facts are effectively not in dispute. Indeed, the Defendants dispositive motions recognized the employee did indeed access each class member's medical information and that is why each proposed class member received a data breach notice.

63. Similarly, the Defendants have challenged the purported members' individual standing to bring this lawsuit, regarding the vast majority of the class who have not alleged that their sensitive medical information was actually used by the criminals who accessed it. The standing analysis has already been conducted by the WVSCA in *Tabata v. Charleston Area Med. Ctr., Inc.,* 759 S.E.2d 459 (2014).

64. The Defendant's challenges to the class members' very ability to bring this lawsuit is a clear example of a dispute of law the resolution of which would obviously advance the determination of the class members' claims. Syl. Pt. 2, *Gaujot* (quoting *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 369 (2011)).

65. When assessing the commonality factor, the Defendants own statements, while not dispositive on the issue, should certainly be given some weight in this determination.

66. In its investigation of the criminality of their employee, the Defendants have already admitted that common fact issues exist regarding "the same individual, the same department, and the same location." *See*Exhibit D: "Email Correspondence

regarding Breach Investigation."

67. The instant case is also distinguishable from *Gaujot*, as there, the class definition was complex and contingent upon a complicated fee structure actually paid by patients of the hospital, and likewise dependent upon an interpretation of an esoteric medical billing statute which is nowhere mentioned in the Plaintiffs' Amended Complaint. In this case, the class definition merely includes all persons whose sensitive information was accessed in the medical data breach described by the Defendants, themselves, in a letter to those affected.

68. Finally, the *Gaujot* case did not overrule the WVSCA's decisions in *Rezulin* and *Tabata*. The Court actually relied upon *Rezulin* in its analysis of that which must be present in order to meet the commonality requirement of Rule 23.[5]

69. The WVSCA in *Gaujot* ultimately decided that the circuit court which denied class de-certification impermissibly certified a class that, given the nature of the class definition, would require "individualized proof...to determine not just damages but liability itself." *Id.*, at 63. Here, the events which allegedly occurred in order to make an individual eligible for class membership are simply the Defendants' failures to protect their information. That the Defendants effectively defined the class, themselves, when they (rightfully) informed those patients affected by the breach, they, themselves, described, is also indicative of the presence of commonality.

70. Therefore, ascertainability is evident in this case as it was not in *Gaujot*, because, while that case required an individualized accounting of each purported class member's medical file to determine his or her eligibility to be part of the class, here, the class members have already been ascertained by the Defendants, who sent letters to all individuals whose sensitive information, by the Defendants' own admissions, was exposed to wrongdoing by their employee.

71. While *Gaujot* reversed a circuit court decision denying decertification of a

class, such decision was premised upon the circuit court's failure to conduct a thorough analysis of whether commonality was present. *Id.*, at 57.

72. In the instant case, a suitably thorough analysis has been undertaken by this Court, as the matter has been fully briefed and the parties allowed opportunity to argue their positions before the Court.

73. The *Gaujot* Court also found that "[w]hen consideration of questions of merit is essential to a thorough analysis of whether the prerequisites of Rule 23 of the West Virginia Rules of Civil Procedure [2017] for class certification are satisfied, failing to undertake such consideration is clear error and an abuse of discretion." Syl. Pt. 8, *Gaujot*, 242 W. Va. 54.

74. In the instant case, no such analysis of the merits of this case is necessary, as the allegations, alone, are predicated upon such a predominant common nexus (that is, the alleged failure of the Defendants to safeguard the purported class members' sensitive medical information from the Defendants' own, wrongdoing employee) that commonality is apparent.

75. Here, the named Plaintiffs share identical legal claims with the entire class and Plaintiffs allege that they were subjected to the same data breach conduct and seek similar relief, which supports commonality.

76. In this context, the primary common questions of law are commonly shared among the class members. There are seven thousand four hundred and forty-five (7,445) individuals who all carry the <u>same</u> legal claims based on the fact that the <u>same</u> employee allegedly breached their medical records on the <u>same</u> system maintained by the <u>same</u> Defendant.

77. Since there is a nucleus of operative facts and law common to the class, the Court **CONCLUDES** that Plaintiffs' proposed class meets the commonality requirement.

Rule 23(a)(3) - Typicality

78. Rule 23(a)(2) provides that claims and defenses of the representative parties be "typical" of those of the class as opposed to being unique to the plaintiffs. W.V.R.C.P. Rule 23(a)(3). *See also* Syl. Pt. 12, *In re West Virginia Rezulin Litigation, supra; Warth v. Seldin,* 422 U.S. 490 (1975).

