IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

DAVID M. LANDAY,

Representative Plaintiff,

v.

DATAVANT, LLC. successor in interest to Health Port Technologies LLC,

Defendant.

CIVIL DIVISION
CLASS ACTION

GD-09-012923

APPENDIX OF EXHIBITS IN SUPPORT OF DECLARATION OF JAMES PIETZ AND THE MOTION FOR PRELIMINARY APPROVAL

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IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

DAVID M. LANDAY, Representative Plaintiff, v. CIOX HEALTH LLC successor in interest to Health Port Technologies LLC, Defendant.	CIVIL DIVISION CLASS ACTION No. GD-09-012923

APPENDIX OF EXHIBITS IN SUPPORT OF DECLARATION OF JAMES M. PIETZ

EXHIBIT
1

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

WAYNE M. CHIURAZZI LAW INC.
D/B/A CHIURAZZI & MENGINE, LLC,
Plaintiff,
vs.
MRO CORPORATION,
Defendant.
****
WAYNE M. CHIURAZZI LAW INC.
D/B/A CHIURAZZI & MENGINE, LLC,
Plaintiff,
vs.
UPMC PRESBYTERIAN SHADYSIDE,
Defendant.
****
WAYNE M. CHIURAZZI LAW INC.
D/B/A CHIURAZZI & MENGINE, LLC,
Plaintiff,
vs.
IOD INCORPORATED,
Defendant.
****
ANTHONY C. MENGINE LAW INC.
D/B/A CHIURAZZI & MENGINE, LLC,
Plaintiff,
vs.
MAGEE-WOMENS HOSPITAL OF
UNIVERSITY OF PITTSBURGH
MEDICAL CENTER,
Defendant.
****

CIVIL DIVISION

Case No.: GD-09-012911

****

Case No.: GD-09-012919

****

Case No.: GD-09-012922

****

Case No.: GD-09-014785

****

MOTION TO ASSIGN CASES TO COMMERCE/COMPLEX LITIGATION CENTER AND FOR COORDINATION

Filed on behalf of: PLAINTIFFS

Counsel of Record for this party:

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IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

WAYNE M. CHIURAZZI LAW INC. D/B/A CHIURAZZI & MENGINE, LLC, Plaintiff, vs. MRO CORPORATION, Defendant.	)	CIVIL DIVISION Case No.: GD-09-012911
**********		
WAYNE M. CHIURAZZI LAW INC. D/B/A CHIURAZZI & MENGINE, LLC Plaintiff, vs. UPMC PRESBYTERIAN SHADYSIDE, Defendant.	)	Case No.: GD-09-012919
**********		
WAYNE M. CHIURAZZI LAW INC. D/B/A CHIURAZZI & MENGINE, LLC, Plaintiff, vs. IOD INCORPORATED, Defendant.	)	Case No.: GD-09-012922
**********		
ANTHONY C. MENGINE LAW INC. D/B/A CHIURAZZI & MENGINE, LLC; Plaintiff, vs. MAGEE-WOMENS HOSPITAL OF UNIVERSITY OF PITTSBURGH MEDICAL CENTER, Defendant.	)	Case No.: GD-09-014785

ORDER

AND NOW, this 18 day of September, 2009, Motion to Assign Cases to Commerce/Complex Litigation Center and for Coordination is hereby GRANTED.

These 4 cases, GD-09-012911, GD-09-012919, GD-09-012922 and GD-09-014785, will be assigned to and coordinated by Judge Wettick in the Commerce/Complex Litigation Center. Parties all contact me when POs are ready to be decided

BY THE COURT:

_____ J.

EXHIBIT
2

1998 Pa. Legis. Serv. Act 1998-26 (H.B. 1048) (PURDON'S)

PENNSYLVANIA 1998 LEGISLATIVE SERVICE

One Hundred Eighty-Second Regular Session of the General Assembly

Additions are indicated by <<+ Text +>>; deletions by <<- Text ->>

Changes in tables are made but not highlighted.

ACT NO. 1998–26

H.B. No. 1048
MEDICAL RECORDS—PRODUCTION—PATIENTS' RIGHTS

AN ACT Amending Title 42 (Judiciary and Judicial Procedure) of the Pennsylvania Consolidated Statutes, further providing for subpoena of medical records; providing for a limit on charges for reproducing medical charts or records; and further providing for rights of patients, for obtaining personal appearance of custodian of original charts, for obtaining production of original medical records and for exemption from attachment of retirement funds and accounts.

The General Assembly of the Commonwealth of Pennsylvania hereby enacts as follows:

Section 1. Section 6152(a) and (c) of Title 42 of the Pennsylvania Consolidated Statutes are amended to read:

<< PA ST 42 Pa.C.S.A. § 6152 >>

§ 6152. Subpoena of records

(a) Election.—

<<+(1)+>> When a subpoena duces tecum is served upon <<+any health care provider or+>> an employee of any health care facility licensed under the laws of this Commonwealth, requiring the production of any medical charts or records at any action or proceeding, it shall be deemed a sufficient response to the subpoena if the <<+health care provider or+>> health care facility notifies the attorney for the party causing service of the subpoena, within three days of receipt of the subpoena, of the health care <<+provider's or+>> facility's election to proceed under this subchapter and of the estimated actual and reasonable expenses of reproducing the charts or records. <<+However, when medical charts or records are requested by a district attorney or by an independent or executive agency of the Commonwealth, notice pursuant to this section shall not be deemed a sufficient response to the subpoena duces tecum.+>>

<<+(2)(i) Except as provided in subparagraph (ii), the health care provider or facility or a designated agent shall be entitled to receive payment of such expenses before producing the charts or records. The payment shall not exceed $15 for searching for and retrieving the records; $1 per page for paper copies for the first 20 pages; 75¢ per page for pages 21 through 60; and 25¢ per page for pages 61 and thereafter; $1.50 per page for copies from microfilm; plus the actual cost of postage, shipping or delivery. No other charges for the retrieval, copying and shipping or delivery of medical records other than those set forth in this paragraph shall be permitted without prior approval of the party requesting the copying of the medical records. The amounts which may be charged shall be adjusted annually beginning on January 1, 2000, by the Secretary of Health of the Commonwealth based on the most recent changes in the consumer price index reported annually by the Bureau of Labor Statistics of the United States Department of Labor.+>>

(ii) Payment to a health care provider or facility for searching for, retrieving and reproducing medical charts or records requested by a district attorney shall not exceed $15, search and retrieval fee, plus the actual cost of postage, shipping or delivery as described in subparagraph (i), as adjusted by the Secretary of Health of the Commonwealth, unless otherwise agreed to by the <<+district attorney.+>>

<<+(3) No independent or executive agency of the Commonwealth shall be required to pay any search or retrieval fee, copying cost or other cost related to medical charts or records under this section unless otherwise required by law, regulation or agreed to by the agency in guidelines, statements of policy or by publication of notice in the Pennsylvania Bulletin.+>>

* * *

(c) Delivery of records.—Following this election, the health care <<+ provider or+>> facility shall hold the originals available, and, upon payment of its <<-estimated reproduction->> expenses by the party causing service of the subpoena, or by any other party, shall within <<-ten->> <<+30+>> days deliver, by <<+first class mail,+>> certified mail, return receipt requested, or by personal delivery, legible and durable copies, certified by the health care <<+provider or+>> facility of all medical charts or records specified in the subpoena. <<+ However, a district attorney shall not be required to pay for copies of medical charts or records before receipt and the charts or records shall be delivered on or before the date specified on the subpoena duces tecum.+>>

* * *

Section 2. Title 42 is amended by adding a section to read:

<< PA ST 42 Pa.C.S.A. § 6152.1 >>

<<+§ 6152.1. Limit on charges+>>

<<+**(a) Charges.—**+>>

<<+(1) Notwithstanding the provisions of section 6152(c) (relating to subpoena of records), a health care provider or facility shall not charge more than a flat fee of $19 for the expense of reproducing medical charts or records, plus the actual cost of postage, shipping or delivery, if the charts or records are requested for the purpose of supporting a claim or appeal under any provision of the Social Security Act (49 Stat. 620, 42 U.S.C. § 301 et seq.) or any Federal or State financial needs-based benefit program. The fee provided for in this subsection shall be adjusted annually by the Secretary of Health of the Commonwealth, as provided for in section 6152(a)(2)(i).+>>

<<+(2) No independent or executive agency of the Commonwealth shall be required to pay any search or retrieval fee, copying cost or other cost related to medical charts or records under this section unless otherwise required by law, regulation or agreed to by the agency in guidelines, statements of policy or by publication of notice in the Pennsylvania Bulletin.+>>

<<+**(b) Documentation.—**The person making the request shall provide the health care provider or facility with clear and convincing documentation that the purpose of the request is to obtain medical charts or records necessary to support a claim or appeal under any provision of the Social Security Act or any Federal or State financial needs-based benefit program.+>>

<<+**(c) Request.—**For purposes of this section, a request for medical charts or records shall include, but not be limited to, a subpoena for medical charts or records under section 6152 or a letter from a person's attorney of record for whom an Appointment of Representative form (SSA–1696–U4) has been executed, indicating the need for such charts or records.+>>

Section 3. Sections 6155(b), 6158 and 6159 of Title 42 are amended to read:

<< PA ST 42 Pa.C.S.A. § 6155 >>

§ 6155. Rights of patients

* * *

(b) Rights to records generally.—

<<+(1)+>> A patient <<+or his designee, including his attorney,+>> shall have the right of access to <<-all of->> his medical charts and records and to <<-photocopy->> <<+obtain photocopies of+>> the same<<+, without the use of a subpoena duces tecum,+>> for his own use <<+. A health care provider or facility shall not charge a patient or his designee, including his attorney, a fee in excess of the amounts set forth in section 6152(a)(2)(i) (relating to subpoena of records)+>>.

<<+(2) Nothing in this subsection shall be construed as requiring an insurer to pay for medical records required to validate medical services for which reimbursement is sought under an insurance contract, except as provided in :+>>

<<+(i) the act of June 2, 1915 (P.L. 736, No. 338),[1] known as the Workers' Compensation Act and the regulations promulgated thereunder;+>>

<<+(ii) 75 Pa.C.S. Ch. 17 (relating to financial responsibility) and the regulations promulgated thereunder; or+>>

<<+(iii) a contract between an insurer and any other party.+>>

<< PA ST 42 Pa.C.S.A. § 6158 >>

§ 6158. Obtaining personal attendance of custodian

The personal attendance of the custodian of the original charts or records specified in the subpoena shall <<+only+>> be required if the subpoena duces tecum so specifies<<-.->> <<+for the purpose of obtaining the custodian's testimony on an issue in dispute and upon payment of the actual and reasonable expenses of the custodian's personal attendance. When the personal attendance of the custodian is requested by a district attorney or an independent or executive agency of the Commonwealth, the fee paid to the custodian shall not exceed the ordinary fee paid to witnesses in criminal cases as specified in section 5903 (relating to compensation and expenses of witnesses) and shall be paid after the custodian's appearance.+>>

<< PA ST 42 Pa.C.S.A. § 6159 >>

§ 6159. Obtaining production of original record

The production of the original record shall <<+only+>> be required if the subpoena duces tecum so specifies<<-.->> <<+for the purpose of comparing the reproduced record to the original, or for the purpose of resolving an issue in dispute, and shall be delivered within 30 days of receipt of the request; except when the original record is requested by a district attorney or an independent or executive agency of the Commonwealth, the records shall be delivered on the date set forth in the subpoena duces tecum.+>>

Section 4. Title 42 is amended by adding a section to read:

<< PA ST 42 Pa.C.S.A. § 6160 >>

<<+§ 6160. Definitions+>>

<<+The following words and phrases when used in this chapter shall have the meanings given to them in this section unless the context clearly indicates otherwise:+>>

<<+"Insurer." A foreign or domestic insurance company, association or exchange holding a certificate of authority under the act of May 17, 1921 (P.L. 682, No. 284),[2] known as The Insurance Company Law of 1921, a health maintenance organization holding a certificate of authority under the act of December 29, 1972 (P.L. 1701, No. 364),[3] known as the Health Maintenance Organization Act, a hospital plan organization holding a certificate of authority under 40 Pa.C.S. Ch. 61 (relating to hospital plan corporations), a professional health services plan corporation holding a certificate of authority under 40 Pa.C.S. Ch. 63 (relating to professional health services plan corporations), a fraternal benefit society holding a certificate of authority under the act of December 14, 1992 (P.L. 835, No. 134),[4] known as the Fraternal Benefit Societies Code, or a risk-assuming preferred provider organization operating pursuant to section 630 of The Insurance Company Law of 1921.+>>

Section 5. Section 8124(b)(1)(ix) of Title 42 is amended to read:

<< PA ST 42 Pa.C.S.A. § 8124 >>

§ 8124. Exemption of particular property

* * *

(b) Retirement funds and accounts.—

(1) Except as provided in paragraph (2), the following money or other property of the judgment debtor shall be exempt from attachment or execution on a judgment:

* * *

(ix) Any retirement or annuity fund provided for under section 401(a), 403(a) and (b), 408 or 409 of the Internal Revenue Code of 1986 (Public Law 99–514, 26 U.S.C. § 401(a), 403(a) and (b), 408 or 409), the appreciation thereon, the income

therefrom <<-and->><<+,+>> the benefits or annuity payable thereunder <<+and transfers and rollovers between such funds +>>. This subparagraph shall not apply to:

(A) Amounts contributed by the debtor to the retirement or annuity fund within one year before the debtor filed for bankruptcy. <<+ This shall not include amounts directly rolled over from other funds which are exempt from attachment under this subparagraph.+>>

(B) Amounts contributed by the debtor to the retirement or annuity fund in excess of $15,000 within a one-year period. <<+ This shall not include amounts directly rolled over from other funds which are exempt from attachment under this subparagraph.+>>

(C) Amounts deemed to be fraudulent conveyances.

* * *

Section 6. This act shall take effect as follows:

(1) The amendment or addition of 42 Pa.C.S. §§ 6152(a) and (c), 6152.1, 6155(b), 6158 and 6159 shall take effect in 60 days.

(2) The remainder of this act shall take effect immediately.

Approved February 18, 1998.

[1] 77 P.S. § 1 et seq.

[2] 40 P.S. § 341 et seq.

[3] 40 P.S. § 1551 et seq.

[4] 40 P.S. § 1142–101 et seq.

PA LEGIS 1998-26

End of Document

EXHIBIT
3

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

ANTHONY C. MENGINE LAW INC.
D/B/A CHIURAZZI & MENGINE, LLC;
and CHARLOTTE HAGANS,

Plaintiffs,

vs.

HEALTHPPORT,

Defendant.

CIVIL DIVISION

Case No.:

GD-09-012923

CLASS ACTION COMPLAINT

Filed on behalf of: PLAINTIFFS

Counsel of Record for this party:

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JURY TRIAL DEMANDED

NOTICE TO DEFEND

You have been sued in court. If you wish to defend against the claims set forth in the following pages, you must take action within twenty (20) days after this complaint and notice are served, by entering a written appearance personally or by attorney and filing in writing with the court your defenses or objections to the claims set forth against you. You are warned that if you fail to do so the case may proceed without you and a judgment may be entered against you by the court without further notice for any money claimed in the complaint and for any claim or relief requested by the Plaintiff. You may lose money or property or other rights important to you.

YOU SHOULD TAKE THIS PAPER TO YOUR LAWYER AT ONCE. IF YOU DO NOT HAVE OR KNOW A LAWYER OR CANNOT AFFORD ONE, THEN YOU SHOULD GO TO OR TELEPHONE THE OFFICE SET FORTH BELOW TO FIND OUT WHERE YOU CAN GET LEGAL HELP:

Lawyer Referral Service
Allegheny County Bar Association
920 City-County Building
414 Grant Street
Pittsburgh, PA 15219
412-261-5555

CLASS ACTION COMPLAINT

NATURE OF THE ACTION

1. This class action is brought on behalf of patients, patient designees, representatives and attorneys ("Medical Records Requestors") who have been overcharged by Defendant Healthport d/b/a ChartOne, Inc. ("Healthport") for reproductions of medical records.

2. By law, a medical records reproduction companies ("MRRC") such as Defendant must provide medical records to Medical Records Requestors for a fee derived from the actual and reasonable cost of searching for, retrieving, reproducing and transmitting the records.

3. Contrary to this law, Defendant Healthport has charged the Representative and Class Plaintiffs, as well as thousands of other Medical Records Requestors , fees that far exceed the actual and reasonable cost of searching for, retrieving, reproducing and transmitting the medical records. Indeed, Defendant has profited from the sale of Pennsylvania hospital patient medical records at the expense of these Medical Records Requestors. This class action is brought to compel Defendant to charge Medical Records Requestors only those fees that are permitted and to recover the money paid by Medical Records Requesters that was in excess of the actual and reasonable cost of searching for, retrieving, reproducing and transmitting the records.

THE PARTIES

4. Plaintiff Anthony C. Mengine Law Inc. d/b/a Chiurazzi & Mengine, LLC ("Chiurazzi & Mengine"), is a law firm located at 101 Smithfield Street, Pittsburgh, Pennsylvania, 15222. In the course of representing its clients, Plaintiff Chiurazzi & Mengine has been repeatedly overcharged by Defendant in relation to medical records requests.

5. Plaintiff, Charlotte Hagans, is an individual who resides in Mapleton Depot Pennsylvania. In the course of obtaining the hospital records of her son Zachary Hulcher, Plaintiff Charlotte Hagans was overcharged by Defendant

6. Defendant Healthport is a corporation or other entity with headquarters at 925 North Point Parkway, Suite 350, Alpharetta, Georgia 30005. This Defendant was formed in 2007 through the merger of SDS, a/k/a Smart Document Solutions ("SDS"), and Companion Technologies. In 2008, this Defendant also merged with ChartOne, Inc. ("ChartOne"). At all times relevant hereto, this Defendant was an MRRC that entered into exclusive agreements with Pennsylvania hospitals to provide medical records to Medical Records Requestors. At all times relevant hereto, this Defendant agreed to provide reproductions of medical records for a fee to the Representative and Class Plaintiffs.

Patients And Their Designees, Representatives and Attorneys Are Legally Entitled To Obtain Medical Record Copies Based Upon The Reasonable And Actual Cost Of Reproduction

7. Under Pennsylvania and United States law, Pennsylvania hospitals are required to create, maintain, and preserve medical records.

8. The hospital records are recognized by law to be the property of the health care provider, not the patient.

9. Although patients are not provided legal dominion and control over their medical records, they, and their designees, representatives and attorneys are given the a legal right to obtain reproductions of medical records for a modest fee based upon the reproduction provider's estimated actual and reasonable costs. Thus, Pennsylvania law limits the amount that Medical Records Requestors may be charged in connection with a request for medical records. Under the law, charges in connection with the provision of reproduced medical records must be cost-based.

10. Additionally, Pennsylvania law creates a "ceiling" on any such charges by establishing a maximum amount that may be charged for "search and retrieval" and a maximum "per page" fee based on the number of paper records reproduced. These statutory maximum amounts are adjusted annually beginning on January 1, 2000, by the Secretary of Health of the Commonwealth based on the most recent changes in the consumer price index reported annually by the Bureau of Labor Statistics of the United States Department of Labor.

11. Pennsylvania law, therefore, imposes a duty on MRRCs to establish procedures to estimate their actual costs for search, retrieval, reproduction and transmittal of medical records and then to charge Medical Records Requestors only that cost. Where the MRRC's estimated actual cost is lower than the statutory maximum amounts set forth in Pennsylvania law, the lower amount must be charged.

12. Pennsylvania law also limits the types, or categories, of fees that may be charged for the reproduction of medical records to the following three categories: A search and retrieval fee; a reproduction fee; and a postage, shipping or delivery fee. No other types or categories of fees may be charged under Pennsylvania law.

Healthport Operates As an MRRC To Provide Copies Of Medical Records To Patients and Patients' Attorneys

13. Defendant Healthport is an MRRC that has entered into exclusive medical records reproduction contracts with numerous Pennsylvania hospitals and hospital systems, including the West Penn Allegheny Health System, Jefferson Regional Medical Center and J.C. Blair Memorial Hospital.

14. Under these contracts, Healthport is a designated agent of the hospital to be the sole and exclusive source from which Medical Records Requestors must obtain reproductions of medical records.

15. As part of these exclusive contracts with Pennsylvania hospitals, Healthport also provides reproductions of patient medical records for various other entities (e.g., physician practice groups, imaging centers, and clinics) that are affiliated with and/or owned by the various hospitals with which Healthport contracts ("affiliated entity").

16. Under these exclusive agreements, when a request for medical records comes in to the hospital or affiliated entity from a Medical Records Requestor, the hospital or affiliated entity notifies Healthport and makes the requested medical records available to the Healthport, usually electronically. Healthport then contacts the Medical Records Requestor directly, informs them of the total number of pages of records to be "copied", and offers to provide these pages in exchange for payment of a specified fee. Once the specified fee is paid by the Medical Records Requestor, Healthport, using its exclusive access to the hospital's or affiliated entity's medical records, "copies" the records and forwards them directly to the Medical Records Requestor.

17. In exchange for this exclusive right to sell the hospital's or affiliated entity's reproduced medical records to Medical Records Requestors, Healthport may share the revenues from the sale of the records with the hospitals and/or affiliated entities, and may provide the hospitals and/or affiliated entities with a range of additional services at no charge or at greatly reduced charge. These services include, but are not limited to, free copies of medical records to satisfy non-billable medical records requests received by the hospital or affiliated entity; on site personnel and/or equipment to facilitate hospital or affiliated entity satisfaction of non-billable medical records requests; scanning of hospital or affiliated entity medical records to digital format for ease of storage and future retrieval and reproduction; and storage of medical records, either in paper or digital form.

Technological Advances Have Reduced The Costs Of Medical Record Location, Retrieval, Reproduction, and Transmittal

18. The use of computers, electronic records and the internet has led to substantial reduction of costs in the storage and reproduction of medical records for hospitals and their MRRC agents, including Healthport. Before the widespread use of computer technology in hospital medical record keeping and record reproduction, whenever a hospital or affiliated entity in Pennsylvania received a request from a Medical Records Requestor for a copy of a patient's medical records, the hospital's or affiliated entity's medical records department first needed to retrieve the patient's medical chart from an in-house or off-site storage location. The patient's medical chart was composed of numerous sheets of paper in different sizes, with information sometimes recorded on the front and back, and often with information recorded on bifolds and trifolds. The top of each page was two-hole punched and the complete chart was held together by metal clips placed through these holes. Once the medical chart was obtained from storage, a person from the hospital or affiliated entity needed to take each sheet of paper out of these clips and photocopy by hand each and every page of the record. The medical records department then needed to reassemble the chart and send it back to storage; assemble the copies; place the copies in a mailing package, and send them via U.S. mail to the Medical Records Requestor. All of this, along with billing and bill collection, was done without the aid of computers, electronic records, or the internet.

19. Because of the implementation of technological advances, medical records in Pennsylvania, and throughout the United States, are increasingly created in electronic form on computers and/or converted into electronic form after creation, and thereafter stored in electronic form on computers. This trend toward computerized hospital records is the result of the belief among health care practitioners and policy makers that electronic medical records enhance

patient safety, increase efficiencies in the delivery of health care, and improve the "bottom line" of hospitals and affiliated entities.

20. Electronic medical records also significantly reduce the time and expense involved in the storage, location, retrieval, reproduction, and transmittal of medical records to Medical Records Requestors. Once computerized, medical records can be retrieved instantly, printed instantly, or electronically transmitted across the globe instantly, all by pressing a few buttons on a computer keyboard.

