

IN THE CIRCUIT COURT OF WOOD COUNTY, WEST VIRGINIA

**JAMES F. SMITH and JOHN E. SMITH, as
Co-Executors and on behalf of the Estate of
Donald E. Smith,**

Plaintiffs,

v.

**Civil Action No. 14-C-829
Honorable Jason Wharton**

**CAMDEN-CLARK MEMORIAL HOSPITAL
CORPORATION,**

Defendant.

AMENDED¹ JOINT MOTION TO CONSOLIDATE

The parties to this action, Plaintiffs James F. Smith and John E. Smith, as co-executors and on behalf of the Estate of Donald E. Smith (the “Smith Plaintiffs”), and Defendant Camden-Clark Memorial Hospital Corporation (“Camden-Clark” or the “Smith Defendant”);² the parties to *Russell G. Binder, Plaintiff v. The Charles Town General Hospital d/b/a Jefferson Medical Center, City Hospital, Inc. d/b/a Berkeley Medical Center, West Virginia University Hospitals, Inc., West Virginia United Health System, Inc., and West Virginia University Hospitals – East, Inc., Defendants*, Civil Action No. 15-C-530 pending in the Circuit Court of Berkeley County, West Virginia (the “Binder Action”), Russell G. Binder (“Binder”) and The Charles Town General Hospital d/b/a Jefferson Medical Center (“Jefferson Medical Center”), City Hospital, Inc. d/b/a Berkeley Medical Center (“Berkeley Medical Center”), West Virginia University Hospitals, Inc., West Virginia United Health System, Inc., and West Virginia University Hospitals – East, Inc. (collectively, the “Binder Defendants”); and proposed intervenor CIOX Health, LLC (“CIOX”),

¹ The parties hereby file an amended version of their previously filed joint motion to consolidate in order to submit exhibits of relevant documents for Your Honorable Court’s review. See attached **Exhibits 1 – 4**.

² Records Imaging and Storage, Inc. was originally named as a Defendant in the initial Complaint and was dismissed in 2017 by Stipulation of Voluntary Dismissal.

by their respective counsel, jointly move the Court to transfer the Binder Action, to this Court and consolidate it with this action, pursuant to Rule 42 of the *West Virginia Rules of Civil Procedure*.

The parties seek consolidation of the Binder Action with this action to obtain this Court's approval and oversight of a class settlement. Specifically, the Smith Plaintiffs, Binder, and CIOX have agreed to a class settlement of claims involving requests for patient medical records from WVU medicine entities that were fulfilled by CIOX, operating as a vendor to the WVU medicine entities (the "WVU Medicine Settlement").³ The WVU medicine entities that are covered by the settlement with CIOX include Camden-Clark for a portion of the requests at issue in this lawsuit,⁴ and the Binder Defendants, including the hospitals, Jefferson Medical Center and Berkeley Medical Center, as well as other identified facilities operating under the WVU Medicine umbrella related to Jefferson and Berkeley Medical Centers, which are identified in Exhibit A of the WVU Medicine Settlement Agreement (the "WVU Medicine Entities").

The State class actions, including this action, were stayed in 2017 due to the overlap with a proposed statewide class action settlement in a federal lawsuit against CIOX, and other medical records vendors (the "Wilson Action"). As the August 24, 2017 Order Granting Motion to Stay states, that proposed statewide settlement in the Wilson Action would have resolved a large portion of the claims of the purported class in this action. The plaintiffs in the Binder Action and in this case sought to intervene in the Wilson Action but the District Court did not rule on the motion as settlement negotiations were in play and eventually agreed upon. In the course of seeking court approval of the settlement of the Wilson Action, the Smith Plaintiffs and the Binder Plaintiff

³ A copy of the WVU Medicine Settlement Agreement is attached as **Exhibit 1**.

⁴ The putative class in the Smith Action includes claims arising out of release of information requests that were processed in-house or by vendors other than CIOX, including Records Imaging & Storage, Inc. Accordingly, the proposed class settlement will not subsume the entirety of the Smith Action but the Parties are continuing settlement discussions at this time.

negotiated the WVU Medicine Settlement. Consequently, claims involving medical records requests to the WVU Medicine Entities that were processed by CIOX were carved out from the amended settlement agreement in the Wilson Action and the Binder and Smith plaintiffs' withdrew as intervenors, as preliminary settlements had been achieved. (See attached Motion to Withdrawal (ecf#300) & Order (ecf#302) attached as **Exhibit 2**). The parties to the Wilson Action obtained preliminary approval of that amended class settlement.

The parties to the WVU Medicine Settlement now seek to obtain court approval and oversight of the administration of their settlement with CIOX. The WVUH Settlement, if approved, would resolve a large portion of the issues and claims in this action and all issues and claims in the Binder Action. Thus, consolidation of the two actions will enable the efficient resolution of the common questions of law and fact presented. Transfer of the Binder Action to this Court and consolidation with this action is appropriate because this matter was filed first.