79. The West Virginia Supreme Court has held that:

> The "typicality" requirement of Rule 23(a)(3) of the West Virginia Rules of Civil Procedure (1998) requires that the "claims or defenses of the representative parties [be] typical of the claims or defenses of the class." A representative party's claim or defense 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. Rule 23(a)(3) only requires that the class representatives' claims be typical of the other class members' claims, not that the claims be identical. When the claim arises out of the same legal or remedial theory, the presence of factual variations is normally not sufficient to preclude class action treatment.

Syl. Pt. 12, *In re West Virginia Rezulin Litigation, supra*; *see also* Syl. Pt. 12, *Tabata v. Charleston Area Med. Ctr., Inc.*, 233 W.Va. 512, 759 S.E.2d 459 (2014).

80. Thus, the typicality requirement assures that the class representatives' interests are "aligned" with those of the class sufficiently to ensure that the class is adequately represented.

81. It is a requirement designed to protect the class members and should not be asserted as a shield behind which parties opposing class certification may hide.

82. The question is whether there is a "sufficient nexus" between the claim of the named plaintiffs and the members of the class. *Barnett v. W.T. Grant Co.*, 518 F.2d 543, 548 (4th Cir. 1975); *Predmore v. Allen*, 407 F.Supp. 1053, 1065 (D.Md. 1975) ("The tail of the typicality requirement, may not wag the dog of class action.").

83. The rationale behind the typicality requirement is that a class representative with typical claims "will pursue his or her own self-interest in the litigation,

and in so doing, will advance the interests of the class members[.]" *In re West Virginia Rezulin Litigation,* 214 W.Va. at 68, 585 S.E.2d at 68 (quoting 1 NEWBERG ON CLASS ACTIONS, § 3:13 at 325).

84. Recognizing that the elements of typicality and commonality tend to merge, *Stott v. Haworth*, 916 F.2D 134, 143 (4th Cir. 1990), it is important to recognize the extent to which the named Plaintiffs in this case bring both common and typical claims.

85. When the individual claims arise "out of the same legal or remedial theory, the presence of factual variations is normally not sufficient to preclude class action treatment." Syl. Pt. 12, *In re West Virginia Rezulin Litigation, supra.*

86. In this case, all of the class members' claims arise from the same or similar alleged breach of privacy from the same employee of Defendant.

87. Each named Plaintiff shares identical legal theories with the proposed class, which exceeds the typicality requirement.

88. The harm suffered by the named Plaintiffs may "differ in degree from that suffered by other members of the class so long as the harm suffered *is of the same type.*" *In re West Virginia Rezulin Litigation,* 214 W.Va. at 68, 585 S.E.2d at 68 (quoting *Boggs v. Divested Atomic Corp.*, 141 F.R.D. 58, 65 (S.D. Ohio 1991). (Emphasis in original).

89. The class representatives in this case share identical claims with the other class members.

90. Ms. Welch and Mr. Roman are victims of the Defendants and they were subjected to the same and repeated medical information breaching conduct, by the very same third-party employee as the rest of the putative class members.

91. Ms. Welch and Mr. Roman seek the very same claims and brings forth the same legal theories as the rest of the class so it is easily confirmed that these claims

are sufficiently typical to satisfy the typicality component.

92. It is also clear that the Defendants present defenses that support typicality. If the Defendant is correct that none of the putative class members hold WVCCPA claims based on misrepresentations, then that defense would be true for the entire proposed class.

93. The fact that the defenses are typical further supports that the typicality threshold is met.

94. Here, Ms. Welch and Mr. Roman bring identical claims and the Defendants bring typical defenses to these claims. Thus, it is clear the typicality requirement is satisfied.

95. Thus, in this case, the Court **FINDS** and **CONCLUDES** that the claims of the named Plaintiffs are of the same type, if not identical, as the claims of the putative class members.

96. Based on the foregoing, the Court further **CONCLUDES** that the claims of the named Plaintiffs are typical of the putative class and Rule 23(a)(3) is satisfied.

Rule 23(a)(4) - Adequacy of Representation

97. The final requirement of Rule 23(a) is that the representative parties must fairly and adequately protect the interests of the class. W.V.R.C.P. 23(a)(4).

98. The West Virginia Supreme Court has held that:

> The "adequacy of representation" requirement of Rule 23(a)(4) of the West Virginia Rules of Civil Procedure [] requires that the party seeking class action status show that the "representative parties will fairly and adequately represent the interests of the class." First, the adequacy of representation inquiry tests the qualifications of the attorneys to represent the class. Second, it serves to uncover conflicts of interest between the named parties and the class they seek to represent.