21. While the actual cost of storing, locating, retrieving, reproducing and transmitting medical records has decreased dramatically, Defendant has failed to charge its actual, diminishing costs to patients and their designees, representatives and attorneys. In fact, Defendant continues to charge Medical Records Requesters the maximum ceiling prices without any relationship to Defendant's actual costs of searching for, retrieving, reproducing and transmitting Pennsylvania hospital and affiliated entity medical records.

Healthport Fails To Establish And Follow A Procedure For Providing Medical Records Based Upon Its Actual And Reasonable Costs

22. Healthport is permitted to assess and charge Medical Records Requestors only for the estimated actual and reasonable expenses it incurs in connection with the reproduction of requested medical records.

23. Healthport does not follow a procedure designed to estimate and charge Medical Records Requestors, for the actual and reasonable expenses it incurs in connection with the search for and retrieval, reproduction and transmission of medical records.

24. Instead, when it reproduces medical records for Medical Records Requesters, Defendant Healthport automatically charges the maximum possible search and retrieval fee; and

the maximum possible fee for making photocopies of paper records without regard to its actual search, retrieval, reproduction and transmittal processes and the actual costs associated therewith.

25. Thus, for requests received after January 1, 2009, Defendant Healthport consistently charged Plaintiffs and all other similarly situated Medical Records Requestors $1.33 per page for pages 1-20; 99 cents per page for pages 21 through 60; and 33 cents per page for pages 61 and thereafter. For requests received from January 1, 2008 to December 31, 2008, Defendant Healthport consistently charged Plaintiffs and all other similarly situated Medical Records Requestors $1.28 per page for pages 1-20; 95 cents per page for pages 21 through 60; and 32 cents per page for pages 61 and thereafter. For requests received from January 1, 2007 to December 31, 2007, Defendant Healthport consistently charged Plaintiffs and all other similarly situated Medical Records Requestors $1.25 per page for pages 1-20; 93 cents per page for pages 21 through 60; and 31 cents per page for pages 61 and thereafter. For requests received from January 1, 2006 to December 31, 2006, Defendant Healthport consistently charged Plaintiffs and all other similarly situated Medical Records Requestors $1.23 per page for pages 1-20; 92 cents per page for pages 21 through 60; and 31 cents per page for pages 61 and thereafter. And for requests received from January 1, 2005 to December 31, 2005, Defendant Healthport consistently charged Plaintiffs and all other similarly situated Medical Records Requestors $1.17 per page for pages 1-20; 88 cents per page for pages 21 through 60; and 30 cents per page for pages 61 and thereafter. Such charges are and have consistently been far in excess of Defendant Healthport's estimated actual and reasonable reproduction costs.

26. With respect to search and retrieval fees, for requests received after January 1, 2009, Defendant Healthport consistently charged Plaintiff Chiurazzi & Mengine and all other similarly situated patient attorneys, designees and representatives a search and retrieval fee of

$19.80. For requests received from January 1, 2008 to December 31, 2008, Defendant Healthport consistently charged Plaintiff Chiurazzi & Mengine and all other similarly situated patient attorneys, designees and representatives a search and retrieval fee of $19.00. For requests received from January 1, 2007 to December 31, 2007, Defendant Healthport consistently charged Plaintiff Chiurazzi & Mengine and all other similarly situated patient attorneys, designees and representatives a search and retrieval fee of $18.54. For requests received from January 1, 2006 to December 31, 2006, Defendant Healthport consistently charged Plaintiff Chiurazzi & Mengine and all other similarly situated patient attorneys, designees and representatives a search and retrieval fee of $18.30. And for requests received from January 1, 2005 to December 31, 2005, Defendant Healthport consistently charged Plaintiff Chiurazzi & Mengine and all other similarly situated patient attorneys, designees and representatives a search and retrieval fee of $17.48. Such charges are and have consistently been far in excess of Defendant Healthport's estimated actual and reasonable search and/or retrieval costs.

27. In addition to the above-referenced reproduction and search and retrieval charges, Defendant Healthport has also consistently charged Plaintiffs and all other similarly situated Medical Records Requestors a sales tax in relation to the search for and retrieval, reproduction and provision of Pennsylvania hospital and/or affiliated entity medical records.

28. A sales tax on the reproduction of medical records is not permitted under Pennsylvania and U.S. law.

Representative Plaintiff Chiurazzi & Mengine Was Subjected To Defendant's Billing Practices

29. In or around August 2008, Plaintiff Chiurazzi & Mengine sent Jefferson Regional Medical Center an authorization from Patient "A" requesting a reproduction of Patient A's hospital medical records.

30. In response to this request, Healthport sent Plaintiff Chiurazzi & Mengine an invoice for $38.94. This invoice is attached as Exhibit 1. Unbeknownst to Plaintiff Chiurazzi & Mengine, the invoice did not reflect charges based upon Healthport's actual or estimated actual expenses for locating, retrieving, reproducing and transmitting the medical records. The medical records charges included a $19.00 fee for search and retrieval; a $1.28 per page fee for the reproduction of 13 pages of medical records; a sales tax charge of $2.55 and a delivery or postage fee of $0.75.

31. Plaintiff Chiurazzi & Mengine Having no other method of obtaining the medical records and believing the invoice comported with law, Plaintiff Chiurazzi & Mengine paid Healthport the requested $38.94. In exchange for this payment, Healthport provided the requested reproduction of Patient A's hospital record.

Representative Plaintiff Charlotte Hagans Was Subjected To Defendant's Billing Practices

32. In September of 2008, Plaintiff Charlotte Hagans sent J.C. Blair Memorial Hospital an authorization requesting a reproduction of her son's hospital medical records.

33. In response to this request, Healthport sent Plaintiff Charlotte Hagans an invoice for $71.45. This invoice is attached as Exhibit 2. Unbeknownst to Plaintiff Hagans the invoice did not reflect charges based upon Healthport's actual or estimated actual expenses for reproducing and transmitting the medical records. The medical records charges included a fee of $1.28 per page for the first 20 pages of reproduced medical records; a fee $0.95 per page for pages 21 through 40; a fee of $0.32 per page for pages 41 through 44; a shipping fee of $2.53; and sales tax of $4.04.

34. Plaintiff Hagans having no other method of obtaining her son's medical records and believing that the charges listed on the invoice comported with the law, Plaintiff Hagans paid

Healthport the requested $71.45. In exchange for this payment, Healthport provided the requested reproduction of Plaintiff Hagans' son's hospital record.

CLASS ACTION ALLEGATIONS

35. This Class Action is filed pursuant to Pa.R.Civ.P. 1701 *et. seq.* by the Representative Plaintiffs on behalf of a class defined as follows:

> All patients, patient designees, representatives and attorneys who requested medical records from a Pennsylvania hospital or affiliated entity that was processed and fulfilled by Healthport, ChartOne and/or SDS from July 1, 2005 until the date of final judgment in this case and who were charged and paid the maximum search and retrieval and/or "per page" reproduction fees as set forth in 42 Pa.C.S. § 6152(a)(2)(i) and/or who were charged and paid a sales tax.

Pa.R.Civ.P. 1702, 1708 and 1709 Prerequisites

Numerosity

36. The proposed Class is so numerous that it is impracticable to bring all persons and entities that comprise it before the Court. The exact number of the members of the Class is unknown, but it is believed to include well over 1,000 persons and attorneys/law firms. The exact number and identity of these persons and attorneys/law firms can be determined from the records maintained by Healthport. In many instances, Class Members are either unaware that claims exist or have sustained individual damages too small to justify the costs of bringing suit separately. When aggregated, however, individual damages are large enough to justify this Class Action.

Commonality

37. The questions of law and fact common to the claims of each Class Member overwhelmingly predominate over any question of law or fact affecting only individual members

of the Class. Questions of law and fact common to the Class include, but are not necessarily limited to, the following:

a. Do the laws of Pennsylvania provide that Healthport may only charge Medical Records Requestors a cost-based fee for the reproduction of Pennsylvania hospital and affiliated entity medical records?

b. Do the laws of Pennsylvania provide that Healthport may only charge patient attorneys, designees and representatives a cost-based fee for the search for and retrieval of Pennsylvania hospital and affiliated entity medical records?

c. Do the laws of Pennsylvania provide that Healthport may not charge Medical Records Requestors a sales tax for the search for and retrieval, reproduction and transmittal of Pennsylvania hospital and affiliated entity medical records?

d. What is the actual and/or estimated actual and reasonable cost incurred by Healthport in the reproduction of Pennsylvania hospital and affiliated entity medical records?

e. What is the actual and/or estimated actual and reasonable cost incurred by Healthport in the search for and retrieval of Pennsylvania hospital and affiliated entity medical records?

f. Does Healthport's failure to charge and collect fees based upon its actual and/or estimated actual and reasonable expenses for the search for, retrieval, reproduction, and transmittal of Pennsylvania hospital and affiliated entity medical records constitute a breach of contract, implied contract, and/or quasi-contract?

g. Does Healthport's charge of sales tax in relation to the search for, retrieval, reproduction, and transmittal of Pennsylvania hospital and affiliated entity medical records constitute a breach of contract, implied contract, and/or quasi-contract?

h. Does Healthport's failure to charge and collect fees based upon its actual and/or estimated actual and reasonable expenses for the search for, retrieval, reproduction, and transmittal of Pennsylvania hospital and affiliated entity medical records entitle Representative and Class Plaintiffs to restitution?

i. Does Healthport's charge of sales tax in relation to the search for, retrieval, reproduction, and transmittal of Pennsylvania hospital and affiliated entity medical records entitle Representative and Class Plaintiffs to restitution?

j. Did a constructive trust arise due to Healthport's knowing acquisition of monies in excess of its actual and/or estimated actual and reasonable cost for the search for and the retrieval, reproduction and transmittal of Pennsylvania hospital and affiliated entity medical records?

k. Did a constructive trust arise due to Healthport's knowing acquisition of sales tax in relation to the search for and retrieval, reproduction and transmittal of Pennsylvania hospital and affiliated entity medical records?

l. Was Defendant Healthport unjustly enriched by its acceptance and retention of payments made by Medical Records Requestors for the search for and retrieval, reproduction and transmittal of Pennsylvania hospital and affiliated entity medical records that exceeded Defendant's actual and/or estimated actual and reasonable costs incurred in these activities?

m. Was Defendant Healthport unjustly enriched by its acceptance and retention of payments made by Medical Records Requestors for sales tax in relation to the search for and retrieval, reproduction and transmittal of Pennsylvania hospital and affiliated entity medical records?

Typicality

38. The claims of Plaintiffs Chiurazzi & Mengine and Charlotte Hagans are typical of the claims of the Class because at all times material to the allegations of this Class Action Complaint, Plaintiffs requested medical records from Pennsylvania hospitals and affiliated entities and was charged similar fees and/or sales tax by Defendant. Plaintiffs and the Class have sustained identical damages, and their claims arise from an identical factual background and identical legal theories as set forth in this Class Action Complaint.

39. On information and belief, Plaintiffs aver that Defendant has charged medical records reproduction fees identical to those charged to Plaintiffs to hundreds, if not thousands of Medical Records Requestors that have requested reproductions of Pennsylvania hospital and affiliated entity medical records.

40. On information and belief, Plaintiff Chiurazzi & Mengine avers that Healthport charged medical records search and retrieval fees identical to those charged to Plaintiff to hundreds, if not thousands of patient attorneys, designees and representatives that have requested reproductions of Pennsylvania hospital and affiliated entity medical records.

41. On information and belief, Plaintiffs aver that Healthport has charged sales taxes in connection with the provision of Pennsylvania and affiliated entity medical records reproductions identical to those charged to Plaintiffs to hundreds, if not thousands of Medical Records Requestors.

42. As a result of Defendant's conduct, Plaintiffs and all other similarly situated patients, patient designees, representatives, and attorneys have sustained damages and losses, including, but not limited to, payment of medical record reproduction charges that exceeded Defendant's actual and/or estimated actual and reasonable expenses incurred; payment of medical records search and retrieval charges that exceeded Defendant's actual and/or estimated actual and reasonable expenses incurred; and payment of sales tax charges.

Adequacy of Representation

43. Representative Plaintiffs will assure the adequate representation of all members of the Class. Their claims are typical of the Class's claims. They have no conflict with Class Members in the maintenance of this action, and their interest in this action is antagonistic to Defendant's interests.

44. Plaintiffs' interests are coincident with, and not antagonistic to, absent Class Members' interest because, by proving their individual claims they will necessarily prove Defendant's liability as to the Class's claims.

45. The Plaintiffs are also cognizant of and determined to faithfully discharge their fiduciary duties to the absent Class Members as Class Representatives. They will vigorously pursue the Class's claims. They are aware that they cannot settle this Class Action without prior Court approval. Representative Plaintiffs have and/or can acquire the financial resources to litigate this Class Action.

46. Undersigned counsel are experienced in litigating Class Actions and have handled many such actions in the state and federal courts for and on behalf of other consumers. Counsel is handling this Class Action on a contingent fee basis and will receive compensation for professional services rendered in this Class Action only as awarded by this Court.

A Class Action Provides A Fair And Efficient Method Of Litigation

47. A class action provides for a fair and efficient method of adjudicating this controversy. The common questions of law and fact outlined above predominate over any question(s) affecting individual Class Members only.

48. The substantive claims of the Representative Plaintiffs and the Class Members will require evidentiary proof of the same kind and application of the same law since Defendant has treated all Class Members in a similar and/or identical manner.

49. The prosecution of separate actions by or against Class Members would create the risk of inconsistent or varying adjudications with respect to individual Class Members and would, as a practical matter, impair or impede the ability of Class Members to protect their interests.

50. To Plaintiffs' knowledge no other similar actions are pending against this Defendant in Pennsylvania.

51. This forum is appropriate for litigation of this Class Action because the Plaintiff Chiurazzi & Mengine is located here and Defendant conducts business here.

52. A class action is superior to other available methods for the fair and efficient adjudication of this controversy. The expense and burden of individual litigation effectively makes it impossible for individual Class Members to seek redress for the wrongs complained of herein.

53. There are no known unusual legal or factual issues that would cause management problems not normally and routinely handled in class actions, and because damages may be calculated with mathematical precision, the cost of administering the Class Fund will be minimized. Because Class Members may be unaware that their rights have been violated or, if

aware, would be unable to litigate their claims on an individual basis because of their relatively small damages, a class action is the only practical proceeding available.

54. Defendant has acted or refused to act on grounds generally applicable to the Class, thereby making final equitable or declaratory relief appropriate with respect to the Class.

COUNT I
Breach of Contract/Implied Contract

55. Plaintiffs re-allege and incorporate by reference each and every allegation in the preceding paragraphs.

56. A contract arises between the Medical Records Requestor and Defendant Healthport every time Defendant Healthport agrees to provide and/or provides a Medical Records Requestor with medical records from a Pennsylvania hospital or affiliated entity in exchange for the Medial Records Requestor's agreement to pay and/or payment of the fees specified by Defendant Healthport.

57. Implicit in each such contract is Defendant Healthport's agreement to provide the reproduced medical records to the Medical Records Requestor in a manner consistent with Pennsylvania law.

58. Also implicit in each such contract and/or Pennsylvania law is Defendant Healthport's covenantal duty of good faith and fair dealing.

59. By agreeing to provide and/or providing the requested medical records, Defendant Healthport implicitly agreed to comply with Pennsylvania law, and to act in full compliance therewith in relation to Defendant's billing for the search for, and the retrieval, reproduction and transmittal of Pennsylvania hospital and affiliated entity medical records; and/or in relation to permissible fees that may be charged Medical Records Requestors in relation to the these medical records requests and/or activities.

60. By failing to charge Plaintiffs and all other similarly situated Medical Records Requestors a fee for the search for and the retrieval, reproduction and transmittal of Pennsylvania hospital and affiliated entity medical records that is based on Defendant Healthport's actual and/or estimated actual and reasonable expenses, Defendant Healthport failed and continues to fail to comply with applicable Pennsylvania law, and therefore breached and continues to breach its contractual obligations to Plaintiffs and all other similarly situated Medical Records Requestors.

61. By charging Plaintiffs and all other similarly situated Medical Records Requestors sales tax in connection with the provision of Pennsylvania hospital and affiliated entity medical records reproductions, Defendant Healthport failed and continues to fail to comply with applicable Pennsylvania law, and therefore breached and continues to breach its contractual obligations to Plaintiffs and all other similarly situated Medical Records Requestors.

62. Defendant Healthport's conduct, as described at length above, constitutes a breach or breaches of contract and/or implied contract between Defendant Healthport and Plaintiffs, and the contracts and/or implied contracts between Defendant Healthport and each and every Class Member, as well as the covenant of good faith and fair dealing implied in and/or applicable to each such contract.

63. As a result of Defendant Healthport's breaches of contract and/or implied contract and its breaches of the covenant of good faith and fair dealing, Plaintiffs and all other similarly situated Medical Records Requestors were caused to suffer damages and losses as set forth in this Class Action Complaint.

64. Defendant Healthport's conduct was intentional, willful, wanton, reckless, and outrageous because Defendant Healthport had actual knowledge of Pennsylvania law governing

charges for the search for and the retrieval, reproduction and transmittal of Pennsylvania hospital and affiliated entity medical records to Medical Records Requestors, but nevertheless persisted in refusing to follow these laws out of a desire to maximize its own economic gains and/or its own convenience.

COUNT II
Restitution

65. Plaintiffs re-allege and incorporate by reference each and every allegation in the preceding paragraphs.

66. At all times material hereto, Healthport was aware that it was billing, charging and/or collecting from Medical Records Requestors fees in excess of those authorized by law for the reproduction of Pennsylvania hospital and affiliated entity medical records. On information and belief, Healthport maintains records of its actual and/or estimated actual costs incurred in the search for, retrieval, reproduction and transmittal of Pennsylvania hospital and affiliated entity medical records to Medical Records Requestors.

67. Notwithstanding this knowledge, Healthport charged and collected from the Representative and Class Plaintiffs fees in excess of Healthport's actual and/or estimated actual costs incurred in the search for and retrieval, reproduction, and transmittal of Pennsylvania hospital and affiliated entity medical records. Healthport thus accepted and appreciated an additional benefit over and above what is authorized by law.

68. Under the circumstances, it would be inequitable for Healthport to retain the money paid by the Representative and Class Plaintiffs in excess of that authorized by law.

COUNT III
Constructive Trust

69. Plaintiffs re-allege and incorporate by reference each and every allegation in the preceding paragraphs.

70. Plaintiffs paid money to Healthport on the condition that the money represented payment for the estimated actual and/or estimated actual and reasonable cost for the search for and retrieval, reproduction, and transmittal of Pennsylvania hospital and affiliated entity medical records.

71. Healthport knew or should have known that the amount paid exceeded its actual and/or estimated actual and reasonable cost incurred in the search for and retrieval, reproduction and transmittal of Pennsylvania hospital and affiliated entity medical records.

72. Healthport has wrongfully acquired and retained money obtained from Plaintiffs.

73. As a result, a constructive trust arose and was imposed at the time of transfer upon the money transferred by Plaintiffs which was in excess of Defendant's actual and/or estimated actual and reasonable costs.

COUNT IV
Unjust enrichment – Quasi Contract

74. Plaintiffs re-allege and incorporate by reference each and every allegation in the preceding paragraphs.

75. Plaintiffs have conferred benefits upon Healthport by making payments for the search for, and the retrieval, reproduction and transmittal of Pennsylvania hospital and affiliated entity medical records in amounts greater than Healthport's actual and/or estimated actual and reasonable costs incurred in these activities.

76. Defendant Healthport has accepted and appreciates these conferred benefits in that Healthport is enabled thereby to charge and collect more than authorized by law for the search for, and the retrieval, reproduction and transmittal of Pennsylvania hospital and affiliated entity medical records.

77. Healthport has accepted and retained these benefits conferred by Plaintiffs and it would be inequitable for Healthport to retain the excess payments made by Plaintiffs since such excess payments are not authorized by law.

78. Accordingly, Plaintiffs are entitled to judgment in the amount of money unjustly conferred on Defendant Healthport.

COUNT V
Relief Pursuant to Declaratory Judgments Act

79. Plaintiffs re-allege and incorporate by reference each and every allegation in the preceding paragraphs.

80. An actual controversy has arisen between Plaintiffs and all others similarly situated, on the one hand, and Healthport on the other. Such controversy concerns the respective rights and duties of the parties with respect to the amount and method by which persons and law firms may be charged for copies of patient medical records in Pennsylvania.

81. Plaintiffs contend that Healthport's charges for medical records constitute a breach of contract/implied contract and results in a right of Restitution, a Constructive Trust, and in Unjust Enrichment. Plaintiffs are informed and believe that Healthport contends the contrary.

82. Consequently, declaratory relief is both necessary and proper in this action to determine the rights and duties which exist between the parties concerning charges for medical records. Since the business practices of Healthport are continuing in that regard, and apparently will be continued into the indefinite future, Plaintiffs and al others similarly situated have no

adequate remedy at law to protect themselves from such ongoing practices other than through declaratory relief.

83. Plaintiffs thus seek a declaration pursuant to the Declaratory Judgments Act, 42 Pa.C.S. § 7532, *et. seq.*, that the conduct of Healthport is in breach of contract and/or unlawful. Plaintiffs further seek all supplemental relief to which they are entitled under 42 Pa.C.S. § 7538, including, but not limited to, damages, restitution and attorneys' fees.

DEMAND FOR RELIEF

WHEREFORE, Plaintiffs demand judgment against Defendant Healthport as follows:

1. Certifying this action as a Class Action with Plaintiffs as the Representatives of the Class;
2. On the First Cause Of Action:
    a. Declaring that the conduct of Defendant was in breach of contract and unlawful;
    b. Awarding damages according to proof at trial;
3. On the First, Second, Third, and Fourth Causes of Action:
    a. Enjoining Defendant from charging anything other than fees based on its actual and reasonable expenses for the search for and retrieval, reproduction and transmittal of Pennsylvania hospital and affiliated entity medical records;
    b. Enjoining Defendant from charging sales tax in response to a patient, patient designee, representative or attorney request for Pennsylvania hospital or affiliated entity medical records;

c. Compelling an accounting, at Defendant's expense, of all sums it has billed patients, patient designees, representatives and attorneys since June 15, 2005 for the search for and retrieval, reproduction and transmittal of Pennsylvania hospital and affiliated entity medical records;

d. Imposing a Constructive Trust upon Defendant and compelling it to transfer into this Constructive Trust all excess fees paid by Plaintiffs and the Class.

e. Awarding damages to Plaintiffs and the Class Members in an amount in excess of the statutory limits for arbitration which fairly compensates them for their damages and losses, together with interest and costs;

f. Awarding pre-judgment interest at the highest level rate from and after the date of service of the initial Class Action Complaint in this Class Action on all amounts paid in excess of those amounts authorized by law;

g Awarding punitive damages.

4. On the Fifth Cause of Action

a. Entering a declaration pursuant to the Declaratory Judgments Act, 42 Pa.C.S. § 7532 *et. seq.* that the conduct of IOD is in breach of contract and/or unlawful;

b. Awarding all supplemental relief to which Plaintiff is entitled under 42 Pa.C.S. § 7538, including, but not limited to, damages, restitution and attorneys' fees;

5. Awarding costs and attorneys' fees to the extent permitted by law; and

6. Awarding such other and further relief as the Court deems necessary and proper.

JURY TRIAL DEMANDED

BERGER & LAGNESE

by: _____

Paul A. Lagnese, Esquire
Pa. I.D. No. 51281
David Paul, Esquire
Pa. I.D. No. 70552
310 Grant Street, Suite 720
Pittsburgh, PA 15219
Telephone: (412) 471-4300

PIETZ LAW OFFICE, LLC

by: _____

James M. Pietz, Esquire
Mitchell Building
304 Ross Street, Suite 700
Pittsburgh, PA 15219
Telephone: (412) 288-4333

ATTORNEYS FOR PLAINTIFFS

ChartONE, Inc.