Accordingly, the Smith and Binder Plaintiffs, the Camden-Clark and Binder Defendants, and CIOX respectfully request that this Court transfer the Binder Action to Wood County and then exercise its discretion to consolidate these actions with this matter as the lead action.

I. BACKGROUND

A. Early Procedural History of the Smith and Binder Actions.

1. The Smith Action.

This action (sometimes, the "Smith Action") commenced on March 24, 2014. The Smith Plaintiffs filed a complaint alleging that Defendant Camden-Clark and its vendor Records Imaging & Storage, Inc. overcharged for providing medical records in violation of West Virginia Code §§ 16-29-1, *et seq.* See *Compl.* ¶¶ 18–36. The Smith Plaintiffs assert that the alleged overcharging also violated the West Virginia Consumer Credit and Protection Act, *id.* ¶¶ 37–42, violated public

policy, *id.* ¶¶ 43–48, and breached implied contracts, *id.* ¶¶ 49–55. The Smith Plaintiffs request compensatory damages and declaratory relief for themselves and for a purported class. *See id.* ¶¶ 9–10. During the purported class period, CIOX also fulfilled medical records requests as a vendor for Camden-Clark, although the Smith Plaintiffs did not name CIOX as a defendant.

2. The Binder Action.

Eighteen months after this action was filed, Binder filed a similar lawsuit in the Circuit Court of Berkeley County, West Virginia on September 25, 2015, naming as defendants two other CIOX customers, Jefferson Medical Center and Berkeley Medical Center. The Binder complaint also named parents of and entities related to those two hospitals, West Virginia University Hospitals, Inc., West Virginia United Health System, Inc., and West Virginia University Medical Corporation. Binder later added West Virginia University Hospitals – East, Inc. as an additional defendant.⁵ Binder similarly alleges that Defendants violated West Virginia Code §§ 16-29-1, *et seq.*, *Binder Compl.* ¶ 11, and breached express or implied contracts and public policy, *id.* Binder seeks to represent a class consisting of persons who requested copies of medical records from Jefferson Medical Center and Berkeley Medical Center directly or through authorized agents or representatives, and who were charged or attempted to be charged unlawful fees during the proposed class period.

B. The Proposed Class Settlement with CIOX in Federal Court and Stay of This Action.

A third action asserting similar claims for alleged overcharging for medical records was filed in the Circuit Court of Kanawha County, West Virginia in April 2016, and was later removed

⁵ Copies of the docket sheet, Complaint, and Order Granting Motion to Amend Complaint in the Binder Action are attached as **Exhibit 3**.

to the United States District Court for the Southern District of West Virginia, where it remains pending as *Thomas M. Wilson, Sr., Daniel Halsey as Administrator of the Estate of Tamara Halsey, Jason Grazuties, Sandra Sheppard, Pamela Bradley, as Executrix of the Estate of Robert Bradley, Deborah Martin, as Executrix of the Estate of Arvada Martin, Lisa New, and Robert Stratton, Plaintiffs v. MRO Corporation, CIOX Health, LLC, and Medi-Copy Services, Inc.*, Civil Action No. 2:16-CV-05279 (the “Wilson Action”).

The plaintiffs in the Wilson Action named CIOX and two other medical records vendors as defendants. The plaintiffs in the Wilson Action sought to represent a class that included medical records requestors whose requests were fulfilled by CIOX. Because the plaintiffs in the Wilson Action brought claims against CIOX directly, the proposed class was not limited to the patients of particular facilities and, instead, was a proposed statewide class of requestors.

In July 2017, the parties to the Wilson Action, including CIOX, entered into a settlement and filed a joint motion for preliminary approval. As a result of that proposed statewide settlement, this action and the Binder action were stayed in August 2017. Counsel for the plaintiffs in this action and the Binder Action then sought to intervene in the Wilson Action to raise concerns about the proposed statewide settlement.

C. The Proposed Settlement with the Smith Plaintiffs and the Binder Plaintiffs concerning the WVU Medicine Entities.

Following the Smith and Binder counsel’s motion to intervene in the Wilson Action, the federal court abstained from taking action on the motion for preliminary approval to enable all parties the opportunity to reach a new settlement. This process played out over numerous years, and involved multiple mediations and Court conferences. To resolve the potential disruption of the settlement in the Wilson Action by the proposed intervenors, in late 2023, CIOX entered the WVU Medicine Settlement resolving claims of overcharging by CIOX for medical records

requests that it fulfilled while acting as a vendor for the WVU Medicine Entities. The proposed WVU Medicine Settlement specifically resolves claims relating to medical records requests between December 1, 2010 and July 5, 2017, which were billed by CIOX for providing copies of medical records requested from the WVU Medicine Entities. The WVU Medicine Entities include Camden-Clark and the WVU Medicine facilities specified in Exhibit A to the WVU Medicine Settlement Agreement, each of which are associated with the Binder Defendants and for which CIOX served as a vendor at any time during the class period.