Syl. Pt. 12, *In re West Virginia Rezulin Litig., supra. See also Christman,* 92 F.R.D. at 452.

99. The Court finds that The Giatras Law Firm, PLLC, zealously pursued the

case and diligently protected the claims from attack.

100. The Giatras Law Firm, PLLC, has experience, skill and training in data breach security cases, and has utilized these skills to prosecute the claims.

101. During the class certification proceeding, counsel for the putative class proffered evidence and provided exhibits from past class action proceedings to support the adequacy component for both class counsel and the proposed class representatives, whom hold no conflict with the proposed class members.

102. Troy N. Giatras and Matthew Stonestreet are skilled attorneys that practice before the bar of this Court and other Courts across the country in complex consumer related, data breach, and class action litigation.

103. The named Plaintiffs are beyond adequate to represent the classes as they each share the convergent interest of obtaining relief for the proposed classes.

104. There are no conflicts between the class representatives and any of the proposed class or subclass members.

105. As the class representatives, the proposed class, and the subclass were alleged to have been subjected to the same data breach practices of the Defendants, the Rule 23(a) requirements are met.

106. Class certification is to be adjudged by the satisfaction or lack thereof of Rule 23 of the West Virginia Rules of Civil Procedure and is not an assessment of the litigation's merits. Syl. pt. 6, *In re W. Va. Rezulin Litigation*, (2003); *Tabata v. Charleston Area Med. Ctr., Inc.*, 233 W. Va. 512, at 467.

107. The Court **FINDS** that it is in the interests of the class and the interests of the named Plaintiffs to maintain representation by The Giatras Law Firm, PLLC, specifically Troy N. Giatras and Matthew Stonestreet.

108. Based on all of the foregoing, the Court **CONCLUDES** that the named Plaintiffs and Plaintiffs' counsel will fairly and adequately protect the interests of the

class.

Rule 23(b)(3) - Predominance and Superiority

109. An action that satisfies the Rule 23(a) requirements may also be maintained as a class action under Rule 23(b)(3) if the trial court finds "that the questions of law or fact common to all members of the class predominate over any questions affecting only individual members," and that a class action "is superior to other available methods for the fair and efficient adjudication of the controversy." W.V.R.C.P. 23(b)(3).

110. As explained in more detail below, the Court **CONCLUDES** that Plaintiffs meet both requirements.

Predominance

111. The West Virginia Supreme Court has likened the predominance requirement to the commonality prerequisite of Rule 23(a)(2), with the added criterion that the common questions of law and/or fact outweigh individual questions:

> The predominance criterion in Rule 23(b)(3) is a corollary to the "commonality" requirement found in Rule 23(a)(2). While the "commonality" requirement simply requires a showing of common questions, the "predominance" requirement requires a showing that the common questions of law or fact outweigh individual questions."

In re W. Va. Rezulin Litig., 214 W.Va. at 71, 585 S.E.2d at 71.

112. "A conclusion on the issue of predominance requires an evaluation of the legal issues and the proof needed to establish them." *In re W. Va. Rezulin Litig.*, *supra*, at 72.

113. "As a matter of efficient judicial administration, the goal is to save time and money for the parties and to promote consistent decisions for people with similar claims." *Id.* (internal quotation marks omitted).

114. In a healthcare data breach case, the WVSCA ruled as follows in

recognizing predominance:

> When this Court applied these guidelines to the instant facts, **it is clear that common issues of law predominate over individual questions...all of the proposed class members allege that their interests in confidentiality and privacy have been wrongfully invaded by the respondents**. Therefore, this Court finds that common questions of law and fact predominate over individual issues for the purpose of class certification under Rule 23(b)(3).

Tabata v. Charleston Area Med. Ctr., Inc., 233 W. Va. 512, 520, 759 S.E.2d 459, 467 (2014)(emphasis supplied).

115. The central question in deciding predominance is "whether adjudication of the common issues in the particular suit has important and desirable advantages of judicial economy compared to all other issues, or when viewed by themselves." *Id.* (quoting 2 *Newberg on Class Actions, 4th Ed.,* § 4.25 at 174.). Judicial economy would not be supported by nearly seven thousand five hundred different trials, with the same evidence being presented seven thousand five hundred times, the same employee testifying almost seven thousand five hundred separate times, all across the State of West Virginia in different courtrooms with different judges. Clearly, judicial economy is not supported by such a scenario.