P.O. Box 152472, Irving, TX 75015-2472 (800)299-8694

INVOICE

Invoice Number: 106280- -123819 Date: 09/02/2008

Medical Record Number: 861947

Dear Katie Killion:

Per your request, enclosed are the medical records forwarded from Jefferson Regional Medical Center, Pittsburgh, PA.

PAYMENT IS DUE UPON RECEIPT OF THIS INVOICE. A service charge of 1.5% per month (annual rate 18%), except Michigan state, will be charged if not paid within 30 days from the date of this invoice.
Please detach the bottom portion of this invoice and return with your remittance to ChartONE, Inc. to ensure proper credit.

Comments:

Requested by:

Katie Killion:
CHIURAZZI AND MENGINE, LLC

ATTY AT LAW
101 SMITHFIELD ST
PITTSBURGH, PA 15222
(412)434-0773-

Please make check payable to:

ChartONE, Inc.
P.O. Box 152472
Irving, TX 75015-2472
(800)299-8694
Federal Tax ID# 94-3360691

Patient: [redacted]
Category: Attorney
SSN [redacted]
Birth Date: 02/04/1983
Admission Date: / /
Requester ID:
Other ID:
TDN/VPN:
Paper Pages: 13
Microfiche Pages: 0
Computer Pages: 0

Base Fee:	19.00
Page Fee:	16.64
Shipping:	0.75
Handling:	0.00
Itemized:	0.00
Tax:	2.55
Adjustment:	0.00
Pre-Payment:	0.00
Total Due:	38.94

Please return this portion with your payment payable to:

ChartONE, Inc.
P.O. Box 152472
Irving, TX 75015-2472

Date: 09/02/2008
Invoice: 106280-1-123819
Patient: [redacted]
Hospital: Jefferson Regional Medical Center, Pittsburgh
Total Due: $38.94

Please check box [ ] if cardholder's billing address is different than requester's address and note on the reverse side of this remittance slip.

CHIURAZZI AND MENGINE, LLC

ATTY AT LAW
101 SMITHFIELD ST
PITTSBURGH, PA 15222

Mastercard [ ] Visa [ ]
Card # _____
Exp. Date _____
Name/Signature (Cardholder): _____
Contact Phone: _____
Total Payment: _____

PENGAD 800-631-6989

EXHIBIT

1

ChartOne.

ChartOne, Inc.
PO Box 152472, Irving, TX 75015-2472, USA
Phone Number: (800) 299-8694
Federal Tax ID# 94-3360691

Invoice

Payment is due upon receipt. A service charge of 1.5% per month may be charged if not paid within 30 days of invoice date.

Invoice Number: 9000243054
Medical Record Number: 10-52-90

Date: 11/13/2008
FOB Shipping Point

Per your request, enclosed are the medical records forwarded from J.C. Blair Memorial Hosp, Huntingdon, PA. Records are included unless this invoice has specific language noted above relating to prepayment being a requirement prior to copies of medical records being released. Payment is due upon receipt of this invoice. Please detach the bottom portion of this inv and return with your remittance.

[redacted]
PO BOX 59
MAPLETON DEPOT, PA 17052

Bill Category:	PAT
Requestor ID:	
Request Date:	09/15/2008
TDN:	
Request ID 1:	
Request ID 2:	
Account No:	
Patient:	[redacted]
SSN:	
DOB:	09/14/1994
Paper Pages:	64
Computer Pages:	0
Microfiche Pages:	0
XRay Pages:	0

Invoice Comments

Search & Retrieval Fee:	$	0.00
Hour Fee:	$	0.00
Page Fee:	$	64.88
Shipping Fee:	$	2.53
Tax:	$	4.04
Adjustment:	$	0.00
Prepayment:	$	0.00
Total Due:	$	0.00

Please return this portion with your payment payable to:

ChartOne, Inc.
PO Box 152472
Irving, TX 75015-2472, USA
Phone Number: (800) 299-8694

Date: 10/15/2008
Invoice Number: 9000243054
Patient Name: [redacted]
Facility Name: J.C. Blair Memorial Hospital
Total Due: $ 0.00

Please check box [ ] if cardholder's billing address is different than requestor's address and note on the reverse of this remittance slip.

[redacted]
PO BOX 59
MAPLETON DEPOT, PA 17052

Card #: _____
Exp. Date: _____
Security Code: _____
Cardholder Signature: _____
Contact Phone Number: _____
Total Payment: _____

PENGAD 800-631-6989

EXHIBIT
2

VERIFICATION

I, CHARLOTTE HAGANS, hereby state that the averments of fact contained in the foregoing CLASS ACTION COMPLAINT are true to the best of my knowledge or information and belief.

This verification is made subject to the penalties of 18 Pa. C.S.A. §4904 relating to unsworn falsification to authorities.

Charlotte Hagans

CHARLOTTE HAGANS

EXHIBIT
4

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

ANTHONY C. MENGINE LAW, INC. D/B/A CHIURAZZI & MENGINE, LLC; and CHARLOTTE HAGANS,	CIVIL DIVISION
Plaintiffs,	No. GD-09-012923
v.	(coordinated with GD-09-012911; GD-09-012919; GD-09-012922; and GD-09-014785)
HEALTHPORT,	**HEALTHPORT TECHNOLOGIES LLC'S PRELIMINARY OBJECTIONS, BRIEF IN SUPPORT OF PRELIMINARY OBJECTIONS AND PROPOSED ORDER**
Defendant.	Filed on behalf of Defendant HealthPort
	Counsel of Record for this Party:
	Richard W. Hosking Pa. I.D. #32982
	James C. Swetz Pa. I.D. #208717
	K&L GATES LLP K&L Gates Center 210 Sixth Avenue Pittsburgh, PA 15222-2613 412/355-6500 412/355-6501 Firm. I.D. #148

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

ANTHONY C. MENGINE LAW, INC. D/B/A CHIURAZZI & MENGINE, LLC; and CHARLOTTE HAGANS,	)	CIVIL DIVISION
	)	
	)	No. GD-09-012923
	)	
Plaintiffs,	)	(coordinated with GD-09-012911; GD-09-012919; GD-09-012922; and GD-09-014785)
	)	
v.	)	
	)	
HEALTHPORT,	)	**HEALTHPORT TECHNOLOGIES LLC'S PRELIMINARY OBJECTIONS**
	)	
Defendant.	)	
	)	
	)	Filed on behalf of Defendant HealthPort
	)	
	)	Counsel of Record for this Party:
	)	
	)	Richard W. Hosking Pa. I.D. #32982
	)	
	)	James C. Swetz Pa. I.D. #208717
	)	
	)	K&L GATES LLP K&L Gates Center 210 Sixth Avenue Pittsburgh, PA 15222-2613 412/355-6500 412/355-6501 Firm. I.D. #148

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

ANTHONY C. MENGINE LAW, INC. D/B/A CHIURAZZI & MENGINE, LLC; and CHARLOTTE HAGANS,	)	CIVIL DIVISION
	)	No. GD-09-012923
Plaintiffs,	)	(coordinated with GD-09-012911; GD-09-012919; GD-09-012922; and GD-09-014785)
v.	)	
HEALTHPORT,	)	
Defendant.	)	

DEFENDANT HEALTHPORT TECHNOLOGIES, LLC'S PRELIMINARY OBJECTIONS TO PLAINTIFF'S CLASS ACTION COMPLAINT

AND NOW COMES Defendant, HealthPort Technologies, LLC ("HealthPort"), by and through its counsel, K&L Gates LLP, and hereby sets forth the following Preliminary Objections pursuant to Rule 1028(a)(4) of the Pennsylvania Rules of Civil Procedure in response to the Class Action Complaint filed by Plaintiffs Anthony C. Mengine Law Inc. d/b/a Chiurazzi & Mengine, LLC ("C&M") and Charlotte Hagans ("Hagans"). In support of these Preliminary Objections, HealthPort states the following:

I. DEMURRER TO COUNTS I AND V

1. Count I of the Complaint seeks damages for breach of contract. Plaintiffs allege that the rate requirements of the Pennsylvania Medical Records Act, 42 Pa.C.S. § 6152 *et. seq.* ("the Act"), are implied terms of a contract between the parties whereby HealthPort produced medical records to the Plaintiffs upon written request. Count V seeks a declaration that Plaintiffs' construction of the Act is correct.

2. Plaintiffs allege that the rates dictated by section 6152 of the Act, 42 Pa.C.S. § 6152, are merely a statutory maximum, or a permissible "ceiling" that a medical record reproduction company ("MRRC") may charge when producing medical records to a patient or a patient's representative. Plaintiffs construe the Act as requiring that bills for retrieving, copying and producing medical records be cost-based if in fact the actual cost is less than the alleged "ceiling" rate.

3. Plaintiffs' construction of the Act is inconsistent with the language or the structure of the Act as it applies to MRRCs, contravenes sound notions of public policy and common sense, and conflicts with decisions from other jurisdictions interpreting similar statutes relating to rates that may be charged for provision of medical records by MRRCs.

4. Plaintiffs incorrectly rely on 42 Pa.C.S. § 6152(a)(1) and (2)(i) for the proposition that the rates set forth therein are a maximum "ceiling," and that HealthPort is obligated thereunder to estimate and charge only its actual and reasonable cost of fulfilling medical record requests. This reliance is misplaced, because §§ 6152(a)(1) and (2)(i), and the rates set forth therein, apply only to "a health care provider or facility or a designated agent" fulfilling medical record requests *pursuant to a subpoena*, and Plaintiffs' allegations relate only to *non*-subpoena medical record requests.

5. The *non*-subpoena medical record requests alleged by Plaintiffs in this case are governed by § 6155 of the Act, 42 Pa.C.S. § 6155. Section 6155 incorporates by reference the rates expressly set forth in § 6152(a)(2)(i), but imposes these rates only upon a "health care provider or facility." Section 6155 conspicuously excludes the term "designated agent." Accordingly, because HealthPort is an MRRC and not a "health care provider or facility,"

HealthPort is not obligated to charge only the rates set forth in § 6152(a)(2)(i), and is free to contract with a medical record requester at invoiced rates.

5. Plaintiffs have merely alleged that at all times HealthPort charged the rates set forth in § 6152(a)(2)(i), and have not identified any source of a contractual or statutory duty to estimate and charge only the actual and reasonable cost of fulfilling medical record requests. Plaintiffs' breach of contract claim must fail, because Plaintiffs have failed to establish, as a matter of law, that HealthPort breached an implied or express term of any contract between the parties. *See Lackner v. Glosser*, 892 A.2d 21, 30 (Pa. Super. Ct. 2006).

6. Plaintiffs' breach of contract claim also fails, because even if HealthPort did have a duty to charge fees less than those expressly provided in 42 Pa.C.S. § 6152(a)(2)(i), Plaintiffs' Complaint makes clear that HealthPort complied with that duty by obtaining "prior approval" for the fees that it did charge.

7. Section 6152(a)(2)(i) provides that "[n]o other charges for the retrieval, copying and shipping or delivery of medical records other than those set forth in this paragraph shall be permitted *without prior approval of the party requesting the copying of medical records.*" In *Liss & Marion, P.C. v. Recordex Acquisition Corp.*, 937 A.2d 503, 513 (Pa. Super. Ct. 2007), the Pennsylvania Superior Court held, based on this language, that HealthPort could only have one conceivable duty under the Act, and that was "the *duty to seek prior approval* of any charges for the copying of medical records not specifically provided for in the Act."

8. Plaintiffs' Complaint alleges that the parties entered a contract for the provision of medical records at the amount stated in the invoice, that they received those records, and that they paid the amount stated in the invoice. Plaintiffs do not allege that they objected to these amounts or that they returned the records to HealthPort.

9. Accordingly, HealthPort did not violate any duty imposed by the Act, because HealthPort obtained prior approval for the fees it charged Plaintiffs.

10. Finally, Plaintiffs construction of the Act is incorrect, because Plaintiffs' construction would work absurd results, Plaintiffs' construction would conflict with decisional law interpreting similar statutes in other jurisdictions, and because the plain language of sections 6152 and 6155, when read as a whole, evidences a legislative intent that (1) the rates set forth in § 6152(a)(2)(i) are *per se* reasonable and 2) an MRRC like HealthPort be excluded from § 6152(a)(2)(i) rates under § 6155.

11. Therefore, the Court should sustain HealthPort's Preliminary Objections as to Plaintiffs' actions for breach of contract (Count I) and declaratory judgment (Count V), and dismiss these claims.

II. DEMURRER TO COUNTS II-IV: RESTITUTION, CONSTRUCTIVE TRUST, AND UNJUST ENRICHMENT

12. In the wake of the Pennsylvania Supreme Court's decision in *Liss & Marion, P.C. v. Recordex Acquisition Corp.*, 983 A.2d 652 (Pa. 2009), Plaintiffs' claims for restitution (Count II), constructive trust (Count III) and unjust enrichment (Count IV) are barred due to the availability of an adequate remedy at law – a breach of contract action based on the implied terms of the Act. However, these claims must also be dismissed because these claims are meritless and fail as a matter of law, for the reasons set forth below.

13. Plaintiffs' unjust enrichment claim fails, because it is premised on an alleged failure to fulfill medical record requests at the actual and reasonable cost of performing these activities. However, because, the Act does not impose such a requirement on an MRRC like HealthPort, and because HealthPort obtained prior approval for the rates that it did charge, Plaintiffs have not alleged any inequitable conduct on the part of HealthPort. Plaintiffs' unjust

enrichment claim should therefore be dismissed. *See AmeriPro Search, Inc. v. Fleming Steel Co.*, 787 A.2d 988, 991 (Pa. Super. Ct. 2001)

14. Plaintiffs' claims for restitution and a constructive trust also fail, because Plaintiffs' predicate claim for unjust enrichment is legally insufficient, as discussed above. *See Wilson Area Sch. Dist. v. Skepton*, 895 A.2d 1250, 1254 (Pa. 2006); *DeMarchis v. D'Amico*, 637 A.2d 1029, 1036 (Pa. Super. Ct. 1994). Accordingly, Plaintiffs' restitution claim should be dismissed.

III. LEGAL INSUFFICIENCY OF DEMAND FOR PUNITIVE DAMAGES

15. Plaintiffs' demand for relief includes a demand for punitive damages.

16. Pennsylvania law does not permit recovery of punitive damages for a breach of contract claim in the absence additional wrongful conduct. *See, e.g., Daniel Adams Associates, Inc. v. Rimbach Pub. Inc.*, 429 A.2d 726, 728 (Pa. Super. Ct. 1981). Furthermore, the Act does not provide for recovery of punitive damages. Plaintiffs' demand for punitive damages should therefore be stricken.

IV. DEMURRER TO COUNTS I-IV: VOLUNTARY PAYMENT

17. The voluntary payment doctrine bars recovery of a payment not legally owed, but paid voluntarily. *Acme Markets, Inc. v. Valley View Shopping Center*, 493 A.2d 736, 737 (Pa. Super. Ct. 1985). Plaintiffs have not pleaded that they were operating under a mistake of fact when they voluntarily paid the invoices attached as Exhibits 1 & 2 to the Complaint. Plaintiffs have pleaded instead that HealthPort billed the alleged maximum rates allowed by the Act. Those rates were publicly available to Plaintiffs for comparison to the rates that were billed. Plaintiffs failed to allege that HealthPort did anything to mislead Plaintiffs into thinking they were not being billed the alleged statutory maximum.

18. If Plaintiffs were operating under a mistaken interpretation of law at the time they paid HealthPort's bill, or failed to take any step to determine whether they were being billed the alleged legally mandated rate, then they are barred from recovery under the voluntary payment doctrine.

V. LEGAL INSUFFICIENCY OF SALES TAX CLAIM

19. Pennsylvania law provides a right to petition the Department of Revenue for refund of sales taxes "to which the Commonwealth is not rightfully entitled." 72 P.S. §§ 7252-53 & 10003.1. All taxes collected must be remitted to the Commonwealth unless refunded to the taxpayer. 72 P.S. § 7225.

20. Plaintiffs have not alleged that they have petitioned the Department of Revenue and pursued their administrative remedy for a refund before bringing a claim for sales tax in this Court. In addition, all sales taxes collected by HealthPort have been remitted to the Department of Revenue in accordance with Pennsylvania law. Accordingly, Plaintiffs' claim for sales taxes must be dismissed, because Plaintiffs have an adequate remedy at law for seeking a refund which they have not pursued, and because HealthPort is no longer in possession of sales taxes collected on behalf of the Commonwealth. *Lilian v. Commonwealth*, 354 A.2d 250, 252-53 (Pa. 1974); *Aldine Apartments, Inc. v. Commonwealth, Dep't of Revenue*, 379 A.2d 333, 336 (Pa. Cmwlth. 1977).

VI. LEGAL INSUFFICIENCY OF REQUEST FOR ATTORNEYS' FEES

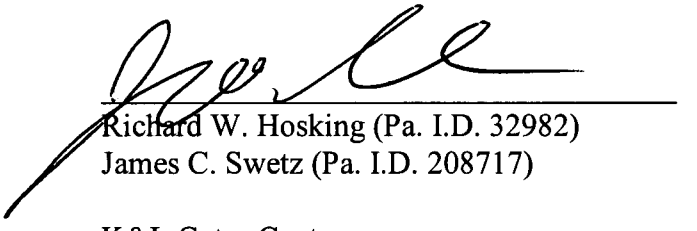
21. Attorneys' fees are not recoverable by a prevailing party in a lawsuit absent a contract provision authorizing them or a statute allowing for their recovery. The Plaintiff has pleaded neither condition. Accordingly, the demand for attorneys' fees should be stricken.

WHEREFORE, for the reasons stated above and in the accompanying memorandum of law, which is incorporated by reference, HealthPort respectfully requests that the Court dismiss Plaintiffs' Complaint with prejudice, and grant any other appropriate relief.

Dated: March 30, 2010

Respectfully submitted,

K&L GATES LLP



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IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

ANTHONY C. MENGINE LAW, INC. D/B/A CHIURAZZI & MENGINE, LLC; and CHARLOTTE HAGANS, Plaintiffs, v. HEALTHPORT, Defendant.	CIVIL DIVISION No. GD-09-012923 (coordinated with GD-09-012911; GD-09-012919; GD-09-012922; and GD-09-014785) **HEALTHPORT TECHNOLOGIES LLC'S BRIEF IN SUPPORT OF PRELIMINARY OBJECTIONS** Filed on behalf of Defendant HealthPort Counsel of Record for this Party: Richard W. Hosking Pa. I.D. #32982 James C. Swetz Pa. I.D. #208717 K&L GATES LLP K&L Gates Center 210 Sixth Avenue Pittsburgh, PA 15222-2613 412/355-6500 412/355-6501 Firm. I.D. #148

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I. INTRODUCTION AND SUMMARY OF ARGUMENT

This putative class action presents, at bottom, a contractual and quasi-contractual claim against Defendant HealthPort Technologies, LLC ("HealthPort"), a medical record reproduction company ("MRRC"), seeking in essence to recover alleged overpayments of bills for the reproduction and production of patient medical records. All of these various claims rest exclusively on an incorrect construction of Pennsylvania's Medical Records Act, 42 Pa.C.S. §§ 6151-6160 (the "Act"), a proffered construction which is contrary to the plain language and structure of the statute, sound notions of public policy, and controlling decisional law interpreting similarly worded statutes in other jurisdictions. Put simply, all of Plaintiffs' claims must fail, because Plaintiffs have failed to identify any concrete legal source of a MRRC's duty to estimate the actual and reasonable cost of storing, retrieving, reproducing and delivering medical records to requesters, and to charge only that cost when fulfilling requests. Accordingly, Plaintiffs' claims for breach of contract (Count I), restitution (Count II), imposition of a constructive trust (Count III), unjust enrichment (Count IV) and declaratory relief (Count V) must be dismissed as legally insufficient, and Plaintiffs' Complaint must be dismissed in its entirety.

II. FACTUAL AND PROCEDURAL HISTORY

A. Procedural History

Anthony Mengine Law, Inc. d/b/a Chiurazzi & Mengine, LLC ("C&M"), and Charlotte Hagans ("Hagans"), initially filed this putative class action against HealthPort in the Court of Common Pleas of Allegheny County, Pennsylvania on July 15, 2009.[1]

[1] On September 18, 2009, four other putative class actions containing similar allegations were assigned to the Commerce/Complex Litigation Center to be coordinated by Judge Stanton R. Wettick. These actions, which are still pending in state court, are styled *Wayne M. Chiurazzi*

On August 20, 2009, HealthPort removed the instant action to the United States District Court for the Western District of Pennsylvania, on the basis of the Class Action Fairness Act of 2005. On February 4, 2010, the Honorable Judge Stanton R. Wettick issued an Opinion and Order sustaining in part and overruling in part the preliminary objections filed by defendants in the State Court Actions, and allowing the breach of contract and declaratory judgment claims to proceed in those cases.[2] On February 12, 2010, the Honorable Gary Lancaster, Chief Judge of the United States District Court for the Western District of Pennsylvania, ordered the case be remanded to the Court of Common Pleas of Allegheny County Pennsylvania. On February 26, 2010, this action was consolidated with the State Court Actions and assigned to Judge Wettick.[3] HealthPort now files these preliminary objections and supporting brief pursuant to Judge Wettick's March 3, 2010 order requiring (1) Plaintiffs to file an amended complaint in their action against defendant MRO, (2) MRO to file its preliminary objections to Plaintiffs' amended complaint by March 30, 2010, and (3) HealthPort to file its preliminary objections to Plaintiffs' Complaint by March 30, 2010.[4]

Law Inc. d/b/a Chiurazzi & Mengine, LLC v. MRO Corp., Case No. GD-09-012911; *Wayne M. Chiurazzi Law Inc. d/b/a Chiurazzi & Mengine, LLC v. UPMC Presbyterian Shadyside*, Case No. GD-09-012919; *Wayne M. Chiurazzi Law Inc. d/b/a Chiurazzi & Mengine, LLC v. IOD Corp.*, Case No. GD-09-012922; and *Anthony C. Mengine Law, Inc. d/b/a Chiurazzi & Mengine, LLC v. Magee-Womens Hospital of University of Pittsburgh Medical Center*, Case No. GD-09-014785 (collectively "the State Court Actions"). A true and correct copy of Plaintiffs' Complaint in the instant action is attached as Exhibit A.

[2] *See infra* § II.C for a discussion of this Opinion and Order, a true and correct copy of which is attached as Ex. B.

[3] A true and correct copy of this Order is attached as Ex. C.

[4] A true and correct copy of this Order is attached as Ex. D. HealthPort incorporates by reference all of the arguments raised by defendants in the State Court Actions. In these Preliminary Objections and Brief in Support thereof, HealthPort raises additional arguments supporting dismissal of Plaintiffs' action to assist the Court in resolution of this matter.