As the plaintiffs in the Smith Action and the Binder Action entered the WVU Medicine Settlement with CIOX in late 2023, the parties to the Wilson Action entered an amended settlement agreement that carved out the WVU Medicine Entities from the list of facilities that were the subjects of that class settlement. The parties to the Wilson Action then filed an amended motion for preliminary approval of their class settlement. On March 5, 2024, the federal court presiding over the Wilson Action issued an order that preliminarily approved the proposed settlement and set a final fairness hearing on July 11, 2024.⁶

D. The Proposed Procedure to Effectuate the WVU Medicine Settlement.

Now that the settlement of the Wilson Action is proceeding, the parties to the WVU Medicine Settlement likewise seek to efficiently administer their settlement. Accordingly, the Smith Plaintiffs and Defendants along with Binder Plaintiffs and Defendants, and CIOX, jointly propose the following procedure to proceed in this Court:

⁶ A copy of the Preliminary Approval Order is attached as **Exhibit 4**.

First, once the Binder Action is consolidated with the Smith Action before this Court, CIOX will seek to intervene as a defendant in the consolidated actions pursuant to Rule 24(b) of the *West Virginia Rules of Civil Procedure*, so this Court will have jurisdiction over CIOX;

Second, all parties will move this Court to carve out the claims that are the subject of the WVU Medicine Settlement, which includes release of information requests processed by CIOX in the Smith action, along with the claims asserted in the Binder Action, into a settlement class that is separate from the claims in the Smith Action that are not subject to the WVU Medicine Settlement, namely, the claims related to release of information requests processed by entities other than CIOX (the “Non-CIOX Claims”), which have not yet settled.⁷

Third, all parties to the settlement class, including CIOX, will jointly move this Court for preliminary approval of the proposed WVU Medicine Settlement; and

Fourth, all parties to the settlement class will work with this Court to obtain preliminary approval of their settlement, to administer the settlement, and to obtain final approval of the settlement and dismissal of claims in the consolidated actions involving medical records requests fulfilled by CIOX as a vendor for the WVU Medicine Entities.

II. ANALYSIS

A. Legal Standard: W. Va. R. Civ. P. 42.

West Virginia Rule of Civil Procedure 42(b) provides that

[w]hen two or more actions arising out of the same transaction or occurrence are pending before different courts or before a court and a magistrate, the court in which the first such action was commenced shall order all the actions transferred to it or any other court in which any such action is pending. The court to which the actions are transferred may order a joint hearing or trial of any or all of the matters in issue

⁷ The Smith Plaintiffs and Camden Clark are continuing to negotiate toward a potential resolution of the remainder of this case, and if such settlement is reached in a timely fashion, then it may be possible for the entire Smith Action to be administered together.

in any of the actions; it may order all the actions consolidated; and it may make such other orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.

W. Va. R. Civ. P. 42(b).

Under the provisions of Rule 42(b) R.C.P., when two actions arise out of the same transaction or occurrence and both actions are pending in two different circuit courts, it is mandatory that the court in which the first action was commenced either transfer the other action to the court where the first action was commenced or transfer its pending action to the court where the other action is still pending. After one of the actions is transferred, then it is discretionary with the court to which one of the actions has been transferred to consolidate the actions for trial, under Rule 42(a) R.C.P., if there is a common question of law and fact in both actions.

Syl., *Hanlon v. Joy Mfg. Co.*, 187 W. Va. 280, 281, 418 S.E.2d 594 (1992) (quoting Syl., *Bank of Ripley v. Thompson*, 149 W. Va. 183, 139 S.E.2d 267 (1964)).

Thus, upon receiving the transfer of an action arising out of the same transaction or occurrence, this Court will then decide whether to consolidate the two actions under Rule 42(a):

When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all the matters in issue in the actions; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.

W. Va. R. Civ. P. 42(a).

A trial court, pursuant to the provisions of R.C.P. 42, has a wide discretionary power to consolidate civil actions for joint hearing or trial and the action of a trial court in consolidating civil actions for a joint hearing or trial will not be reversed in the absence of a clear showing of abuse of such discretion and in the absence of a clear showing of prejudice to any one or more of the parties to the civil action which have been so consolidated.

Syl. pt. 1, *Holland v. Joyce*, 155 W. Va. 535, 185 S.E.2d 505 (1971).