116. The *Rezulin* court noted:

> [t]he predominance requirement does not demand that common issues be dispositive, or even determinative; it is not a comparison of the amount of court time needed to adjudicate common issues versus individual issues; nor is it a scale-balancing test of the number of issues suitable for either common or individual treatment. 2 *Newberg on Class Actions 4th Ed.*, 4.25 at 169-173. Rather, "[a] single common issue may be the overriding one in the litigation despite the fact that the suit also entails numerous remaining individual questions. *Id.* at 172. The presence of individual issues may pose management problems for the circuit court, but courts have a variety of procedural options under Rule 23(c) and (d) to reduce the burden of resolving individual damage issues, including bifurcated trials, use of subclasses or masters, pilot or test cases with selected class members, or even class decertification after liability is determined. As the leading treatise in this area states, "[c]hallenges based on . . . causation, or reliance have usually been rejected and will not bar predominance satisfaction because those issues go to the right of a class member to

> recover, in contrast to underlying common issues of the defendant's liability." 2 *Newberg on Class Actions 4th Ed.* § 4.26 at 2.41. "The class members may eventually have to make an individual showing of damages does not preclude class certification." *Smith v. Behr Process Corp.*, 113 Wash.App. 306, 54 P.3d 665, 675 (2002). (citations omitted.)

In re West Virginia Rezulin Litigation, 214 W.Va. at 72, 585 S.E.2d at 72.

117. The questions of fact and law predominate in this matter because this case involves the same employee who received the same training, the same allegations of failed supervision, the breach of all seven thousand four hundred and forty-four (7,445) individual's records using the same computer system, all maintained by the Defendant and, finally, all the individuals present the same legal questions.

118. Based on the evidence indicating that separate actions would involve multiple counties, with multiple Judges reaching various conclusions, the Court **CONCLUDES** that the management of identical legal issues that predominate and that judicial efficiency and public policy are all consistent with a finding that this matter satisfies Rule 23(b)(3).

119. Thus, the Court further **CONCLUDES** that the common questions of law as to whether the Defendant violated WVCCPA statutory provisions predominate in this action.[6]

120. Accordingly, the Court also **CONCLUDES** that the common questions relating to the Plaintiffs' claims predominate over any questions effecting only individual class members.

121. Based on the foregoing, the Court **CONCLUDES** that class action maintenance of this case is the best available method for the adjudication of class members' claims.

122. As a result, the Court further **CONCLUDES** that class certification will provide an efficient and superior method for resolution of the underlying controversy.

IV. CONCLUSION

WHEREFORE, for these and other reasons stated on the record, the Court **GRANTS** Plaintiffs' Motion for Class Certification. It is therefore **ORDERED** that this case shall proceed as a class action pursuant to Rule 23.

Accordingly, the Court hereby **CERTIFIES** a class pursuant to Rule 23 of the *West Virginia Rules of Civil Procedure* that includes all West Virginia citizens residents whose personal information was accessed in the data breach identified by the Defendant in its February 23, 2017 data breach notices.

Accordingly, the Court hereby **CERTIFIES** a subclass of those 109 individuals whose information was found in the possession of Ms. Roberts' accomplice. *See*Exhibit G: "Redacted Spreadsheet."

Accordingly, the Court hereby appoints and approves Debra S. Welch and Eugene A. Roman as Class Representatives.

The Court hereby further appoints and approves Troy N. Giatras and Matthew Stonestreet as counsel to the Certified Class.

Pursuant to Rule 23(c), the Court notes that this certification, like all class certifications, is conditional and may be refined or modified if deemed appropriate.

The Court notes the objections of all parties as to those matters adverse to their respective interests. The Clerk is directed to send certified copies of this Order to all parties or counsel of record as follows:

Troy N. Giatras, Esq. (WVSB #5602)
Matthew Stonestreet, Esq. (WVSB #11398)
Phillip A. Childs, Esq. (WVSB #12191)
The Giatras Law Firm, PLLC
118 Capitol Street, Suite 400
Charleston, West Virginia 25301
(304) 343-2900
Counsel for Class Plaintiffs

Marc E. Williams, Esquire
Robert L. Massie, Esquire
Thomas M. Hancock, Esquire
NelsonMullinsRiley&Scarborough, LC
949 Third Avenue, Suite 200
Huntington, West Virginia 25701
(304) 526-3500
Counsel for Defendants

/s/ David M. Hammer
Circuit Court Judge
23rd Judicial Circuit