B. Plaintiffs' Allegations in the Instant Action

The allegations of Plaintiffs' Complaint are as follows. HealthPort is an MRRC that contracts with hospitals and other health care providers and facilities to retrieve, reproduce and provide copies of medical records to authorized requesting entities for a fee. Compl. ¶ 6. Authorized requesters include, among others, patients and their designees, representatives and attorneys. *Id.* ¶ 21.

In their Complaint, Plaintiffs allege that, in or around August and September of 2008, Plaintiffs C&M and Hagans requested medical records from two Pennsylvania hospitals that contracted with HealthPort to fulfill such requests. *Id.* ¶¶ 29, 32. Pursuant to customary practice of MRRCs doing business in Pennsylvania, HealthPort sent Plaintiffs invoices, setting forth the charges for search and retrieval, reproduction of pages, shipping and sales tax. *Id.* ¶¶ 30, 33; Exs. 1 & 2. Plaintiffs paid these charges, without objection, and HealthPort fulfilled their requests by sending copies of these medical records to Plaintiffs (which they presumably retained and used). *Id.* at ¶¶ 31, 34.[5]

Fees charged by MRRCs in connection with the subpoena of records are regulated under the Commonwealth's Medical Records Act (the "Act") and implementing regulations. The portions of the Act relevant to the Complaint's allegations provide, in pertinent part, as follows:

> **§ 6152. Subpoena of records.**
>
> **(a) Election.--**
>
> (1) When a subpoena duces tecum is served upon any health care provider or an employee of any health care facility licensed under the laws of this Commonwealth, requiring the production of any medical charts or records at any action or

[5] The invoices attached as Exs. 1 & 2 to Plaintiffs' Complaint show that the invoices were actually sent with copies of the requested records enclosed. Plaintiffs then apparently paid the invoices and kept the records.

> proceeding, ***it shall be deemed a sufficient response to the subpoena if the health care provider or health care facility notifies the attorney for the party causing service of the subpoena . . . of the health care provider's or facility's election to proceed under this subchapter and of the estimated actual and reasonable expenses of reproducing the charts or records.***
>
> (2)(i) . . . ***[T]he health care provider or facility or a designated agent shall be entitled to receive payment of such expenses before producing the charts or records.*** The payment shall not exceed $15 for searching for and retrieving the records, $1 per page for paper copies for the first 20 pages, 75¢ per page for pages 21 through 60 and 25¢ per page for pages 61 and thereafter; $1.50 per page for copies from microfilm; plus the actual cost of postage, shipping or delivery. ***No other charges for the retrieval, copying and shipping or delivery of medical records other than those set forth in this paragraph shall be permitted without prior approval of the party requesting the copying of the medical records.*** The amounts which may be charged shall be adjusted annually beginning on January 1, 2000, by the Secretary of Health of the Commonwealth based on the most recent changes in the consumer price index reported annually by the Bureau of Labor Statistics of the United States Department of Labor.

(emphasis added). In addition, Section 6155(b) of the Act, 42 Pa.C.S. § 6155(b), provides:

> **§ 6155. Rights of patients.**
>
> .....
>
> **(b) Rights to records generally.--**
>
> (1) ***A patient or his designee, including his attorney***, shall have the right of access to his medical charts and records and to obtain photocopies of the same, without the use of a subpoena duces tecum, for his own use. ***A health care provider or facility shall not charge a patient or his designee, including his attorney, a fee in excess of the amounts set forth in section 6152(a)(2)(i) (relating to subpoena of records).***

(emphasis added). Plaintiffs' allegations relate not to subpoenas but to medical record requests by an attorney pursuant to written authorization of a client (C&M), and by a mother on behalf of her son (Hagan). Compl. ¶¶ 29-34. Accordingly, Plaintiffs' claims implicate the rates set forth in § 6152(a)(2)(i) only by virtue of their being cross-referenced in § 6155(b)(1). It is §

6155(b)(1) and § 6152(a)(2)(i) upon which Plaintiffs must base their tentative claims, not §§ 6152(a)(1) & (2)(i). Section 6155(b)(1) merely states that the health care provider or facility may not charge amounts in excess of the amounts set forth in section 6152(a)(2)(i), as adjusted annually by Secretary of Health regulations.

Conspicuously ignoring § 6155(b)(1), the applicable statute, and instead focusing their attention on 42 Pa.C.S. § 6152(a)(1) , Plaintiffs allege that an MRRC must estimate its actual costs of fulfilling medical record requests and then charge only that cost and nothing more. Compl. ¶ 11. As expressly authorized under Pennsylvania law – and as is undisputed in this case – HealthPort charged Plaintiffs the exact fees currently stated under Department of Health regulations for search, retrieval and reproduction, as well as the actual postage and shipping costs associated with their requests. Compl. ¶¶ 25-26.[6] HealthPort also assessed Plaintiffs a sales tax pursuant to a mandate from the Pennsylvania Department of Revenue, although Plaintiffs claim that sales tax for reproduction of medical records is unauthorized as a matter of law.[7] *Id.* ¶¶ 12, 27-28.

Despite the fee provisions explicitly set out in 42 Pa.C.S. § 6152(a)(2)(i) and its implementing regulations, Plaintiffs assert that Pennsylvania law additionally "imposes a duty on MRRCs to establish procedures to estimate their ***actual*** costs for the search, retrieval, reproduction and transmittal of medical records and then to charge [requesters] ***only*** that cost."

---

[6] Plaintiffs allege the rates they were charged in paragraphs 25-26 of their Complaint. These were the exact rates set forth by Secretary of Health regulations in effect during those time periods, as shown in annual rate regulations promulgated pursuant to the Act. For the Court's convenience, Pennsylvania Bulletin notices of effective rates in effect during the time periods relevant to Plaintiffs' allegations are attached as Ex. E.

[7] A letter from the Pennsylvania Department of Revenue authorizing HealthPort's assessment of sales tax for medical records is attached as Ex. F. Plaintiffs' have no claim for sales taxes in this Court as discussed *infra* § III.F.

Compl. ¶ 11 (emphasis added). Accordingly, the crux of Plaintiffs' case is that HealthPort charged them the exact cost authorized under Pennsylvania regulations pursuant to the Act, an amount allegedly in excess of the "actual and reasonable cost of searching for, retrieving, reproducing and transmitting the medical records[,]" and that Plaintiffs are entitled to be paid the difference under a suite of contractual and quasi-contractual theories. *Id.* ¶¶ 3, 55-83.

Based on the above allegations, Plaintiffs allege that they and putative class members are entitled to damages and injunctive relief based on five legal and equitable theories of recovery. Count I of the Complaint asserts a cause of action for breach of contract on the basis that the Act's provisions implicitly govern the terms of each agreement to provide medical records to requesters, and the alleged violation of the Act's fee requirements constitutes a breach of these agreements. *Id.* ¶¶ 55-64. Count II seeks restitution for fees HealthPort allegedly charged "in excess of [its] actual and/or estimated actual costs incurred in the search for and retrieval, reproduction, and transmittal of Pennsylvania hospital and affiliated entity medical records." *Id.* ¶ 67. Count III seeks a constructive trust based on the allegation that "HealthPort has wrongfully acquired and retained money obtained from Plaintiffs." *Id.* ¶ 72. Count IV seeks a judgment for the amount of money unjustly conferred on HealthPort under a theory of unjust enrichment and quasi-contract. *Id.* ¶¶ 74-78. Finally, Count V seeks a declaration that Plaintiffs' construction of the Act is correct and "that the conduct of HealthPort is in breach of contract and/or unlawful." *Id.* ¶ 83.

As demonstrated more fully below, all of Plaintiffs' claims fail, because (a) the rates set forth in the Act apply only to a health care facility or provider, and not an MRRC like HealthPort, and (b) even if these rates do apply, HealthPort has complied with all of the Act's

requirements, by obtaining prior approval for the rates that it did charge – the rates expressly set forth in the Act and Secretary of Health regulations in effect at the time fees were assessed.

C. The *Liss & Marion* Decision

On November 16, 2009, the Supreme Court of Pennsylvania held that a contract implied-in-fact existed between an MRRC and attorney medical record requester in a case involving similar allegations of medical record overcharges, and that this contract would support a breach of contract claim for alleged medical record charges in excess of the rates explicitly set forth in the Act. *See Liss & Marion P.C. v. Recordex Acquisition Corp.*, 983 A.2d 652 (Pa. 2009). Notably, the Court did not address the merits of a breach of contract claim based on the Act, nor did the Court engage in a meaningful construction of the Act's text with respect to the requirements it imposes on an MRRC like HealthPort.

The Court summarily explained the Act's requirements, as follows:

> The [Act] imposes a duty on medical care providers, like the hospitals that hired [defendants], to produce medical records in a timely fashion, *i.e.*, within three days of receiving a subpoena or request. 42 Pa.C.S. § 6152(a)(1). A hospital may elect to provide either the original records or certified copies. 42 Pa.C.S. § 6152(a)(1). If the hospital chooses to provide copies, it must supply in its response to the request an estimate of the 'actual and reasonable expenses of reproducing the charts or records.' 42 Pa.C.S. § 6152(a)(1).
>
> Separately, the [Act] also places limits on the prices charged by medical providers or their "designated agents" for copying medical records. 42 Pa.C.S. 6152(a)(2). . . . The [Act] states that '[n]o other charges for the retrieval, copying and shipping or delivery of medical records other than those set forth in this paragraph shall be permitted without prior approval of the party requesting the copying of the medical records.' 42 Pa.C.S. §6152(a)(2)(i).

Id. at 658. The Court did not draw a distinction between subpoenaed and non-subpoenaed medical record requests, despite the fact that § 6152 only applies to subpoenaed records.[8]

The *Liss & Marion* Court did not address § 6155(b)(1), nor did it specifically address the question of whether a MRRC must charge "actual and reasonable" rates for electronically stored records. *Id.* at 663 n.9. The Court addressed only the question of whether an MRRC could charge one of two rates, which the Court identified as a microfilm rate ("Rate M"), or a default rate ("Rate D"), for paper copies electronically stored but not stored on microfilm. The Court held that "Rate M was the highest permissible charge for certified copies under the [Act] and applies only to microfilm." *Id.* at 656. The Court went on to acknowledge that the Act imposed a lower "default rate for copies from *all other media*." *Id.* at 658 (emphasis added).

The Court in *Liss & Marion* rejected the appellant MRRC's argument that, because the Act does not specifically address electronic records, those records can be billed at "any reasonable rate." *Id.* at 663 n.9. Accordingly, an MRRC could charge Rate D, the rates expressly set forth in the Act, as adjusted annually by the Secretary of Health, for paper copies from electronically stored records, but could not charge Rate M for those records. This is all the *Liss & Marion* Court held, and, significantly, this is all that Plaintiffs allege HealthPort did in the instant case – *i.e.*, that HealthPort charged Rate D for paper copies of electronically stored records.

Consequently, in holding that Plaintiffs had stated a claim for breach of contract based upon the terms of the Act, the *Liss & Marion* Court ***did not*** squarely address the central issue posited by Plaintiffs here – whether an MRRC must provide paper copy medical records from an electronic medium in response to non-subpoenaed requests "at cost," or, alternatively, whether it

[8] *See infra*, § III.B.1.(a) for a discussion of § 6152's applicability only to subpoenaed records.

can charge Rate D as set forth in the Act. *Id.* ("Because we decide that, in fact, the enumerated rate 'for paper copies,' rate D, does apply and should have been charged, we do not reach the issue of what rate may be charged when the [Act] does not contain a specific relevant rate.").

D. Judge Wettick's Opinion and Order

On February 4, 2010, the Honorable Judge Stanton R. Wettick issued an Opinion and Order ("Opinion") with respect to the State Court Actions (not including the instant case against HealthPort, which was still pending in federal court at that time). In his Opinion, Judge Wettick concluded the following:

- (1) as set forth in *Liss & Marion*, a breach of contract claim against an MRRC defendant could be predicated on a violation of the terms of the Act, *see* Op. at 4;
- (2) a hospital cannot impose a charge on a requester in excess of Rate D for paper copies, the applicable rate set forth in the Act and its annual adjusting regulations for paper copies, *see id.*;
- (3) the basis of both parties' arguments in the State Court Actions was § 6152(a)(2)(i), *see id.* at 5;
- (4) based on the plain language selected by the legislature in § 6152(a)(2)(i) and the lack of any modifying provisions, the term "such expenses" used in § 6152(a)(2)(i) could only mean "actual and reasonable expenses of reproducing the charts or records" as those were the only expenses referred to in § 6152(a)(1), *see id.* at 6;
- (5) because the *Liss & Marion* plaintiffs never argued that the MRRC defendants could not charge rate D for paper copies, the issue raised in the State Court Actions (and in the instant action) was never considered by the Supreme Court, *see id.* at 9; and
- (6) the Court could not rule as a matter of law that the voluntary payment defense applied. *See id.*

As demonstrated below, it does not appear that the Court considered, because Plaintiffs never presented, the proper basis for their breach of contract and declaratory judgment claims under the Act. Specifically, this Court's February 4, 2010 Opinion and Order focused exclusively on § 6152 and its subparts and makes no mention of § 6155, which governs non-subpoena requests for medical records, like the transactions alleged by Plaintiffs here. Based on

a reading of § 6155, Plaintiffs' claims must fail. Furthermore, HealthPort obtained prior approval for the rates that it did charge, and thus complied with the Act to the extent that it did apply to transactions between an MRRC and a requester. Accordingly, and for the reasons discussed in more detail below, Counts I-V of Plaintiffs' Complaint must fail.

III. ARGUMENT

A. Standard of Review for Preliminary Objections in the Nature of a Demurrer

Rule 1028(a)(4) of the Pennsylvania Rules of Civil Procedure provides for the assertion of preliminary objections, in the nature of a demurrer, addressing the legal insufficiency of a pleading.

When ruling on preliminary objections in the nature of a demurrer, the court considers as true all well-pled facts that are material and relevant, as well as all reasonable inferences that may be drawn from those facts. *Giffin v. Chronister*, 616 A.2d 1070, 1073 (1992) (citations omitted). In determining whether to sustain a demurrer the court need not accept as true conclusions of law, unwarranted inferences from the facts, argumentative allegations, or expressions of opinion. *Id.* Preliminary objections should be sustained when it is free from doubt that the plaintiff will be unable to prove facts sufficient to establish his right to relief. *Werner v. Zazyczny*, 681 A.2d 1331, 1335 (Pa. 1996).

In this case, none of the claims brought by Plaintiffs against HealthPort withstand this scrutiny, and must be dismissed. Even if, for purposes of these Preliminary Objections, it is assumed that the facts alleged in Plaintiffs' Complaint are true, Plaintiffs' claims against HealthPort are still legally insufficient. HealthPort's Preliminary Objections should be sustained, and Plaintiffs' Complaint should be dismissed.

B. Plaintiffs' Breach of Contract and Declaratory Judgment Claims are Legally Insufficient.

To state a claim for breach of contract under Pennsylvania law, a plaintiff must establish "(1) the existence of a contract, including its essential terms; (2) breach of a duty imposed by contract; and (3) resulting damages." *Lackner v. Glosser*, 892 A.2d 21, 30 (Pa. Super. Ct. 2006). Plaintiffs allege that the Act imposes a duty on an MRRC to estimate and charge the actual and reasonable cost of storing, reproducing and delivering medical records to requesters, and that HealthPort breached its contractual duty to Plaintiffs when it charged the rates explicitly set forth in the Act and its regulations. As discussed below, this claim fails, because it rests on a fundamentally flawed interpretation of the Act. Accordingly, Plaintiffs have identified no legal source of the implied term to fulfill medical record requests "at cost," because there is no Pennsylvania law imposing such a requirement.

Plaintiffs allege, and HealthPort acknowledges, that Plaintiffs and HealthPort entered a contract for the provision of medical records to patient and attorney requesters. However, Plaintiffs' breach of contract action still fails as a matter of law. *First*, Plaintiffs' contractual and declaratory judgment claims fail because the Act, by its terms, does not apply to HealthPort. Specifically, 42 Pa.C.S. § 6152(a)(2)(i), which Plaintiffs advance as the sole basis of their breach of contract claim, applies to health care facilities and providers and their "designated agents." However, that provision is inapplicable to non-subpoena record requests like those presented in this case, which requests are governed by § 6155. Section 6155 governs non-subpoena requests by providing a right of access to medical records, but its incorporation of the rates set forth in § 6152(a)(2)(i) conspicuously exclude the term "designated agent," and impose the Act's rates only on a "health care provider or facility." An MRRC such as HealthPort does not fall within the meaning of that phrase. Therefore, an MRRC like HealthPort is free to contract with a requester at prices set out in the invoice. Indeed, Plaintiffs' Complaint makes clear there was a

contract here; this was a unilateral contract based on the conduct of Plaintiffs and HealthPort and governed by the terms of HealthPort's invoices, not the terms of the Act.

Second, Plaintiffs' breach of contract claim fails because Plaintiffs' Complaint establishes that HealthPort complied with the Act. HealthPort obtained prior approval for the rates it did charge when, as Plaintiffs allege, Plaintiffs requested records, HealthPort invoiced the records, and Plaintiffs paid the invoices and retained these records.

Finally, as discussed below, the rates charged by HealthPort complied with the Act.

1. The Act Does Not Impose a Duty on HealthPort to Estimate and Charge Actual and Reasonable Cost.

Section 6155(b)(1), and not § 6152, applies to the non-subpoena medical record requests in this case. Section 6155(b)(1) provides that "[a] health care provider or facility shall not charge a patient or his designee, including his attorney, a fee in excess of the amounts set forth in section 6152(a)(2)(i) (relating to subpoena of records)." As discussed below, this provision makes clear that the rates set forth in the Act *do not* apply to an MRRC like HealthPort.

(a) Section 6152 only applies to subpoena requests.

The plain terms of §§ 6152(a)(1) and (2)(i), apply to *subpoena requests* for medical records, which deem it a "sufficient response" to a subpoena for a "health care provider or facility" to respond to a subpoena by sending its "election to proceed" under the subchapter, and a statement of the estimated actual and reasonable costs of fulfilling the request. Indeed, the title of § 6152 is "Subpoena of records" and § 6155(b)(1) refers parenthetically to the rates in § 6152(a)(2)(i) as "relating to subpoena of records." Here, Plaintiffs' Complaint deals exclusively with medical requests by an attorney pursuant to patient authorization and a request by a patient's relative. Accordingly, the Court must analyze § 6155, not § 6152(a)(1), in order to determine the requirements imposed on an MRRC by the Act.

(b) Section 6155 applies only to "health care providers and facilities."

Section 6155(b), and the rate limitations in § 6152(a)(2)(i), apply only to a "health care provider or facility." Where a legislative definition of a word or phrase in a statute is absent, the Court should define that term according to its plain and ordinary usage. 1 Pa.C.S. §1903(a) ("Words and phrases shall be construed according to rules of grammar and according to their common and approved usage."); *Koken v. Reliance Ins. Co.*, 893 A.2d 70, 81 (Pa. 2006) (same); *Crusco v. Ins. Co. of North Am.*, 437 A.2d 52, 54 (Pa. Super. Ct. 1981) ("it is assumed that the legislature uses words in their standard, or accepted, sense").

HealthPort is not a health care provider or facility in any ordinary sense of this phrase; HealthPort is instead an MRRC that contracts with hospitals to provide medical records to requesters.[9] Accordingly, the rates set forth in § 6152 cannot apply to HealthPort. Nor does Plaintiffs' attempt to apply the rates in § 6152(a)(2)(i) by alleging that HealthPort is a "designated agent" (Compl., ¶ 14), undermine this conclusion, as those words are notably absent from § 6155 altogether, and § 6155 is the provision that makes the Act's rates applicable to HealthPort in this case. *Commonwealth of Pa. v. Fedorek*, 946 A.2d 93, 99-101 (Pa. 2008) (holding that the conspicuous absence of a modifier in one subsection of a disorderly conduct statute was a clear indication of legislative intent to have the modifier not apply to that subsection); *Commonwealth of Pa. v. Berryman*, 649 A.2d 961, 965 (Pa. Super. Ct. 1994) ("[w]here a legislature includes specific language in one section of a statute and excludes it from

[9] Although the terms "health care facility" and "health care provider" are not defined in the Act here, the definitions of those phrases set forth in the Pennsylvania Health Care Facilities Act, 35 P.S. §§ 448.103 *et. seq.*, would clearly not include an MRRC like HealthPort. *See* 35 P.S. § 448.103 (defining "health care facility" as a "facility providing clinically related health services, including, but not limited to, a general or special hospital" and defining "health care provider" as "[a]n individual, a trust or estate, a partnership, a corporation . . ., the Commonwealth, or a political subdivision or instrumentality . . . thereof, that operates a health care facility.").

another, that language should not be implied where excluded.") (citing *Bureau of Liquor Control Enforcement v. Prekop*, 627 A.2d 223 (Pa. Commw. Ct. 1993)).

(c) Section 6155 is a patient access statute that does not obligate HealthPort to furnish copies; HealthPort is free to contract with requesters for the amounts stated in invoices.

Third, § 6155(b) is an access statute that does not obligate the health care provider to furnish copies. Indeed, the statute merely states that "a patient or his designee, including his attorney, shall have the right of access to his medical charts and records . . . without the use of a subpoena" for a fee not in excess of the rates set forth in § 6152(a)(2)(i). This provision does not obligate the health care provider to do anything other than to make the medical records available to qualifying parties requesting them. If the healthcare facility elected to produce the records, it would then be subject to the rates set out in § 6152(a)(2)(i) and could not get around those rate requirements by outsourcing to an MRRC like HealthPort. In that instance, the provider would still be subject to the rates set forth in § 6152(a)(2)(i). However, since there is no obligation on the part of the health care provider to produce the records, HealthPort is free to contract with the requesting party as that party's agent or employee at the rates set out in HealthPort's invoice.

2. HealthPort Complied with the Act

Even if HealthPort *did* have some duty to charge a fee less than that explicitly provided by Pennsylvania statute in 42 Pa.C.S. § 6152 (which HealthPort disputes), Plaintiffs' Complaint makes clear that HealthPort complied with that duty by obtaining "prior approval" for the fees that it did charge. Indeed, it is undisputed in this case – and is repeatedly alleged in Plaintiffs' Complaint – that HealthPort and Plaintiffs entered a contract for the reproduction and provision of the medical records at the fee stated in the invoice. *See* Compl., ¶¶ 29-34, Exs. 1 & 2 to Complaint. Accordingly, even if there was any viable basis for believing that HealthPort had to

fulfill medical record requests "at cost," HealthPort complied with the Act by obtaining approval for the rates that it did charge.

As the Pennsylvania Superior Court confirmed in the *Liss & Marion* case,[10] an MRRC like HealthPort only has one conceivable duty under the Act, and that is "the *duty to seek prior approval* of any charges for the copying of medical records not specifically provided for in the Act." *Liss & Marion, P.C. v. Recordex Acquisition Corp.*, 937 A.2d 503, 513 (Pa. Super. Ct. 2007) (emphasis added). The Pennsylvania Superior Court based this reasoning on the express terms of 42 Pa.C.S. § 6152(a)(2)(i), which states that "[n]o other charges for the retrieval, copying and shipping or delivery of medical records other than those set forth in this paragraph shall be permitted ***without prior approval of the party requesting the copying of medical records.***" *Id.* (quoting § 6152(a)(2)(i), emphasis in opinion).