The trial court, when exercising its discretion in deciding consolidation issues under West Virginia Rules of Civil Procedure 42(a), should consider the following factors: (1) whether the risks of prejudice and possible confusion outweigh the considerations of judicial dispatch and economy; (2) what the burden would be on the parties, witnesses, and available judicial resources posed by multiple lawsuits; (3) the length of time required to conclude multiple lawsuits as compared to the time required to conclude a single lawsuit; and (4) the relative expense to all

concerned of the single-trial, multiple-trial alternatives. When the trial court concludes in the exercise of its discretion whether to grant or deny consolidation, it should set forth in its order granting or denying consolidation sufficient grounds to establish for review why consolidation would or would not promote judicial economy and convenience of the parties, and avoid prejudice and confusion.

Syl. pt. 1, *State ex rel. Appalachian Power Co. v. MacQueen*, 198 W. Va. 1, 479 S.E.2d 300 (1996) (quoting syl. pt. 2, *State ex rel. Appalachian Power Co. v. Ranson*, 190 W. Va. 429, 438 S.E.2d 609 (1993)). “The purpose of Rule 42 is ‘to promote judicial dispatch and economy, and to guarantee substantial justice to the parties.’” *Hutson v. Henry*, 184 W. Va. 692, 693, 403 S.E.2d 435, 436 (1991) (quoting *Pickett v. Taylor*, 178 W. Va. 805, 807, 364 S.E.2d 818, 821 (1987)).

B. The Binder Action should be transferred to this Court.

The Binder Action should be transferred to this Court pursuant to Rule 42(b) because the proposed settlement of claims arises out of identical transactions and occurrences in both actions. This action and the Binder Action both concern alleged overcharging for medical records by CIOX when it served as a vendor to Camden-Clark, Berkeley Medical Center, Jefferson Medical Center, and the WVU Medicine Entities. That is, the WVU Medicine Settlement broadly settles all claims of alleged overcharging by CIOX for medical records requested from the WVU Medicine Entities. The WVU Medicine Settlement settles a large number of the purported class claims of alleged overcharging in this action and all of the purported class claims of alleged overcharging in the Binder Action. The unitary WVU Medicine Settlement would be most efficiently addressed—indeed, could only be efficiently addressed—by one reviewing court.

C. The Binder Action should be consolidated with this action.

Once the Binder Action is transferred, this Court should then exercise its discretion to consolidate the two actions for purposes of approving, administering, and finalizing their proposed

class settlement. The WVU Medicine Settlement creates common questions of law and fact between the two actions.

The “common questions of law and fact” requirement of Rule 42(a) is reflected in the commonality requirement of Rule 23(a)(2), for which “[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 the class members.” Syl. Pt. 11, *In re W. Va. Rezulin Litig.*, 214 W. Va. 52, 585 S.E.2d 52 (2003).

Inasmuch as CIOX has agreed to settle claims of alleged overcharging when it was a vendor for the Smith Defendants and the Binder Defendants, as well as the WVU Medicine Entities, the proposed settlement raises the same factual and legal questions about the propriety of certifying the proposed settlement class under Rule 23(a)(2) pertaining to the same vendor services provided by CIOX to the WVU Medicine Entities. Consolidation would provide the recognized benefits of efficiency, economy, and consistency by addressing the same class settlement for administration by one court. *See Cavender v. McCarty*, 198 W. Va. 226, 233, 479 S.E.2d 887, 894 (1996) (Cleckley, J., concurring); *see also Bank of Ripley v. Thompson*, 149 W. Va. 183, 189, 139 S.E.2d 267, 271 (1964).

Furthermore, consolidation poses no risk of prejudice or burden to any party because both cases have been stayed since August 2017. While the cases have been stayed, the parties have reached a settlement that largely obviates the need to further litigate these actions. Class administration is a technical process, which, because CIOX has agreed to a unitary settlement covering the WVU Medicine Entities, would result in duplication and inextricable overlap in the

administration of the same settlement in two actions. Consolidation also resolves this intractable problem of two courts administering a unitary settlement, which could result in different results.

III. CONCLUSION

WHEREFORE, the Smith Plaintiffs, the Smith Defendants, Binder, the Binder Defendants, and proposed intervenor CIOX, respectfully request that the Binder Action be transferred to this Court and consolidated with this action for the purpose of preliminarily approving, administering, and finalizing the proposed WVU Medicine Settlement.

Respectfully submitted,

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**CAMDEN-CLARK MEMORIAL HOSPITAL
CORPORATION and RECORDS IMAGING
AND STORAGE, INC.,**

Defendants.

CERTIFICATE OF SERVICE

I hereby certify that on June 27, 2024, a true and correct copy of the foregoing “Amended Joint Motion to Consolidate” was served on all counsel of record in this action and in *Binder v. The Charles Town General Hospital, Inc., et al.*, Civil Action No. 15-C-530, pending in the Circuit Court of Berkeley County, West Virginia, via electronic submission in both actions using the WV E-Filing System.

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