Here, the allegations of Plaintiffs' Complaint make clear that the Plaintiffs approved of the charges as stated in HealthPort's invoices, because they paid these charges without protest, thereby manifesting their approval. In August and September of 2008, the Plaintiffs each sent patient authorizations requesting reproduction of medical records. Compl., ¶¶ 19, 32. On September 2, 2008, HealthPort[11] sent the medical records to the Chiurazzi & Mengine law firm, along with HealthPort's invoice. *See* Compl., ¶ 30; Ex. 1 to the Complaint. The Complaint establishes that Plaintiff Charlotte Hagans received the medical records she requested and HealthPort's associated invoice on November 13, 2008. *See id.* at ¶ 33; Ex. 2 to the Complaint.

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[10] The *Liss & Marion* Supreme Court ruling apparently affirmed and did not disturb this aspect of the Superior Court's opinion.

[11] The invoices appended to Plaintiffs' Complaint were actually sent by ChartOne, Inc., which has now merged with HealthPort.

Both Plaintiffs then paid for the records, *id.* at ¶¶ 31, 34, and neither Plaintiff alleges they objected to or returned those records to HealthPort.

Accordingly, HealthPort did not violate any duty here, because Plaintiffs allege in their Complaint that HealthPort provided the record with the invoice. Plaintiffs certainly had the option of not paying the fees stated in the invoice and returning the records. They did not and, therefore, HealthPort received "prior approval" for the fees it charged (i.e., fees exactly equal to those lawfully provided in the Act as authorized by the Secretary of Health regulations in effect during the relevant time periods).[12] Accordingly, even if the charges that HealthPort charged deviated from those it was required to charge under the Act (which they did not) HealthPort obtained the requisite "prior approval" to assess those charges.

C. The Act Represents a Legislative Judgment That the Act's Rates are *Per* Se Reasonable and That They Do Not Apply to an MRRC Like HealthPort.

Plaintiffs incorrectly allege, despite the plain language of the statute and the express billing rates for paper copies of medical copies set forth therein, that HealthPort is obligated to charge *only* its estimated actual and reasonable cost of fulfilling medical records under the Act. This allegation lacks merit based on the text of the Act and as a matter of sound public policy and common sense.

It is a fundamental maxim of statutory construction that a court should look to the plain language of a statute to derive its meaning, as this is the most reliable indicator of legislative

[12] Recently, the United States Court of Appeals for the Sixth Circuit held that plaintiffs had no claim against an MRRC for alleged charges in excess of the actual cost of shipping medical records based on an analogous Ohio statute because "[w]hen each plaintiff requested medical records from [defendant], received and retained the records, and remitted payment in accordance with the terms of the invoices, the result was a binding contract with [defendant]" that was expressly permitted by the statute." *See Bergmoser v. Smart Document Solutions, LLC*, 268 Fed. Appx. 392, 395 (6th Cir. 2008). As Plaintiffs have alleged, this is precisely what occurred here, because, as provided in the Act, HealthPort obtained prior approval for the rates it did charge Plaintiffs – the rates expressly set forth in the Act and its regulations.

intent. *See* 1 Pa.C.S. § 1921(b) ("When the words of a statute are clear and free from all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit."). Further, in construing legislative intent from the words of a statute where the words are not explicit, a court should consider, among others, "[t]he occasion and necessity for the statute . . . [t]he mischief to be remedied[,] . . . the object to be attained[, and] . . . the consequences of a particular interpretation." 1 Pa.C.S. § 1921(c). Finally, in ascertaining the intent of the legislature from statutory text, a court should work under the presumption "[t]hat the General Assembly does not intend a result that is absurd, impossible of execution or unreasonable [and] . . . [t]hat the General Assembly intends the entire statute to be effective and certain." 1 Pa.C.S. § 1922(1)-(2).

Here, as recognized in *Liss & Marion*, § 6152(a)(2)(i) sets forth express rates to be charged for paper copies (Rate D) and microfilm copies (Rate M). The legislature would not have done so, and further would not have delegated to the Secretary of Health an annual adjustable fee, if it wished for courts to determine, on a case-by-case basis, what is a reasonable billable amount for the provision of medical records. Indeed, if this Court *were* to adopt Plaintiffs' construction of the Act, it would lead to absurd results and would contravene public policy. For instance, without a bright–line standard or concrete statutory criteria for determining what may be charged for fulfillment of medical record requests, MRRCs would be routinely whip-sawed into costly class actions based on varying interpretations of "actual and reasonable cost." This determination would have to be made by judge or jury on a case-by-case basis,

leading to inconsistent and unworkable results. This simply cannot be what the Pennsylvania General Assembly intended when it passed the Act.[13]

Furthermore, the above conclusion is entirely consistent with the Court's February 4, 2010 holding. Judge Wettick reached the conclusion that, based upon the plain language of § 6152, Plaintiffs in the State Court Actions had stated a claim for breach of contract based upon the terms of the Act, because § 6152(a)(2)(i) used the term "such expenses," which could only refer back to earlier provisions of the Act discussing "actual and reasonable expenses." The Court noted it was constrained to construe a statute *in pari materia* when they relate to the same things and that such statutory parts must be construed together. Op. at 7 (citing 1 Pa.C.S. §§ 1932). The Court also invoked the presumption that the General Assembly intends the entire statute to be effective, and construed the statute so as to give effect to all of its provisions. *Id.* (citing 1 Pa.C.S. § 1922(2) and *Holland v. Marcy*, 883 A.2d 449, 455-56 (Pa. 2005)).

HealthPort respectfully submits that these very same principles of statutory construction compel a different result when the Court's attention is directed to 42 Pa.C.S. § 6155, the

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[13] Indeed, appellate courts in Texas, New York, and, most recently, in Illinois have interpreted the "maximum" rates set forth in similar state enactments as presumptively reasonable to avoid the absurd result of litigating the meaning of "reasonable" on a case-by-case basis. *See Solon v. Midwest Medical Records Ass'n, Inc.*, Case No. 107719, 2010 WL 966395, at *7 (Ill. March 18, 2010) (holding based upon statutory text and legislative history that $20 handling charge specifically set forth in statute was reasonable, because "[t]he legislature thought it necessary to specifically define what was reasonable in order to avoid arbitrary and unreasonable charges to patients"); *In re Metro ROI, Inc.*, 203 S.W.3d 400, 406 (Tex. Ct. App. 2006) ("We believe a proper construction of the statute is that a fee which does not exceed the fee established by the Legislature is reasonable. By specifying the maximum fees which can be charged, the Legislature has clearly indicated what constitutes an unreasonable fee."); *Casillo v. St. John's Episcopal Hosp., Smithtown*, 580 N.Y.S.2d 992, 998 (N.Y. Sup. Ct. 1992) ("The . . . amendments capping copying costs within the definition of 'reasonable charge' was not intended to create a plethora of litigation where the courts would be forced to determine what is an allowable fee in this case or that case. . . Rather, it was enacted to create a unifying definition for the 'reasonable charge' standard and to stem the burgeoning costs being imposed on patients seeking to obtain their own medical records for whatever purpose.").

applicable statutory section for its analysis. As noted *supra*, pp. 4-5, Plaintiffs failed to present to the Court the applicable statutory section in their Complaint. Section 6155(b)(1) is the provision governing non-subpoena requests, and this section only applies to health care providers and facilities, not an MRRC like HealthPort and even then, incorporates the fees set forth in section 6152(a)(2)(i). When the entire Act is construed as a whole, and sections 6152 and 6155 are construed together as relating to the same subject matter (a patient's right to medical records and the fee governing such access), the Court must conclude that the legislature intended § 6152 to apply to subpoena requests, and intended § 6155 to apply to non-subpoena requests fulfilled by health care providers and facilities, not MRRCs.

Accordingly, the General Assembly's intent is clear from the language of §§ 6152 and 6155 when read together. These sections, under axioms of statutory construction, indicate that (1) the rates set forth in § 6152 are *per se* reasonable and (2) § 6155 does not apply to an MRRC like HealthPort.

D. Plaintiffs' Claims for Restitution, Constructive Trust, Unjust Enrichment and Punitive Damages Are Legally Insufficient.

In the wake of *Liss &* Marion, Plaintiffs' quasi-contractual claims are precluded due to the availability of a breach of contract action. *See* Op. at 3 n.2 (noting that Plaintiffs "in the present and related cases [were] no longer pursuing alternative theories" based on restitution, constructive trust and unjust enrichment in light of *Liss & Marion*'s holding that a breach of contract action may be pursued); *Lackner*, 892 A.2d at 34 ("A quasi-contract imposes a duty, not as a result of any agreement, whether express or implied, but in spite of the absence of an agreement, when one party receives unjust enrichment at the expense of another.") (quoting *AmeriPro Search, Inc. v. Fleming Steel Co.*, 787 A.2d 988, 991 (Pa. Super. 2001)). Nevertheless, HealthPort demonstrates the legal insufficiency of these claims below. Plaintiffs'

claims for restitution (Count II), constructive trust (Count III) and unjust enrichment (Count IV) must be dismissed because these doctrines are inapplicable, as pled, to the present case. Counts II-IV are fatally flawed for the same reason as Count I – *i.e.*, they fail to establish that HealthPort acted in contravention of any aspect of Pennsylvania law. As such, Counts II-IV must be dismissed for the same reasons that Count I fails, and Plaintiffs are also not entitled to punitive damages based on the allegations of their Complaint.

1. Plaintiffs' Claim for Unjust Enrichment Fails.

Under Pennsylvania law, the elements of unjust enrichment are (1) benefits conferred on defendant by plaintiff, (2) appreciation of such benefits by defendant, and (3) acceptance and retention of such benefits under such circumstances that it would be inequitable for defendant to retain the benefit without payment of value. *AmeriPro Search, Inc. v. Fleming Steel Co.*, 787 A.2d 988, 991 (Pa. Super. Ct. 2001). Pennsylvania law is well-established that the doctrine of unjust enrichment does not apply, and therefore a quasi-contract theory is not actionable, "simply because the defendant may have benefited as a result of the actions of the plaintiff." *Lackner v. Glosser*, 892 A.2d 21, 34 (Pa. Super. Ct. 2006) (citing *AmeriPro*, 787 A.2d at 991).

In support of their unjust enrichment claim, Plaintiffs recite the following:

> 75. Plaintiffs have conferred benefits upon HealthPort by making payments for the search for, and the retrieval, reproduction and transmittal of . . . medical records in amounts greater than HealthPort's actual and/or estimated actual and reasonable costs[.]
>
> 76. HealthPort has accepted and appreciates these conferred benefits in that HealthPort is enabled thereby to charge and collect more than authorized by law for the search for, and the retrieval, reproduction, and transmittal of . . . medical records.
>
> 77. HealthPort has accepted and retained these benefits . . . and it would be inequitable for HealthPort to retain the excess payments made by Plaintiffs since such excess payments are not authorized by law.

Compl., ¶¶ 75-77. These allegations share one fatal flaw – they are premised on HealthPort's alleged violation of the Act through its failure to fulfill medical record requests at the actual and reasonable cost of performing such activities. However, as already described, the Act and its regulations do not impose such a requirement. Accordingly, Plaintiffs have alleged only that HealthPort charged the rates expressly set forth in the Act as authorized, that Plaintiffs entered into a contract with HealthPort to pay the amounts charged in the invoices, that these amounts were the rates stated in the Act's regulations (*i.e.* the "maximum" fees), and that Plaintiffs indeed paid these amounts. *See* Compl., ¶¶ 24-26, 29-34. There is nothing inequitable about HealthPort's reproduction and provision of medical records at the rates specified in the Act and its regulations and as specified in a written contract between the parties. Plaintiffs' allegations make clear, even if the Court deems the rates applicable to an MRRC like HealthPort, that HealthPort complied with the Act by obtaining prior approval for the rates it did charge. Accordingly, Plaintiffs' unjust enrichment claim fails on the third element, because Plaintiffs' Complaint discloses no aspect of Pennsylvania law rendering HealthPort's retention of Plaintiffs' payments for medical records inequitable. Count IV must therefore be dismissed.

2. Plaintiffs' Claim for Restitution Fails.

Plaintiffs' claim for restitution likewise fails. The Pennsylvania Supreme Court has held that restitution is a remedy in the event that a defendant has been unjustly enriched. *Wilson Area Sch. Dist. v. Skepton*, 895 A.2d 1250, 1254 (Pa. 2006) ("[a] person who has been unjustly enriched at the expense of another must make restitution to the other."). As already discussed, there is no unjust enrichment simply because HealthPort charged the rates set forth in the Act and in the invoices forming its contract with the Plaintiffs and the Plaintiffs paid these invoices. Plaintiffs do not dispute that their restitution claim depends entirely on the success of their unjust enrichment claim. Compl., ¶¶ 67-68 (reciting the elements of the unjust enrichment claim as

support for restitutionary relief). Accordingly, Plaintiffs' claim for unjust enrichment fails, and so, too, must their claim for restitution. Count II must therefore be dismissed.

3. Plaintiffs' Claim for a Constructive Trust Fails.

Plaintiffs' claim for a constructive trust fails with its unjust enrichment claim. As with restitution, "the controlling factor in determining whether a constructive trust should be imposed is whether it is necessary to prevent unjust enrichment." *DeMarchis v. D'Amico*, 637 A.2d 1029, 1036 (Pa. Super. Ct. 1994) (citation omitted). A constructive trust should not be imposed here, because Plaintiffs have failed to allege circumstances giving rise to an unjust enrichment claim. Plaintiffs do not dispute that "unjust enrichment" is an element of a claim for a constructive trust. Accordingly, the claim for a constructive trust in Count III must also be dismissed.

4. Plaintiffs' Claim for Punitive Damages Fails.

It therefore follows that Plaintiffs' claim for punitive damages must also fail. Pennsylvania law does not permit recovery of punitive damages for a breach of contract claim in the absence additional wrongful conduct. *See, e.g., Daniel Adams Associates, Inc. v. Rimbach Pub. Inc.*, 429 A.2d 726, 728 (Pa. Super. Ct. 1981) (affirming grant of demurrer as to claims for punitive damages based only on breach of contract claims where there were no facts averred in plaintiff's complaint "tending to support" the conclusion that defendant breached a "duty imposed by society."). Furthermore, the Act does not provide for an award for punitive damages. Plaintiffs' demand for punitive damages should be stricken.

E. Counts I-IV Are Barred By the Voluntary Payment Doctrine.

Plaintiffs' Complaint makes clear that the voluntary payment doctrine applies and bars all of Plaintiffs' claims. No further factual inquiry is necessary, and this case is ripe for disposition based on Plaintiffs' knowing and voluntary payment of the invoices in question.

The voluntary payment doctrine is a well-established principle of Pennsylvania law providing that "[w]here, under a mistake of law, one voluntarily and without fraud or duress pays money to another with full knowledge of the facts, the money paid cannot be recovered." *Acme Markets, Inc. v. Valley View Shopping Center*, 493 A.2d 736, 737 (Pa. Super. Ct. 1985); *see also Kline v. Morrison*, 44 A.2d 267, 269 (Pa. 1945) ("It is well settled that money, not legally due, but paid voluntarily cannot be recovered back").[14] As Plaintiffs contend, the voluntary payment doctrine does not preclude an action to recover money voluntarily paid, where the payor did not actually voluntarily pay – *i.e.*, where the payor did not have full knowledge of all of the facts or was laboring under a mistaken belief as to those facts.

Here, no factual inquiry is necessary to determine that Plaintiffs have no cause of action to recover money voluntarily paid pursuant to the invoices, when they had full knowledge of the facts surrounding the transactions. Plaintiffs have alleged that, from 2005 through 2009, HealthPort "consistently" charged Plaintiffs the rates expressly contained in 42 Pa.C.S. § 6152(a)(2)(i), as adjusted by the Consumer Price Index. Compl., ¶¶ 25-26. Each time HealthPort invoiced the Plaintiffs, it fully disclosed its fees and delivered the medical record

[14] Indeed, numerous courts in other jurisdictions have held that the voluntary payment doctrine precludes claims for breach of contract for alleged overpricing of medical records, on factual allegations strikingly similar to those in this case. *See, e.g.*, *Boykin v. Smart Corp.*, 669 So. 2d 939, 941 (Ala. Civ. App. 1995) (holding voluntary payment doctrine barred plaintiffs' breach of contract and injunctive claims for recovery of money spent on medical records where "it [was] undisputed that plaintiffs received the copies of the requested medical records, received [defendant's] invoices for photocopying the requested medical records, and paid the invoices without objection."); *Morales v. CopyRight, Inc.*, 813 N.Y.S. 2d 731, 732 (N.Y. App. Div. 2006) (granting motion to dismiss for failure to state claim alleging overbilling of medical record reproduction costs where "complaint . . . alleges, inter alia, that all of the named plaintiffs paid their respective bills for the photocopying costs, but does not allege that payment was made as a result of fraud, mistake . . ., or with protest."); *Cotton v. Med-Cor Health Info. Solutions, Inc.*, 472 S.E.2d 92, 94 (Ga. Ct. App. 1996) (affirming trial court's dismissal of complaint where plaintiffs' allegations indicated that "when plaintiffs' made the payments, all material facts were known by them.").

copies after receiving payment. *Id.* ¶¶ 29-30. HealthPort hid nothing from Plaintiffs, as established from the invoices attached as Exhibits 1 and 2 to Plaintiffs' Complaint, which clearly stated the fees being charged Plaintiffs. *Id.* ¶¶ 30, 33. Finally, Plaintiffs selectively ignore the fact that they could have obtained the records on their own, with patient authorization, rather than paying for the records through HealthPort in the first place. *See* 42 Pa.C.S. §§ 6152(a)(1) (giving health care facility the choice of responding to a subpoena with a notice setting forth the actual and reasonable expense of reproduction), and 6155 (obligating a health care provider to grant access to patient's medical records). They instead made the knowing and voluntary decision to pay the invoices and obtain the records from HealthPort. Compl., at ¶¶ 31, 34.

Although Plaintiffs are correct that *Liss & Marion* rejected the voluntary payment doctrine as a defense on the facts before it, that case is clearly distinguishable on this count. Here, Plaintiffs' Complaint makes clear that the voluntary payment doctrine applies, as discussed above, because there is no allegation that Plaintiffs were laboring under a mistake of fact. The *Liss & Marion* court held that plaintiffs lacked full knowledge of the facts, because they were not aware at the time of the transactions that medical records were being generated from electronic media but the medical record reproduction company defendant was charging the rate applicable to reproductions from microfilm. *Liss & Marion*, 937 A.2d at 514. Here, in contrast, Plaintiffs were fully informed in the invoices of the amounts they were being charged for hard copies of medical records, which could be verified as being exactly equivalent to the rates set forth in the Act's regulations. Plaintiffs' idiosyncratic interpretation of the Act is a "mistake of law" that does not entitle them to recover these payments under the voluntary payment doctrine.

Accordingly, this case is more like *Acme Markets*, in which the Pennsylvania Superior Court affirmed the trial court's decision sustaining preliminary objections to plaintiff's complaint

on the grounds of the voluntary payment doctrine. In that case, as here, no factual development was necessary to determine that the doctrine applied to preclude plaintiff's claims. In *Acme Markets*, a tenant sued a landlord for recovery of payments allegedly made in error pursuant to the erroneous interpretation of two lease provisions. The plaintiffs alleged that the lease required certain payments for property maintenance and taxes "during the initial term" of the lease, but that the tenant had made these payments well past the expiration of the lease's initial term. *Acme Markets*, 493 A.2d at 737. The plaintiff tenant sought to recover these payments. The Pennsylvania Superior Court affirmed the order of the trial court sustaining preliminary objections to Plaintiffs' complaint, reasoning:

> The mistake alleged by [plaintiff] is clearly a mistake of law and not a mistake of fact. The money it seeks to recover was voluntarily and deliberately paid by [plaintiff] to its lessor because of an interpretation of the lease agreement which [plaintiff], according to the complaint, mistakenly placed thereon. Such a mistake is a mistake of law. Because the payments were made under a mistake of law in interpreting the lease, there can be no recovery in this action.

The reasoning of *Acme Markets* applies with equal force here. The Plaintiffs, laboring under a mistaken interpretation of the Act, voluntarily paid the invoices they were sent along with the medical records. *See* Compl., ¶¶ 31, 34 (Plaintiff[s] . . . believing that the charges listed on the invoice comported with the law, . . . paid HealthPort the requested [amount]."). This is no different than the mistaken interpretation of the lease alleged in *Acme Markets*. Furthermore, as in that case, no factual record is necessary to reach this conclusion; it is evidence from the face of Plaintiffs' Complaint. Counts I-IV must be dismissed on this ground.

F. Plaintiffs' Sales Tax Claim Fails as a Matter of Law.

Plaintiffs insist that they were charged sales tax in violation of the Act and seek to recover these sales tax proceeds from HealthPort. Plaintiffs ignore the fact that, even if they are

correct, they cannot recover this money from HealthPort. HealthPort has not retained this money and has remitted it to the Commonwealth of Pennsylvania. As discussed below, Plaintiffs have not sought proper recourse by pursuing a refund of sales tax from the Department of Revenue, and therefore they have failed to exhaust their administrative remedies under relevant Pennsylvania tax law. Plaintiffs' claim for recovery of sales tax, on any theory, must be rejected, because Plaintiffs cannot maintain a class action for refund of sales tax in this Court where an adequate remedy exists at law.

Under Pennsylvania tax laws, the right to petition the Department of Revenue for refund of sales taxes "to which the Commonwealth is not rightfully entitled" is provided by 72 P.S. §§ 7252, 7253 & 10003.1. Section 7253 specifically provides that a refund of taxes "shall be made only where the person who has actually paid the tax files a petition for refund with the [the Department of Revenue] under Article XXVII [72 P.S. § 9701 et seq.]" Pursuant to 72 P.S. § 9703 in Article XXVII, the Department must issue a decision regarding the petition for refund within six months, subject to a right to petition the Board of Finance and Revenue to review the Department's decision as provided by 72 P.S. § 9704.

Pursuant to 72 P.S. § 7225, all taxes collected by any person from purchasers in accordance with Article II of the Tax Reform Code of 1971(which imposes the sales and use tax), or collected "under color" of Article II, constitute "a trust fund for the Commonwealth" and must be remitted to the Commonwealth unless refunded to the taxpayer. Any amounts collected by vendors and not refunded to taxpayers must be remitted to the Department of Revenue on a monthly or quarterly basis as provided by 72 P.S. § 7217.

Case law involving similar sales tax claims clearly precludes Plaintiff from maintaining an action for alleged improper sales tax charges in this Court. In *Lilian v. Commonwealth*, 354

A.2d 250, 252-53 (Pa. 1974), the Pennsylvania Supreme Court held that a class action cannot be maintained where an adequate remedy exists at law to seek the refund of taxes paid. Furthermore, in *Aldine Apartments, Inc. v. Commonwealth, Dep't of Revenue*, 379 A.2d 333, 336 (Pa. Cmwlth. 1977), the Commonwealth Court held that, because amounts collected as sales taxes constitute a trust fund for the Commonwealth, refunds may be paid only by the Commonwealth and vendors "are merely collecting agents and, legally, can play no role in the refund of these taxes." *See also Silberman v. Commonwealth*, 738 A.2d 508, 509 (Pa. Cmwlth. 1999) in which the Commonwealth Court observed that because amounts collected as sales taxes are collected by vendors in trust for the Commonwealth, "when a purchaser pays sales tax to a vendor, by paying the Commonwealth's agent, he has effectively paid the Commonwealth."

As in *Lilian*, Plaintiffs' have no cause of action for recovery of sales tax charges in this Court. As in *Aldine Apartments*, HealthPort is a merely a "collecting agent" vendor who, "legally, can play no role in the refund of these taxes." Accordingly, because Plaintiffs have not exhausted their exclusive administrative remedy of seeking a sales tax refund through the petition process, and because they cannot legally recover any alleged improper sales tax charges from HealthPort, Plaintiffs' action for sales tax must be dismissed. If Plaintiffs seek a refund of sales tax charges, they must petition the Department of Revenue for such relief.

G. Plaintiffs are Not Entitled to Attorneys' Fees.

Plaintiffs' Complaint also requests attorneys' fees. Pennsylvania, however, has consistently followed the general, American rule that there can be no recovery of attorneys' fees from an adverse party, absent an express statutory authorization, a clear agreement between the parties or some other established exception. *See, e.g., Merlino v. Delaware County*, 728 A.2d 949, 951 (Pa. 1999); 42 Pa.C.S. § 2503(10) (providing that "a litigant is entitled to attorneys' fees as part of the taxable costs, only in circumstances specified by statute heretofore or hereafter

enacted"). Here, the Act does not provide for the award of attorneys' fees and no agreement between the parties for such fees exists. Accordingly, Plaintiffs' request for attorneys' fees should be stricken from the Complaint.

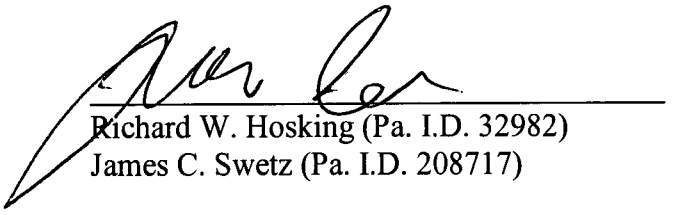
IV. CONCLUSION

For the foregoing reasons, HealthPort's Preliminary Objections should be sustained and Plaintiffs' Complaint should be dismissed in its entirety.

Dated: March 30, 2010

Respectfully submitted,

K&L GATES LLP



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Attorneys for Defendant HealthPort

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **PRELIMINARY OBJECTIONS, BRIEF IN SUPPORT OF PRELIMINARY OBJECTIONS AND PROPOSED ORDER** was served upon plaintiffs' counsel and all counsel of record, via first class mail, postage prepaid, this 30th day of March, 2010, as follows:

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James C. Swetz

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

ANTHONY C. MENGINE LAW, INC. D/B/A CHIURAZZI & MENGINE, LLC; and CHARLOTTE HAGANS,	)	CIVIL DIVISION
	)	No. GD-09-012923
Plaintiffs,	)	(coordinated with GD-09-012911; GD-09-012919; GD-09-012922; and GD-09-014785)
v.	)	
HEALTHPORT,	)	**HEALTHPORT TECHNOLOGIES LLC'S PROPOSED ORDER GRANTING PRELIMINARY OBJECTIONS**
Defendant.	)	
	)	Filed on behalf of Defendant HealthPort
	)	Counsel of Record for this Party:
	)	Richard W. Hosking Pa. I.D. #32982
	)	James C. Swetz Pa. I.D. #208717
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IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

ANTHONY C. MENGINE LAW, INC. D/B/A CHIURAZZI & MENGINE, LLC; and CHARLOTTE HAGANS,	)	CIVIL DIVISION
	)	No. GD-09-012923
Plaintiffs,	)	(coordinated with GD-09-012911; GD-09-012919; GD-09-012922; and GD-09-014785)
v.	)	
HEALTHPORT,	)	
Defendant.	)	

ORDER

NOW, this _____ day of _____, 20____, upon consideration of HealthPort's Preliminary Objections to Plaintiffs' Class Action Complaint, Brief in Support, and all responses thereto, it is hereby ORDERED and DECREED that HealthPort's Preliminary Objections are SUSTAINED. The Complaint is dismissed with prejudice.

BY THE COURT:

_____

J.

EXHIBIT
5

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

WAYNE M. CHIURAZZI LAW INC., D/B/A CHIURAZZI & MENGINE, LLC,

Plaintiff

vs.

UPMC PRESBYTERIAN SHADYSIDE,

Defendant

CIVIL DIVISION

NO. GD09-012919

OPINION AND ORDER OF COURT

HONORABLE R. STANTON WETTICK, JR.

COORDINATED WITH:

WAYNE M. CHIURAZZI LAW INC.
D/B/A CHIURAZZI & MENGINE, LLC,

Plaintiff

vs.

MRO CORPORATION,

Defendant

NO. GD09-012911

****

WAYNE M. CHIURAZZI LAW INC.
D/B/A CHIURAZZI & MENGINE, LLC,

Plaintiff

vs.

IOD INCORPORATED,

Defendant

NO. GD09-012922

****

ANTHONY C. MENGINE LAW INC.,
D/B/A CHIURAZZI & MENGINE, LLC,

Plaintiff

vs.

MAGEE-WOMENS HOSPITAL OF
UNIVERSITY OF PITTSBURGH
MEDICAL CENTER,

Defendant

NO. GD09-014785

NO. GD09-012919
COORDINATED WITH: NOS. GD09-012911; GD09-012922; and GD09-014785

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IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

WAYNE M. CHIURAZZI LAW INC., D/B/A CHIURAZZI & MENGINE, LLC,

Plaintiff

vs.

UPMC PRESBYTERIAN SHADYSIDE,

Defendant

CIVIL DIVISION

NO. GD09-012919

OPINION AND ORDER OF COURT

HONORABLE R. STANTON WETTICK, JR.

COORDINATED WITH:

WAYNE M. CHIURAZZI LAW INC. D/B/A CHIURAZZI & MENGINE, LLC,

Plaintiff

vs.

MRO CORPORATION,

Defendant

NO. GD09-012911

****

WAYNE M. CHIURAZZI LAW INC. D/B/A CHIURAZZI & MENGINE, LLC,

Plaintiff

vs.

IOD INCORPORATED,

Defendant

NO. GD09-012922

****

ANTHONY C. MENGINE LAW INC., D/B/A CHIURAZZI & MENGINE, LLC,

Plaintiff

vs.

MAGEE-WOMENS HOSPITAL OF UNIVERSITY OF PITTSBURGH MEDICAL CENTER,

Defendant

NO. GD09-014785

NO. GD09-012919
COORDINATED WITH: NOS. GD09-012911; GD09-012922; and GD09-014785

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OPINION AND ORDER OF COURT

WETTICK, J.

UPMC's preliminary objections seeking dismissal of each count of plaintiff's class action complaint (Count 1—Breach of Contract/Implied Contract; Count II—Restitution; Count III—Constructive Trust; Count IV—Unjust Enrichment—Quasi-Contract; and Count V—Relief Pursuant to Declaratory Judgments Act) are the subject of this Opinion and Order of Court.[1]

Each count is based on allegations that UPMC charged plaintiff law firm for copies of medical charts and records an amount in excess of the maximum charges permitted by the Medical Records Act. The relevant provisions of the Act (42 Pa.C.S. §6152(a)(1) and (2)(i)) read as follows:

> **(a) Election.—**
>
> (1) When a subpoena duces tecum is served upon any health care provider or an employee of any health care facility licensed under the laws of this Commonwealth, requiring the production of any medical charts or records at any action or proceeding, it shall be deemed a sufficient response to the subpoena if the health care provider or health care facility notifies the attorney for the party causing service of the subpoena, within three days of receipt of the subpoena, of the health care provider's or facility's election to proceed under this

[1]The Chiurazzi law firm has filed identical class action lawsuits against other entities that have furnished medical records at GD09-012911 (defendant is MRO Corporation), GD09-012922 (defendant is IOD Incorporated), and GD09-014785 (defendant is Magee-Womens Hospital of University of Pittsburgh Medical Center). My rulings in this litigation will govern the preliminary objections filed by the defendants in these three cases.

> subchapter and of the estimated actual and reasonable expenses of reproducing the charts or records. However, when medical charts or records are requested by a district attorney or by an independent or executive agency of the Commonwealth, notice pursuant to this section shall not be deemed a sufficient response to the subpoena duces tecum.
>
> (2)(i) Except as provided in paragraph (ii), the health care provider or facility or a designated agent shall be entitled to receive payment of such expenses before producing the charts or records. The payment shall not exceed $15 for searching for and retrieving the records, $1 per page for paper copies for the first 20 pages, 75¢ per page for pages 21 through 60 and 25¢ per page for pages 61 and thereafter; $1.50 per page for copies from microfilm; plus the actual cost of postage, shipping or delivery. No other charges for the retrieval, copying and shipping or delivery of medical records other than those set forth in this paragraph shall be permitted without prior approval of the party requesting the copying of the medical records. The amounts which may be charged shall be adjusted annually beginning on January 1, 2000, by the Secretary of Health of the Commonwealth based on the most recent changes in the consumer price index reported annually by the Bureau of Labor Statistics of the United States Department of Labor.

The question of whether claims may be raised in a civil action to recover payments in excess of the amounts permitted by the Medical Records Act was recently answered by the Pennsylvania Supreme Court in *Liss & Marion, P.C. v. Recordex Acquisition Corp.*, 983 A.2d 652 (Pa. 2009).

In a class action complaint, the Liss & Marion law firm sought recovery for itself and all other individuals and entities who were billed and charged for copies of records greater than the amount permitted by the Medical Records Act, as adjusted annually by the Secretary of Health based on the most recent change in the consumer price index. Recovery was sought through a four-count complaint. The trial court permitted the members of the class to pursue common law breach of contract claims based on the existence of a contract implied in fact that both parties expected the Medical Records

Act to control the pricing of their contract. The trial court did not permit the class to pursue any other causes of action raised in the complaint.

Both the Pennsylvania Superior Court and the Pennsylvania Supreme Court affirmed the rulings of the trial court that a breach of contract action may be brought to recover charges that exceed the amounts permitted by the Medical Records Act and that the trial court correctly dismissed the remaining causes of action.[2]

Under the second sentence of §6152(a)(2)(i) of the Medical Records Act, charges may not exceed $1.50 per page for copies from microfilm and for copies not from microfilm charges may not exceed the following amounts: $1 per page—pages 1-20, 75¢ per page—pages 21-60, and 25¢ per page—pages 61 and thereafter.

In *Liss & Marion*, the defendants were charging the plaintiff and the other members of the class the higher charge per page permitted for copies from microfilm. However, the copies were not from microfilm. To the contrary, the defendants were providing copies from electronically stored records while deceptively representing on the invoices that the copies were from microfilm.

A major defense of the defendants was that the second sentence of §6152(a)(2)(i) only covers charges for copies from paper and from microfilm. The case involved copies from electronically stored records. Copies from electronically stored records are not covered by §6152(a)(2)(i). Consequently, copies from electronically

[2]As a result of the ruling of the Pennsylvania Supreme Court in *Liss & Marion* that a breach of contract action may be pursued, the plaintiff in the present and related cases is no longer pursuing alternative theories raised in Count II (Restitution), Count III (Constructive Trust), and Count IV (Unjust Enrichment).

stored records may be billed at any reasonable rate and the plaintiff failed to prove at trial that the defendants' rates were unreasonable.

The Pennsylvania Supreme Court rejected this argument. It stated that §6152(a)(2)(i) creates a higher price rate for paper copies from microfilm (rate M) and a lower default rate (rate D) for paper copies from all other media.

On the basis of the rulings in *Liss & Marion*, the following matters can no longer be disputed: (1) plaintiff may pursue a breach of contract action against UPMC based on allegations that UPMC's charges exceeded those permitted under the Medical Records Act; and (2) UPMC cannot imposes charges that are in excess of the rate D for the copies of medical records that are the subject of this litigation because these were not copies from microfilm.

In the present case, plaintiff law firm does not contend that UPMC has imposed charges in excess of the rate D. In its complaint, the law firm alleges that the use of computers, electronic records, and the Internet has substantially reduced the costs to the hospitals of storing and reproducing medical records. However, while the actual costs of storing, locating, retrieving, reproducing, and transmitting records has decreased dramatically, UPMC has failed to base its charges for providing copies of medical records on its actual (diminishing) costs. Instead, UPMC continues to charge the maximum ceiling price provided for in §6152(a)(2)(i) for rate D copies (i.e., copies that are not from microfilm).

It is plaintiff's position that the Medical Records Act requires health care facilities to charge only their actual and reasonable expenses for producing records or charts;

the Act does not permit them to charge the full amount set forth in §6152(a)(2)(i) where those charges exceed actual and reasonable expenses.

UPMC seeks dismissal of the breach of contract claim on the ground that any charges that do not exceed the rate D are permitted under the Medical Records Act. The purpose of the Act, according to UPMC, was to eliminate the continuing dispute between health care providers and persons seeking medical records from a health care provider by establishing a fixed price to be adjusted annually. Consequently, plaintiff's complaint should be dismissed because it is based on a misreading of the Medical Records Act.

Both parties base their respective positions on the portion of §6152(a)(2)(i) that is set forth at pages 1 and 2 of this Opinion.

The amount that a health care facility may charge for furnishing paper copies of medical records is initially addressed in §6152(a)(1) which requires health care providers to notify persons seeking copies of medical records of the estimated "actual and reasonable expenses of reproducing the charts and records." If given its ordinary meaning, *actual expenses* means expenses existing in fact, and *reasonable expenses* means that the costs are not padded. Consequently, UPMC may charge only its actual and reasonable expenses unless other provisions within §6152(a)(2)(i) modify this provision.

Other provisions do not modify this provision. To the contrary, §6152(a)(2)(i) also provides for charges to be based on actual expenses. The initial sentence states that the health care provider is "entitled" to receive payment of "such expenses before producing the charts or records." The term *such expenses* can only refer to the "actual

and reasonable expenses of reproducing the charts or records" because these are the only expenses referred to in earlier provisions of §6152. Thus, the language of the first sentence of §6152(a)(2)(i) that the health care "is entitled to receive such expenses" clearly and unambiguously provides that charges shall be based on actual expenses. UPMC appears to contend that the language of the second sentence of §6152(a)(2)(i) contradicts a reading of the prior provisions referring to charges to be based on actual expenses. I disagree.

The second sentence of §6152(a)(2)(i) does not provide that a health care provider is entitled to receive additional payments in excess of its actual expenses. To the contrary, while the previous provisions of §6152 entitle the health care provider to receive actual and reasonable expenses, this second sentence of §6152(a)(2)(i) places a cap on what may be charged as actual and reasonable expenses by providing that the payment of actual and reasonable expenses "shall not exceed" the amounts set forth in this sentence. Or, in other words, this sentence applies only to health care providers whose actual expenses exceed the amounts set forth in the pricing schedule.

Also see §6152(c), which governs delivery of records; it provides for the health care provider to deliver copies within thirty days "upon payment of its expenses by the party causing service of the subpoena."

I recognize that there can be legislation which provides for charges to be based on reasonable expenses and which thereafter includes a formula to calculate reasonable expenses. However, the Medical Records Act is not such legislation. Nothing in the language of the Act suggests that the charges in the second sentence are presumed to be actual expenses. To the contrary, the use of the language "shall

not exceed" modifies a health care provider's entitlement to recover actual expenses by setting the maximum amount that may be charged where the actual expenses exceed this amount.

Finally, even if there could be some merit to UPMC's contention that the second sentence offers support for its position that health care providers may charge the amounts set forth in the pricing schedule, such a construction cannot be reconciled with the prior provisions within §6152 which require charges to be based on actual and reasonable expenses. See 1 Pa.C.S. §1932 which provides that statutes or parts of statutes are in *pari material* when they relate to the same things and that such statutes or parts of statutes shall be construed together, if possible, as one statute. Also 1 Pa.C.S. §1922(2) provides that the General Assembly intends the entire statute to be effective and certain, while case law holds that there is a presumption in drafting a statute that the General Assembly intended the entire statute to be effective; thus, if possible, a statute must be construed as to give effect to all of its provisions. See *Holland v. Marcy*, 883 A.2d 449, 455-56 (Pa. 2005), and *Galloway v. Pennsylvania State Police*, 756 A.2d 1209, 1213 (Pa. Cmwlth. 2000).

UPMC's interpretation of the Medical Records Act would require that I substitute the word *charges* for *actual expenses* so that §6152(a)(2)(i) would provide that the health care provider shall notify the attorney of the estimated "charges" (rather than "estimated actual and reasonable expenses") and the first sentence of §6152(a)(2)(i) would provide that the health care provider is entitled to receive payment "of such charges" (rather than "of such expenses"). However, the legislation uses the word *expenses*; its use of this word rather than the word *charges* produces a very different

result, and I must construe the legislation by using the words which the General Assembly selected.

UPMC contends that the Pennsylvania Supreme Court in *Liss & Marion* has already ruled that under §6152(a)(2)(i) a health care facility may charge the rate D for paper copies that are not from microfilm records. Its contention is based on the following statements within the Court's Opinion.

In addressing the defendants' argument that the Medical Records Act does not provide a specific rate for copies from electronic records, the Court stated:

> The language of the MRA is clear: when providing paper copies from any medium, Appellants are entitled to receive rate D per page. The only exception is when the copies are made from microfilm; then, Appellants can charge the higher rate M. Here, Appellants made paper copies from electronic records and not from microfilm so the rate "for paper copies", rate D, applies. We affirm the lower courts' holdings that the MRA created a higher price rate for copies from microfilm, rate M, and a default rate, rate D, for copies from all other media. *Liss v. Marion*, *supra*, 983 A.2d at 662-63 (footnotes omitted).

UPMC also relies on footnote 9 which reads as follows:

> Appellants argue that copies from electronic records need only be billed at a "reasonable" rate because none of the rates enumerated in subsection 6152(a)(2)(i) apply. Because we decide that, in fact, the enumerated rate "for paper copies", rate D, does apply and should have been charged, we do not reach the issue of what rate may be charged when the MRA does not contain a specific or relevant rate. *Id.* at 663.

UPMC also relies on a provision within footnote 6 which reads as follows:

> . . . Finally, as the trial court recognized, the MRA rates embody the public policy of the Commonwealth regarding the amounts to be charged by the industry for copying medical records. *Id.* at 659 n.6.

In *Liss & Marion*, the law firm and the members of the class were seeking to recover only the difference between what they were charged and the rate D. The law firm and the class never claimed that the defendants could not charge the rate D; it contended only that it could not charge more than the rate D. Thus, the issue raised in the present case was never considered by the Pennsylvania Supreme Court. Instead, the language upon which UPMC relies was in response to the defendants' contention that the plaintiff was not entitled to the rate D because the rate D does not apply to copies from electronic records.

Next, UPMC contends that I should dismiss the complaint against it on the basis of the voluntary payment defense.

UPMC correctly contends that this case differs from *Liss & Marion* because it does not involve invoices that contain misleading information. However, this means only that the issues that will be addressed in this litigation regarding the voluntary payment defense will differ from the issues presented where the hospital furnished false information to the persons obtaining copies of medical records.

I cannot rule, as a matter of law, that the defense does apply. This is an affirmative defense that must be raised in the UPMC's Answer.

For these reasons, I enter the following Order of Court:

ORDER OF COURT

On this 4 day of February, 2010, upon consideration of UPMC's preliminary objections, it is hereby ORDERED that:

(1) Counts II, III, and IV of plaintiff's complaint are dismissed; and

(2) defendant's preliminary objections are otherwise overruled.

BY THE COURT:

WETTICK, J.

EXHIBIT
6

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

ANTHONY C. MENGINE LAW, INC. d/b/a CHIURAZZI & MENGINE, LLC; and CHARLOTTE HAGANS,	CIVIL DIVISION
Plaintiffs	NO. GD09-012923
vs.	MEMORANDUM AND ORDER OF COURT
HEALTHPORT,	
Defendant	HONORABLE R. STANTON WETTICK, JR.

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MEMORANDUM AND ORDER OF COURT

WETTICK, J.

I.

Plaintiffs do not oppose dismissal of Counts, II, III, and IV of their five-count class action complaint.

II.

I sustain defendant's preliminary objections seeking dismissal of plaintiffs' claims for punitive damages.

III.

Defendant seeks dismissal on the ground that its charges did not exceed those provided for under the second sentence of §6152(a)(2)(i) as adjusted by the Secretary of Health and that the Medical Records Act permits a healthcare provider to impose any charges that do not exceed this amount.

I am overruling these preliminary objections for the reasons set forth in my Memorandum Dated June 17, 2010 entered in *Wayne M. Chiurazzi Law Inc. v. MRO Corp.* (GD09-012911).

IV.

Defendant seeks dismissal based on the voluntary payment doctrine. The defense of a voluntary payment was rejected in *Liss & Marion, P.C. v. Recordex Acquisition Corp.*, 983 A.2d 652 (Pa. 2009), because the defendants had misrepresented the source of the copies (i.e., because of the defendants' fraud, the plaintiffs did not know that they were being charged more than the charges permitted under the second sentence of §6152(a)(2)(i), as adjusted).

In the present case, on the other hand, the charges did not exceed those set forth in the second sentence of §6152(a)(2)(i), as adjusted. Defendant contends that plaintiffs knew that the charges were based on defendant's interpretation of the Medical Records Act as permitting charges that do not exceed those set forth in the second sentence of §6152(a)(2)(i), as adjusted, and that plaintiffs never questioned the charge or defendant's reading of the Medical Records Act. Consequently, the voluntary payment doctrine bars plaintiffs' claims.

I am overruling defendant's preliminary objections seeking dismissal based on the voluntary payment doctrine because this is an affirmative defense based on facts that defendant must establish.

V.

Defendant seeks dismissal of plaintiffs' complaint based on the provision in the third sentence of §6152(a)(2)(i) which provides that the charges for medical records that exceed those set forth in this section are not permitted "without prior approval of the party requesting the copying of the medical records." Defendant contends that payment

of the invoices without objection constitutes prior approval.[1] These preliminary objections are overruled because this is also an affirmative defense.

[1]This claim was rejected in *Liss & Marion* because the invoices included misleading information.

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA
CIVIL DIVISION

ANTHONY C. MENGINE LAW, INC. d/b/a CHIURAZZI & MENGINE, LLC; and CHARLOTTE HAGANS, Plaintiffs vs. HEALTHPORT, Defendant	NO. GD09-012923

ORDER OF COURT

On this 17 day of June, 2010, upon consideration of defendant's preliminary objections to plaintiffs' complaint, it is hereby ORDERED that:

(1) Counts II, III, and IV of the complaint are dismissed;

(2) the punitive damage claims are dismissed; and

(3) preliminary objections are otherwise overruled.

BY THE COURT:

WETTICK, J.

Copies mailed. (CA) 6/17/10

EXHIBIT
7

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

WAYNE M. CHIURAZZI LAW INC. d/b/a CHIURAZZI & MENGINE, LLC and DAVID A. NEELY,

Plaintiffs

vs.

MRO CORPORATION,

Defendant

CIVIL DIVISION

NO. GD09-012911

MEMORANDUM AND ORDER OF COURT DATED JUNE 17, 2010

HONORABLE R. STANTON WETTICK, JR.

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MEMORANDUM AND ORDER OF COURT
DATED JUNE 17, 2010

WETTICK, J.

In this Memorandum and Order of Court, I address MRO Corporation's preliminary objections seeking dismissal of both counts within plaintiffs' second amended class action complaint.[1]

Count I of plaintiffs' complaint is a breach of contract/implied contract and Count II is a count titled *Relief Pursuant to Declaratory Judgments Act.*

Each count is based on allegations that MRO charged plaintiffs, for producing medical charts and records, an amount in excess of the maximum charges permitted by the Medical Records Act.[2] The relevant provisions of the Act (42 Pa.C.S. §6152(a)(1) and (2)(i)) read as follows:

---

[1]Previously, I entered a court order dated February 4, 2010 addressing defendant's preliminary objections to plaintiffs' initial complaint. On March 3, 2010, I granted reconsideration. Thereafter, plaintiffs filed an amended and second amended complaint. The second amended complaint includes an additional plaintiff who received copies of medical records reproduced on a CD-ROM without receiving paper copies.

The Chiurazzi/Mengine Law Firm has filed similar class action lawsuits against other entities that furnished medical records at GD09-012922 (defendant is IOD, Inc.), GD09-014785 (defendant is Magee Womens Hospital of the University of Pittsburgh Medical Center), GD09-012919 (defendant is UPMC Presbyterian Shadyside), and GD09-012923 (defendant is HealthPort).

[2]Defendant's preliminary objections to the Second Amended Complaint include the issues for which reconsideration was granted.

(a) Election.—

(1) When a subpoena duces tecum is served upon any health care provider or an employee of any health care facility licensed under the laws of this Commonwealth, requiring the production of any medical charts or records at any action or proceeding, it shall be deemed a sufficient response to the subpoena if the health care provider or health care facility notifies the attorney for the party causing service of the subpoena, within three days of receipt of the subpoena, of the health care provider's or facility's election to proceed under this subchapter and of the estimated actual and reasonable expenses of reproducing the charts or records. However, when medical charts or records are requested by a district attorney or by an independent or executive agency of the Commonwealth, notice pursuant to this section shall not be deemed a sufficient response to the subpoena duces tecum.

(2)(i) Except as provided in paragraph (ii), the health care provider or facility or a designated agent shall be entitled to receive payment of such expenses before producing the charts or records. The payment shall not exceed $15 for searching for and retrieving the records, $1 per page for paper copies for the first 20 pages, 75¢ per page for pages 21 through 60 and 25¢ per page for pages 61 and thereafter; $1.50 per page for copies from microfilm; plus the actual cost of postage, shipping or delivery. No other charges for the retrieval, copying and shipping or delivery of medical records other than those set forth in this paragraph shall be permitted without prior approval of the party requesting the copying of the medical records. The amounts which may be charged shall be adjusted annually beginning on January 1, 2000, by the Secretary of Health of the Commonwealth based on the most recent changes in the consumer price index reported annually by the Bureau of Labor Statistics of the United States Department of Labor.

Plaintiffs do not allege that they were charged any amounts for the production of medical records that exceeded the charges provided for in the second sentence of §6152(a)(2)(i) as adjusted annually by the Secretary of Health as provided for in the fourth sentence of this provision. Plaintiffs do allege that the amounts which they were charged significantly exceeded the actual and reasonable expenses of reproducing the medical records.

Plaintiffs contend that a health care facility may only charge its actual and reasonable expenses where these expenses are less than the amount set forth in the second sentence of §6152(a)(2)(i) as adjusted. Defendant, on the other hand, contends that it may impose any charge that does not exceed the amounts permitted within the second sentence as adjusted.

If defendant's construction of the Medical Records Act is correct, this case and all related litigation will be dismissed. However, if plaintiffs' construction of the Medical Records Act is correct, this litigation will require consideration of several (possibly complicated) factual and legal issues, including what are actual and reasonable expenses, the applicability of the voluntary payment doctrine, and the applicability of the prior approval provision of §6152(a)(2)(i).

The question of whether claims may be raised in a civil action to recover payments in excess of the amounts permitted by the Medical Records Act was recently answered by the Pennsylvania Supreme Court in *Liss & Marion, P.C. v. Recordex Acquisition Corp.*, 983 A.2d 652 (Pa. 2009).

In a class action complaint, the Liss & Marion law firm sought recovery for itself and all other individuals and entities who were billed and charged for copies of records greater than the amount permitted by the Medical Records Act, as adjusted annually by the Secretary of Health based on the most recent change in the consumer price index. The trial court permitted the members of the class to pursue common law breach of contract claims based on the existence of a contract implied in fact that both parties expected the Medical Records Act to control the pricing of their contract.[3]

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[3]The trial court did not permit the class to pursue any other causes of action *raised in the* complaint. *Id.* at 656.

Both the Pennsylvania Superior Court and the Pennsylvania Supreme Court affirmed the rulings of the trial court that a breach of contract action may be brought to recover charges that exceed the amounts permitted by the Medical Records Act and that the trial court correctly dismissed the remaining causes of action.

Under the second sentence of §6152(a)(2)(i) of the Medical Records Act, charges for copies from microfilm may not exceed $1.50 per page and charges for copies not from microfilm and for copies not from microfilm may not exceed the following amounts: $1 per page—pages 1-20, 75¢ per page—pages 21-60, and 25¢ per page—pages 61 and thereafter.

In *Liss & Marion*, the defendants were charging the plaintiff and the other members of the class the higher charge per page permitted for copies from microfilm. However, the copies were not from microfilm. To the contrary, the defendants were providing copies from electronically stored records while deceptively representing on the invoices that the copies were from microfilm.

A major defense of the defendants was that the second sentence of §6152(a)(2)(i) only covers charges for copies from paper and from microfilm. The case involved copies from electronically stored records. Copies from electronically stored records are not covered by §6152(a)(2)(i). Consequently, copies from electronically stored records may be billed at any reasonable rate and the plaintiff failed to prove at trial that the defendants' rates were unreasonable. *Id.* at 662.

The Pennsylvania Supreme Court rejected this argument. It stated that §6152(a)(2)(i) creates a higher price rate for paper copies from microfilm (rate M) and a lower default rate (rate D) for paper copies from all other media. *Id.* n.8.

On the basis of the rulings in *Liss & Marion*, the following matters can no longer be disputed: (1) plaintiffs may pursue a breach of contract action against MRO based on allegations that MRO's charges exceeded those permitted under the Medical Records Act; and (2) MRO cannot impose charges that are in excess of the rate D for the copies of medical records that are the subject of this litigation because these were not copies from microfilm.

In the present case, plaintiffs do not contend that defendant has imposed charges in excess of the rate D. In their complaint, plaintiffs allege that the use of computers, electronic records, and the Internet has substantially reduced the costs of storing and reproducing medical records. However, while the actual costs of storing, locating, retrieving, reproducing, and transmitting records has decreased dramatically, defendant has failed to base its charges for providing copies of medical records on actual (diminishing) costs. Instead, defendant continues to charge the maximum ceiling price provided for in §6152(a)(2)(i) for rate D copies (i.e., copies that are not from microfilm).

It is plaintiffs' position that the Medical Records Act requires health care facilities to charge only their actual and reasonable expenses for producing records or charts; the Act does not permit them to charge the full amount set forth in §6152(a)(2)(i) where those charges exceed actual and reasonable expenses.

Defendant seeks dismissal of the breach of contract claim on the ground that any charges that do not exceed the rate D are permitted under the Medical Records Act. The purpose of the Act, according to defendant, was to eliminate the continuing dispute between health care providers and persons seeking medical records from a health care

provider by establishing a fixed price to be adjusted annually. Consequently, plaintiffs' complaint should be dismissed because it is based on a misreading of the Medical Records Act.

Both parties base their respective positions on the portion of §6152(a)(2)(i) that is set forth at page 2 of this Memorandum.

The amount that a health care facility may charge for furnishing paper copies of medical records is initially addressed in §6152(a)(1) which requires health care providers to notify persons seeking copies of medical records of the estimated "actual and reasonable expenses of reproducing the charts and records." If given its ordinary meaning, *actual expenses* means expenses existing in fact, and *reasonable expenses* means that the costs are not padded. Consequently, the charges must be based on actual and reasonable expenses unless other provisions within §6152(a)(2)(i) modify this provision.

Other provisions do not modify this provision. To the contrary, other provisions of §6152(a)(2)(i) also provide for charges to be based on actual expenses. The initial sentence states that the health care provider is "entitled" to receive payment of "such expenses before producing the charts or records." The term *such expenses* can only refer to the "actual and reasonable expenses of reproducing the charts or records" because these are the only expenses referred to in earlier provisions of §6152. Thus, the language of the first sentence of §6152(a)(2)(i) that the health care provider "is entitled to receive such expenses" clearly and unambiguously provides that charges shall be based on actual and reasonable expenses.

Defendant appears to contend that the language of the second sentence of §6152(a)(2)(i) contradicts a reading of the prior provisions referring to charges to be based on actual expenses. I disagree.

The second sentence of §6152(a)(2)(i) does not provide that a health care provider is entitled to receive additional payments in excess of its actual expenses. To the contrary, while the previous provisions of §6152 entitle the health care provider to receive actual and reasonable expenses, this second sentence of §6152(a)(2)(i) places a cap on what may be charged as actual and reasonable expenses by providing that the payment of actual and reasonable expenses "shall not exceed" the amounts set forth in this sentence. Or, in other words, this sentence applies only to health care providers whose actual expenses exceed the amounts set forth in the pricing schedule.

Also see §6152(c), which governs delivery of records; it provides for the health care provider to deliver copies within thirty days "upon payment of its expenses by the party causing service of the subpoena."

I recognize that there can be legislation which provides for charges to be based on reasonable expenses and which thereafter includes a formula to calculate reasonable expenses.[4] However, the Medical Records Act is not such legislation. Nothing in the language of the Act suggests that the charges in the second sentence are presumed to be actual expenses. To the contrary, the use of the language "shall not exceed" modifies a health care provider's entitlement to recover actual expenses by

[4]There are very sound reasons for enacting legislation that sets a formula for calculating charges. It prevents time consuming and expensive litigation because the parties know where they stand. Furthermore, a charge based on actual and reasonable expenses may be difficult to calculate and may be a moving target.

setting the maximum amount that may be charged where the actual expenses exceed this amount.

Finally, even if there could be some merit to defendant's contention that the second sentence offers support for its position that health care providers may charge the amounts set forth in the pricing schedule, such a construction cannot be reconciled with the prior provisions within §6152 which require charges to be based on actual and reasonable expenses. See 1 Pa.C.S. §1932 which provides that statutes or parts of statutes are in *pari material* when they relate to the same things and that such statutes or parts of statutes shall be construed together, if possible, as one statute. Also 1 Pa.C.S. §1922(2) provides that the General Assembly intends the entire statute to be effective and certain, while case law holds that there is a presumption in drafting a statute that the General Assembly intended the entire statute to be effective; thus, if possible, a statute must be construed as to give effect to all of its provisions. See *Holland v. Marcy*, 883 A.2d 449, 455-56 (Pa. 2005), and *Galloway v. Pennsylvania State Police*, 756 A.2d 1209, 1213 (Pa. Cmwlth. 2000).

Defendant's interpretation of the Medical Records Act would require that I substitute the word *charges* for *actual expenses* so that §6152(a)(2)(i) would provide that the health care provider shall notify the attorney of the estimated "charges" (rather than "estimated actual and reasonable expenses") and the first sentence of §6152(a)(2)(i) would provide that the health care provider is entitled to receive payment "of such charges" (rather than "of such expenses"). However, the legislation uses the word *expenses*; its use of this word rather than the word *charges* produces a very

different result, and I must construe the legislation by using the words which the General Assembly selected.

Defendant contends that the Pennsylvania Supreme Court in *Liss & Marion* has already ruled that under §6152(a)(2)(i) a health care facility may charge the rate D for paper copies that are not from microfilm records. Its contention is based on the following statements within the Court's Opinion.

In addressing the defendants' argument that the Medical Records Act does not provide a specific rate for copies from electronic records, the Court stated:

> The language of the MRA is clear: when providing paper copies from any medium, Appellants are entitled to receive rate D per page. The only exception is when the copies are made from microfilm; then, Appellants can charge the higher rate M. Here, Appellants made paper copies from electronic records and not from microfilm so the rate "for paper copies", rate D, applies. We affirm the lower courts' holdings that the MRA created a higher price rate for copies from microfilm, rate M, and a default rate, rate D, for copies from all other media. *Liss v. Marion*, *supra*, 983 A.2d at 662-63 (footnotes omitted).

Defendant also relies on footnote 9 which reads as follows:

> Appellants argue that copies from electronic records need only be billed at a "reasonable" rate because none of the rates enumerated in subsection 6152(a)(2)(i) apply. Because we decide that, in fact, the enumerated rate "for paper copies", rate D, does apply and should have been charged, we do not reach the issue of what rate may be charged when the MRA does not contain a specific or relevant rate. *Id.* at 663 n.9.

Defendant also relies on a provision within footnote 6 which reads as follows:

> . . . Finally, as the trial court recognized, the MRA rates embody the public policy of the Commonwealth regarding the amounts to be charged by the industry for copying medical records. *Id.* at 659 n.6.

In *Liss & Marion*, the law firm and the members of the class were seeking to recover only the difference between what they were charged and the rate D. The law firm and the class never claimed that the defendants could not charge the rate D; it contended only that it could not charge more than the rate D. Thus, the issue raised in the present case was never considered by the Pennsylvania Supreme Court. Instead, the language upon which defendant relies was in response to the defendants' contention that the plaintiffs were not entitled to the rate D because the rate D does not apply to paper copies from electronic records.

The second amended complaint includes a plaintiff who alleges that he received copies of medical records reproduced on a CD-ROM, without receiving paper copies, and was charged at the maximum rates set forth in the second sentence of §6152(a)(2)(i) from non-microfilm. For the reasons set forth above, this plaintiff could not be charged more than the actual and reasonable expense of furnishing the medical records.

MRO contends that my ruling that charges cannot exceed actual and reasonable expenses, even if correct, applies only to charges when a subpoena duces tecum is served on a health care provider pursuant to 42 Pa.C.S. §6152(a)(1).

In the present case, plaintiffs did not serve subpoenas. Plaintiffs obtained the records through 42 Pa.C.S. §6155(b)(1) which reads as follows:

> **(b) Rights to records generally.–**
>
> (1) A patient or his designee, including his attorney, shall have the right of access to his medical charts and records and to obtain photocopies of the same, without the use of a subpoena duces tecum, for his own use. A health care provider or facility shall not charge a patient or his designee, including his attorney, a fee in excess of the

> amounts set forth in section 6152(a)(2)(i) (relating to subpoena of records).

The second sentence of §6155(b)(1) provides that a health care provider shall not charge "a fee in excess of the amounts set forth in section 6152(a)(2)(i) (relating to subpoena of records)." Defendant contends that by using the terms "fee" and "amounts," the Legislature intended to allow a health care provider who receives a written request for records to impose any charge that does not exceed the amounts set forth in the second sentence of §6152(a)(2)(i), as adjusted by the Secretary of Health. Because of the use of the terms "fees" and "amounts," the reference to §6152(a)(2)(i) did not include the first sentence of this section which, under my interpretation of §6152(a)(2)(i), does not permit charges in excess of actual and reasonable expenses.

I do not find this argument to be persuasive for several reasons.

First, §6155(b) refers to amounts set forth in §6152(a)(2)(i)–and not to amounts set forth in the second sentence of §6152(a)(2)(i). If I have correctly construed the term "such expenses" in the first sentence of §6152(a)(2)(i) as referring to §6152(a)(1) and prohibiting a change that does not exceed actual and reasonable expenses, this is an "amount" set forth in §6152(a)(2)(i) within the meaning of §6155(b)(1).

Second, *Liss & Marion v. Recordex Acquisition*, *supra*, considered requests for medical records and the Court looked to §6152(a)(1). See, e.g., the statement at 983 A.2d 658: "The MRA imposes a duty on medical providers, like hospitals that hired Appellants, to produce medical records in a timely fashion, i.e., within three days <u>of receiving a subpoena or request</u>. 42 Pa.C.S. §6152(a)(1). . . . If the hospital chooses to provide copies, it must supply in its response to the request an estimate of the

'actual and reasonable expenses of reproducing the charts or records.' 42 Pa.C.S. §6152(a)(1)." (Emphasis added.)

Third, legislation shall not be construed to reach an unreasonable result. 1 Pa.C.S.A. §1922(1). There is no reason why the General Assembly would permit a health care provider to charge more for health care records if such records are sought through a request rather than through a subpoena.

For these reasons, I am overruling defendant's preliminary objections seeking dismissal of plaintiffs' complaint on the ground that defendant's charges did not exceed the amounts provided for in the second sentence of 42 Pa.C.S. §6152(a)(2)(i).[5]

[5]Defendant's preliminary objections include a proposed court order which sets forth the statement specified in 42 Pa.C.S. §702(b).

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA
CIVIL DIVISION

WAYNE M. CHIURAZZI LAW INC. d/b/a CHIURAZZI & MENGINE, LLC and DAVID A. NEELY,	
Plaintiffs	NO. GD09-012911
vs.	
MRO CORPORATION,	
Defendant	

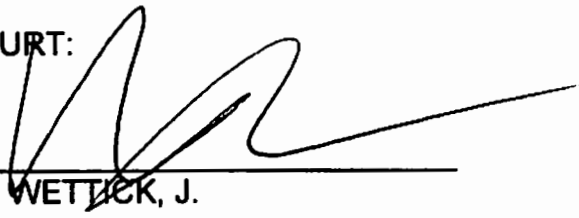
ORDER OF COURT

On this 17th day of June, 2010, upon consideration of defendant's preliminary objections seeking dismissal of plaintiffs' Second Amended Complaint on the ground that plaintiffs were not charged any amount for the production of medical records that exceeded the amounts set forth in the second sentence of 42 Pa.C.S. §6152(a)(2)(i), as adjusted, it is hereby ORDERED that these preliminary objections are overruled based on my construction of the relevant provisions of the Medical Records Act as not allowing charges that exceed actual and reasonable expenses.

I am of the opinion that this order of court overruling defendant's preliminary objections involves a controlling question of law as to which there is substantial ground

for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the matter.

BY THE COURT:



WETTICK, J.

EXHIBIT
8

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

ANTHONY C. MENGINE LAW, INC. D/B/A CHIURAZZI & MENGINE, LLC; and CHARLOTTE HAGANS, Plaintiffs, v. HEALTHPORT, Defendant.	CIVIL DIVISION No. GD-09-012923 (coordinated with GD-09-012911; GD-09-012919; GD-09-012922; and GD-09-014785) **HEALTHPORT TECHNOLOGIES LLC'S ANSWER AND NEW MATTER** Filed on behalf of Defendant HealthPort Counsel of Record for this Party:
To WAYNE CHIURAZZI LAW INC. D/B/A CHIURAZZI & MENGINE LLC You are hereby notified to file a written response to the enclosed Answer and New Matter to Class Action Complaint within twenty (20) days from the date of service hereof or a judgment may be entered against you. By _____ James C. Swetz, Esq.	Richard W. Hosking Pa. I.D. #32982 James C. Swetz Pa. I.D. #208717 K&L GATES LLP K&L Gates Center 210 Sixth Avenue Pittsburgh, PA 15222-2613 412/355-6500 412/355-6501 Firm. I.D. #148

ANSWER TO PLAINTIFFS' CLASS ACTION COMPLAINT

AND NOW COMES Defendant HealthPort Technologies LLC ("HealthPort"), by and through its undersigned counsel, and hereby submits this Answer and New Matter ("Answer") to Plaintiffs' Class Action Complaint ("Complaint"),[1] stating as follows:

ANSWER TO COMPLAINT

1. Denied. Paragraph 1 of the Complaint states conclusions of law to which no response is required.

2. Denied. Paragraph 2 of the Complaint states conclusions of law to which no response is required.

3. Denied. HealthPort admits only that it is a limited liability company that charges medical record requesters for the search for, retrieval, reproduction and transmittal of medical records. To the extent that this paragraph alleges that the Medical Records Act ("MRA"), 42 Pa. C.S. § 6151 *et seq.*, requires that medical record reproduction companies ("MRRCs") such as HealthPort charge the "actual and reasonable" expenses of reproducing medical charts or records, it is denied.

4. Denied. Paragraph 4 of the Complaint states conclusions of law to which no response is required. To the extent a response is deemed necessary, HealthPort admits only that Plaintiff Chiurazzi & Mengine is a law firm located at 101 Smithfield Street, Pittsburgh, Pennsylvania, 15222. HealthPort denies that it overcharged Plaintiff Chiurazzi & Mengine in relation to medical records requests.

[1] On June 17, 2010, the Court sustained HealthPort's preliminary objections and dismissed Plaintiffs' claims for restitution (Count II); a constructive trust (Count III); and unjust enrichment (Count IV).

5. Denied. Paragraph 5 of the Complaint states conclusions of law to which no response is required. To the extent a response is deemed necessary, HealthPort admits only that Plaintiff Charlotte Hagans is an individual who resides in Mapleton Depot, Pennsylvania. HealthPort denies that it overcharged Plaintiff Charlotte Hagans in relation to medical records requests.

6. Denied as stated. HealthPort admits only that (i) it is a limited liability company headquartered in Alpharetta, Georgia that was formed through the 2007 merger of Smart Document Solutions ("SDS") and Companion Technologies, and the subsequent merger of this entity with ChartOne, Inc. ("ChartOne") in 2008, (ii) it is a limited liability company organized under the laws of the state of Georgia with its principal place of business in the state of Georgia, and (iii) it is an MRRC that provided the representative plaintiffs with copies of their medical records for a fee approved by the representative plaintiffs.

7. Denied. Paragraph 7 of the Complaint states conclusions of law to which no response is required.

8. Denied. Paragraph 8 of the Complaint states conclusions of law to which no response is required.

9. Denied. Paragraph 9 of the Complaint states conclusions of law to which no response is required.

10. Denied. Paragraph 10 of the Complaint states conclusions of law to which no response is required.

11. Denied. Paragraph 11 of the Complaint states conclusions of law to which no response is required.

12. Denied. Paragraph 12 of the Complaint states conclusions of law to which no response is required.

13. Admitted in part, denied in part. HealthPort admits that is an MRRC that entered into agreements with hospitals in Pennsylvania, including the West Penn Allegheny Health System, Jefferson Regional Medical Center and J.C. Blair Memorial Hospital, to provide medical records to requesters. To the extent that the allegations of Paragraph 13 characterize the agreements HealthPort entered into with hospitals relating to medical records, those allegations are denied because the agreements are writings that speak for themselves.

14. Denied. The allegations of Paragraph 14 characterize the agreements HealthPort entered into with hospitals relating to medical records, and HealthPort denies the allegations because the agreements are writings that speak for themselves.

15. Denied. The allegations of Paragraph 15 characterize the agreements HealthPort entered into with hospitals relating to medical records, and HealthPort denies the allegations because the agreements are writings that speak for themselves.

16. Admitted in part, denied in part. The allegations of Paragraph 16 characterize the agreements HealthPort entered into with hospitals relating to medical records, and HealthPort denies the allegations because the agreements are writings that speak for themselves. By way of further response, HealthPort admits that it contacts the Medical Records Requestor directly, informs them of the total number of pages of records to be 'copied', and offers to provide these pages in exchange for payment of a specified fee.

17. Admitted in part, denied in part. The allegations of Paragraph 17 characterize the agreements HealthPort entered into with hospitals and/or affiliated entities relating to medical records, and HealthPort denies the allegations because the agreements are writings that speak for

themselves. To the extent a response is required, HealthPort denies that it shares any revenue with hospitals and/or affiliated entities related to medical records requests. By way of further response, HealthPort will, in certain instances depending on the provisions contained in its contract with the provider, provide services to the hospital, for consideration, and, in instances where the hospital renders services, share revenues with the hospital.

18. After a reasonable investigation, HealthPort is without knowledge or information sufficient to form a belief as to the truth of the averments in Paragraph 18 of the Complaint, and therefore denies same.

19. After a reasonable investigation, HealthPort is without knowledge or information sufficient to form a belief as to the truth of the averments in Paragraph 19 of the Complaint, and therefore denies same.

20. After a reasonable investigation, HealthPort is without knowledge or information sufficient to form a belief as to the truth of the averments in Paragraph 20 of the Complaint, and therefore denies same.

21. Denied. After reasonable investigation, HealthPort is without knowledge or information regarding Plaintiffs' broad characterizations of practices related to medical records for hospitals and MRRCs in general, and, therefore, HealthPort denies such allegations. To the extent that this paragraph alleges that the MRA requires that HealthPort charge the "actual and reasonable" expenses of reproducing medical records, HealthPort denies such allegations. Further, to the extent that this paragraph alleges that the MRA only provides a "ceiling" on any such charges for the search, retrieval, reproduction and transmission of medical records, HealthPort denies the allegations. HealthPort denies the remaining allegations of Paragraph 21 of the Complaint as conclusions of law to which no response is required.

22. Denied. Paragraph 22 of the Complaint states conclusions of law to which no response is required.

23. Denied. HealthPort denies the allegations of Paragraph 23 of the Complaint as conclusions of law to which no response is required. To the extent a response is required, HealthPort alleges that the MRA does not require that a health care provider or facility or a designated agent estimate and charge requesters the actual and reasonable expenses incurred in connection with the search for, retrieval, reproduction and transmission of medical records. By way of further response, at all relevant times, HealthPort complied with the MRA's requirements for charges in connection with the search for, retrieval, reproduction and transmission of requesters' medical records.

24. Denied. HealthPort denies the allegations of Paragraph 24 of the Complaint as conclusions of law to which no response is required. To the extent a response is required, HealthPort alleges that at all times relevant it has complied with the MRA's requirements for charges in connection with the search for, retrieval, reproduction and transmission of requesters' medical records.

25. Denied. HealthPort denies that the MRA requires HealthPort to estimate and charge the requesters HealthPort's actual and reasonable expenses incurred in connection with the reproduction of medical records. By way of further response, at all relevant times, HealthPort complied with the MRA's requirements for charges in connection with the reproduction of requested medical records – including those established in 42 Pa. C.S. § 6152(a)(2)(i) and adjusted by the Secretary of Health based on the consumer price index. HealthPort denies the remaining allegations of Paragraph 25 of the Complaint as conclusions of law to which no response is required.

26. Denied. HealthPort denies that the MRA requires HealthPort to estimate and charge the requesters HealthPort's actual and reasonable expenses incurred in connection with the reproduction of medical records. By way of further response, at all relevant times, HealthPort complied with the MRA's requirements for charges in connection with the reproduction of requested medical records – including those established in 42 Pa. C.S. § 6152(a)(2)(i) and adjusted by the Secretary of Health based on the consumer price index. HealthPort denies the remaining allegations of Paragraph 26 of the Complaint as conclusions of law to which no response is required.

27. Denied as stated. HealthPort admits only that it charged requesters sales tax, which it was permitted to do under Pennsylvania and federal law, and that sales tax charges were stated in invoices issued to requesters. At all relevant times, HealthPort complied with the MRA's requirements for charges in connection with the reproduction of requested medical records – including those established in 42 Pa. C.S. § 6152(a)(2)(i) and adjusted by the Secretary of Health based on the consumer price index. By way of further response, HealthPort denies that the MRA requires HealthPort to estimate and charge requesters HealthPort's actual and reasonable expenses incurred in connection with the search for, retrieval, reproduction and transmission of medical records.

28. Denied. Paragraph 28 of the Complaint states conclusions of law to which no response is required. To the extent a response is deemed necessary, HealthPort denies that (i) the MRA requires HealthPort to estimate and charge requesters HealthPort's actual and reasonable expenses incurred in connection with the search for, retrieval, reproduction and transmission of medical records, and (ii) the MRA or any other aspect of Pennsylvania or federal law prohibits

the charging of sales tax for the search for, retrieval, reproduction and transmission of medical records.

29. Admitted.

30. Admitted in part, denied in part. It is admitted that HealthPort issued the invoice attached as Exhibit 1 to the Complaint. To the extent the allegations of this paragraph characterize the invoice, they are denied because the invoice is a writing that speaks for itself. HealthPort denies that Plaintiff Chiurazzi & Mengine lacked knowledge that the invoice did not reflect charges based upon HealthPort's actual or estimated actual exposes for locating, retrieving, reproducing and transmitting medical records, because HealthPort charged the fees set forth in 42 Pa. C.S. § 6152(a)(2)(i). By way of further response, at all relevant times, HealthPort complied with the MRA's requirements for charges in connection with the search for, retrieval, reproduction and transmission of requesters' medical records.

31. Admitted in part, denied in part. Plaintiff had the choice of obtaining copies of the medical records from HealthPort at the rates and fees specified by HealthPort in its invoice or obtaining the records directly or through a copy service of its choice. Admitted that in exchange for payment of the fees specified in HealthPort's invoice, HealthPort provided the records to Plaintiff.

32. Admitted.

33. Admitted in part, denied in part. It is admitted that HealthPort issued the invoice attached as Exhibit 2 to the Complaint. To the extent the allegations of this paragraph characterize the invoice, they are denied because the invoice is a writing that speaks for itself. By way of further response, at all relevant times, HealthPort complied with the MRA's

requirements for charges in connection with the search for, retrieval, reproduction and transmission of requesters' medical records.

34. Admitted in part, denied in part. Plaintiff had the choice of obtaining copies of the medical records from HealthPort at the rates and fees specified by HealthPort in its invoice or obtaining the records directly or through a copy service of its choice. Admitted that in exchange for payment of the fees specified in HealthPort's invoice, HealthPort provided the records to Plaintiff.

35. Denied. HealthPort denies the allegations of Paragraph 35 of the Complaint as conclusions of law to which no response is required. To the extent a response is required, HealthPort denies that this action is properly brought as a class action because the requirements in Pa. R. Civ. P. 1701 *et seq.*, are not met. By way of further response, at all relevant times, HealthPort complied with the MRA's requirements for charges in connection with the search for, retrieval, reproduction and transmission of requesters' medical records – including those established in 42 Pa. C.S. § 6152(a)(2)(i) and adjusted by the Secretary of Health based on the consumer price index.

36. Denied. HealthPort incorporates Paragraph 36 as if fully set forth herein. After reasonable investigation, HealthPort is without knowledge or information regarding the number of claimants in the putative class, and, therefore, HealthPort denies such allegations. By way of further response, HealthPort denies that the name and identity of any putative class member can be determined from HealthPort's records. Further, after reasonable investigation, HealthPort is without knowledge or information whether the claimants in the putative class are aware of their potential claims or the amount of individual damages they allegedly sustained, and, therefore

HealthPort denies such allegations. HealthPort denies the remaining allegations of Paragraph 36 as conclusions of law to which no response is required.

37. Denied. HealthPort denies the allegations of Paragraph 37 and its subparts as consisting of conclusions of law to which no response is required. To the extent that Paragraph 37 and its subparts allege that the MRA requires that HealthPort charge the cost-based "actual and reasonable" expenses of reproducing medical charts or records, it is denied. By way of further response, the facts of each individual request alleged by a putative claimant will necessarily differ from request to request, depending on the size of the records at issue, the particular records requested, and the time and labor involved in responding to each particular request, and the fact or extent to which the putative claimant paid for such request, among other varying and individual issues. In addition, no response to subparagraphs (h)-(m) is required because they pertain to causes of action that were dismissed.

38. Denied. HealthPort denies the allegations of Paragraph 38 as consisting of conclusions of law to which no response is required. To the extent that Paragraph 38 alleges that the MRA requires that HealthPort charge the cost-based "actual and reasonable" expenses of reproducing medical charts or records, it is denied. By way of further response, the facts of each individual request alleged by a putative claimant will necessarily differ from request to request, depending on the size of the records at issue, the particular records requested, and the time and labor involved in responding to each particular request, and the fact or extent to which the putative claimant paid for such request, among other varying and individual issues.

39. Denied. Paragraph 39 of the Complaint states conclusions of law to which no response is required. To the extent a response is deemed necessary, HealthPort is without

knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 39, and therefore denies same.

40. Denied. Paragraph 40 of the Complaint states conclusions of law to which no response is required. To the extent a response is deemed necessary, HealthPort is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 40, and therefore denies same.

41. Denied. Paragraph 41 of the Complaint states conclusions of law to which no response is required. To the extent a response is deemed necessary, HealthPort is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 41, and therefore denies same.

42. Denied. Paragraph 42 of the Complaint states conclusions of law to which no response is required. To the extent a response is deemed necessary, HealthPort is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 42, and therefore denies same.

43. Denied. Paragraph 43 of the Complaint states conclusions of law to which no response is required. To the extent a response is deemed necessary, HealthPort is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 43, and therefore denies same.

44. Denied. Paragraph 44 of the Complaint states conclusions of law to which no response is required. To the extent a response is deemed necessary, HealthPort is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 44, and therefore denies same.

45. Denied. Paragraph 45 of the Complaint states conclusions of law to which no response is required. To the extent a response is deemed necessary, HealthPort is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 45, and therefore denies same.

46. Denied. Paragraph 46 of the Complaint states conclusions of law to which no response is required. To the extent a response is deemed necessary, HealthPort is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 46, and therefore denies same.

47. Denied. Paragraph 47 of the Complaint states conclusions of law to which no response is required. To the extent a response is deemed necessary, HealthPort is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 47, and therefore denies same.

48. Denied. Paragraph 48 of the Complaint states conclusions of law to which no response is required. To the extent a response is deemed necessary, HealthPort is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 48, and therefore denies same.

49. Denied. Paragraph 49 of the Complaint states conclusions of law to which no response is required. To the extent a response is deemed necessary, HealthPort is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 49, and therefore denies same.

50. Denied. Paragraph 50 of the Complaint states conclusions of law to which no response is required. To the extent a response is deemed necessary, HealthPort is without

knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 50, and therefore denies same.

51. Denied. Paragraph 51 of the Complaint states conclusions of law to which no response is required. To the extent a response is deemed necessary, HealthPort is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 51, and therefore denies same.

52. Denied. Paragraph 52 of the Complaint states conclusions of law to which no response is required. To the extent a response is deemed necessary, HealthPort is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 52, and therefore denies same.

53. Denied. Paragraph 53 of the Complaint states conclusions of law to which no response is required. To the extent a response is deemed necessary, HealthPort is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 53, and therefore denies same.

54. Denied. Paragraph 54 of the Complaint states conclusions of law to which no response is required. To the extent a response is deemed necessary, HealthPort is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 54, and therefore denies same.

COUNT I

55. HealthPort incorporates by reference its answers to the foregoing paragraphs as if fully set forth herein.

56. Denied. Paragraph 56 of the Complaint states conclusions of law to which no response is required.

57. Denied. Paragraph 57 of the Complaint states conclusions of law to which no response is required.

58. Denied. Paragraph 58 of the Complaint states conclusions of law to which no response is required.

59. Denied. Paragraph 59 of the Complaint states conclusions of law to which no response is required.

60. Denied. Paragraph 60 of the Complaint states conclusions of law to which no response is required.

61. Denied. Paragraph 61 of the Complaint states conclusions of law to which no response is required.

62. Denied. Paragraph 62 of the Complaint states conclusions of law to which no response is required.

63. Denied. Paragraph 63 of the Complaint states conclusions of law to which no response is required.

64. Denied. Paragraph 64 of the Complaint states conclusions of law to which no response is required.

WHEREFORE, HealthPort respectfully requests that judgment be entered in its favor and against Plaintiffs plus any of its costs and fees and such further relief as the Court deems appropriate.

COUNTS II-IV

On June 17, 2010, the Court dismissed Plaintiffs' claims for restitution (Count II; paragraphs 65-68); a constructive trust (Count III; paragraphs 69-73); and unjust enrichment

(Count IV; paragraphs 74-78). Accordingly, no responses to the allegations of paragraphs 65-78 are required.

COUNT V

79. HealthPort incorporates its answers to the foregoing paragraphs as if fully set forth herein.

80. Denied. Paragraph 80 of the Complaint states conclusions of law to which no response is required.

81. Denied. Paragraph 81 of the Complaint states conclusions of law to which no response is required.

82. Denied. Paragraph 82 of the Complaint states conclusions of law to which no response is required.

83. Denied. Paragraph 83 of the Complaint states conclusions of law to which no response is required.

WHEREFORE, HealthPort respectfully requests that judgment be entered in its favor and against Plaintiffs plus any of its costs and fees and such further relief as the Court deems appropriate.

NEW MATTER

1. HealthPort incorporates by reference each and every paragraph of its foregoing Answer to the Complaint as if fully set forth herein.

2. Plaintiffs' Complaint fails to state a claim upon which relief can be granted.

3. Plaintiffs' claim is barred in whole or in part because, at all relevant times, HealthPort complied with the MRA's requirements for charges in connection with the search for, retrieval, reproduction and transmission of requesters' medical records.

4. Plaintiffs' claims are barred because the MRA mandates that one of the two rates set forth in 42 Pa. C.S. § 6152(a)(2)(i) must be charged whenever records were being produced – one rate when the requested records are stored on microfilm and another rate for records stored on or in any other medium.

5. Plaintiffs' claims are barred because the MRA does not require that HealthPort estimate and/or charge it "actual and reasonable" expenses of reproducing medical charts or records.

6. Plaintiffs' claims are barred because the MRA dictates the "actual and reasonable" expenses of reproducing medical charts or records by setting forth the rates that may be charged that the legislature had deemed reasonable *per se*.

7. Plaintiffs' claims are barred in whole or in part because HealthPort's charges were justified by the decisional law of the Commonwealth of Pennsylvania interpreting the applicable provisions of the MRA.

8. Plaintiffs' claims are barred in whole or in part because HealthPort did not overcharge any patient, patient designee, representative and/or attorney for the reproduction of medical records under the MRA.

9. Plaintiffs' claims are barred in whole or in part because HealthPort complied with any duty it had under the MRA by obtaining "prior approval" from the Plaintiffs for the fees that it charged pursuant to § 6152(a)(2)(i).

10. Plaintiffs' claims are barred by the voluntary payment doctrine.

11. Plaintiffs' claims are barred by the exclusivity of the remedies available under the MRA and other provisions of the Pennsylvania Code.

12. Plaintiffs' claims are barred by the doctrine of accord and satisfaction.

13. Plaintiffs' claims are barred by the doctrine of consent.

14. Plaintiffs' claims are barred by the doctrine of estoppel, waiver and/or release.

15. Plaintiffs' claims are barred by the doctrine of failure of consideration.

16. Plaintiffs' claims are barred by the doctrine of payment.

17. Plaintiffs failed to join a necessary party/all necessary parties.

18. Plaintiffs failed to exhaust their administrative remedies.

19. Plaintiffs' claims are barred by the doctrine of laches.

20. Plaintiffs' claims are barred or otherwise limited by operation of any applicable statutes of limitation.

21. Plaintiffs' claims are barred, in whole or in part, because they have failed to mitigate their damages.

22. Plaintiffs' claims are barred because they have suffered no damages.

23. Plaintiffs' Complaint fails to identify a class capable of certification pursuant to the requirements in Pa. R. Civ. P. 1701 *et seq*.

24. Plaintiffs lack standing to pursue their claims as alleged.

25. HealthPort properly charged sales taxes for furnishing medical records to Plaintiffs under Pennsylvania law.

26. Plaintiffs are not entitled to attorneys' fees or litigation costs.

27. By virtue of this Honorable Court's June 17, 2010 Order and Memorandum Opinion, Plaintiffs have no claim for restitution, constructive trust, or unjust enrichment.

28. By virtue of this Honorable Court's June 17, 2010 Order and Memorandum Opinion, Plaintiffs have no claim for punitive damages.

29. HealthPort hereby incorporates any defense made applicable as a result of any appeal in any of the coordinated actions, including the interlocutory appeal as to denial of MRO's preliminary objections certified by this Court on June 17, 2010.

30. HealthPort hereby incorporates any affirmative defenses and/or New Matter asserted by any of the defendants in the above-captioned coordinated actions.

WHEREFORE, HealthPort respectfully requests the Court to enter judgment in its favor as to Plaintiffs' claims and any cross-claims asserted against it by any other defendants. HealthPort requests any further relief to which it may be entitled.

Dated: July 19, 2010

By: _____
Richard W. Hosking, Esq.
James C. Swetz, Esq.
Attorneys for Defendant HealthPort

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **Answer and New Matter** was served upon Plaintiffs' counsel and all counsel of record, via first class mail, postage prepaid, this 19th day of July, 2010, as follows:

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Philadelphia, PA 19103

James C. Swetz

EXHIBIT
9

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

ANTHONY C. MENGINE LAW, INC. D/B/A CHIURAZZI & MENGINE, LLC; and CHARLOTTE HAGANS, *et al.*,	CIVIL DIVISION
Plaintiffs,	Coordinated Action Nos. GD-09-012911; GD-09-012919; GD-09-012922; GD-09-012923; GD-09-014785; GD-10-004369
v.	**JOINT STIPULATED MOTION TO AMEND THE COURT'S AUGUST 23, 2010 SCHEDULING ORDER**
HEALTHPORT; IOD INCORPORATED; UPMC PRESBYTERIAN SHADYSIDE; AND MAGEE-WOMENS HOSPITAL OF UNIVERSITY OF PITTSBURGH MEDICAL CENTERS,	Filed jointly on behalf of Plaintiffs and Defendants
Defendants.	**Counsel of Record for Defendants:**
	Richard W. Hosking Pa. I.D. #32982 James C. Swetz Pa. I.D. #208717 K&L GATES LLP K&L Gates Center 210 Sixth Avenue Pittsburgh, PA 15222-2613 412/355-6500 412/355-6501 Firm. I.D. #148
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IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

ANTHONY C. MENGINE LAW, INC. D/B/A CHIURAZZI & MENGINE, LLC; and CHARLOTTE HAGANS, *et al.*,	)	CIVIL DIVISION
Plaintiffs,	)	GD-09-012911; GD-09-012919; GD-09-012922; GD-09-012923; GD-09-014785; GD-10-004369
v.	)	
HEALTHPORT; IOD INCORPORATED; UPMC PRESBYTERIAN SHADYSIDE; AND MAGEE-WOMENS HOSPITAL OF UNIVERSITY OF PITTSBURGH MEDICAL CENTERS,	)	
Defendants.	)	

ORDER

NOW, this 4 day of Oct, 2010, upon consideration of the foregoing Joint Stipulated Motion to Amend the Court's August 23, 2010 Scheduling Order, it is hereby ORDERED and DECREED that said Motion is GRANTED. Exhibit A is amended to read as follows:

> AND NOW, to-wit, this 23rd day of August, 2010, it is hereby ORDERED that, where appropriate, Defendants will file motions for partial judgment on the pleadings on or before October 15, 2010. Plaintiffs will file their response thereto on or before November 29, 2010. Defendants will file their reply to Plaintiffs' responses on or before December 9, 2010. Argument will be December 20, 2010 at 1:00 p.m.

BY THE COURT:

J.

EXHIBIT
10

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

ANTHONY C. MENGINE LAW, INC. D/B/A CHIURAZZI & MENGINE, LLC; and CHARLOTTE HAGANS,	CIVIL DIVISION
Plaintiffs,	No. GD-09-012923
v.	(coordinated with GD-09-012911; GD-09-012919; GD-09-012922; GD-09-014785; GD-10-004369)
HEALTHPORT,	**MOTION FOR JUDGMENT ON THE PLEADINGS**
Defendant.	Filed on behalf of Defendant HealthPort Technologies, LLC
	Counsel of Record for this Party:
	Richard W. Hosking Pa. I.D. #32982
	James C. Swetz Pa. I.D. #208717
	K&L GATES LLP K&L Gates Center 210 Sixth Avenue Pittsburgh, PA 15222-2613 412/355-6500 412/355-6501

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

ANTHONY C. MENGINE LAW, INC. D/B/A CHIURAZZI & MENGINE, LLC; and CHARLOTTE HAGANS,	)	CIVIL DIVISION
	)	No. GD-09-012923
Plaintiffs,	)	(coordinated with GD-09-012911; GD-09-012919; GD-09-012922; GD-09-014785; GD-10-004369)
v.	)	
HEALTHPORT,	)	
Defendant.	)	

MOTION FOR JUDGMENT ON THE PLEADINGS

AND NOW COMES Defendant, HealthPort Technologies, LLC ("HealthPort"), by and through its counsel, K&L Gates LLP, and files the following Motion for Judgment on the Pleadings ("Motion") pursuant to Rule 1034 of the Pennsylvania Rules of Civil Procedure and the Court's Scheduling Order dated August 23, 2010, as amended October 5, 2010. In support of this Motion, HealthPort states the following:

1. On July 15, 2009, Plaintiffs filed the instant Class Action Complaint against HealthPort in the Court of Common Pleas of Allegheny County, Pennsylvania.

2. Count I of the Complaint seeks damages for breach of contract. Plaintiffs allege that the rate requirements of the Pennsylvania Medical Records Act, 42 Pa.C.S. § 6152 *et. seq.* ("the Act"), are implied terms of a contract between the parties whereby HealthPort produced medical records to the Plaintiffs upon written request. Compl. at ¶¶ 56-64.

3. On June 17, 2010, this Honorable Court partially sustained Defendants' Preliminary Objections to Plaintiffs' Complaints in the above-captioned coordinated matters, leaving only Plaintiffs' breach of contract (Count I) and declaratory judgment (Count V) claims.

4. Based on the material facts alleged in the Complaint, Plaintiffs' breach of contract claim must fail for at least four reasons.

- First, HealthPort cannot be held liable on a contract between a disclosed principal (the hospital), and third-parties (Plaintiffs), when it did not expressly assume such responsibility. As matter of law, Plaintiffs' breach of contract claim must therefore be dismissed.
- Second, if there was a contract between HealthPort and Plaintiffs, it was a unilateral contract governed by the terms of the invoices that HealthPort sent to Plaintiffs. As alleged, HealthPort discharged any contractual obligation it had under these contracts when Plaintiffs paid the fees stated in the invoices and retained the invoices without objection.
- Third, the voluntary payment doctrine bars Plaintiffs' claims as alleged, because Plaintiffs voluntarily and with full knowledge paid the fees stated in the invoices (fees equivalent to those set forth in the Act and its regulations) and retained the records without objection.
- Fourth, as alleged, HealthPort obtained "prior approval" for the fees that it stated in its invoices, when Plaintiffs paid those invoices and retained the records without objection, thereby manifesting their approval for the fees that were charged. Such "prior approval" is expressly permitted by the Act and relevant decisional law. *See Liss & Marion, P.C. v. Recordex Acquisition Corp.*, 937 A.2d 503, 513 (Pa. Super. Ct. 2007). Thus, if HealthPort had any contractual duty under the Act, it fully complied with that duty.

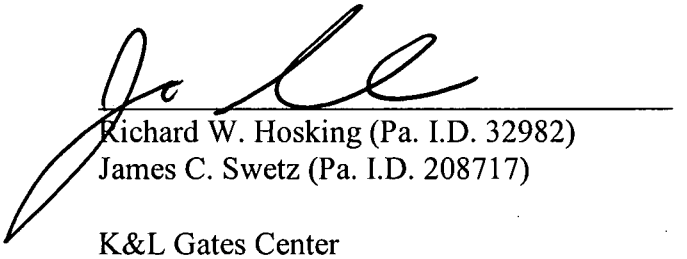
5. Accordingly, based on the foregoing, Plaintiffs' breach of contract claim must be dismissed based on the facts alleged in Plaintiffs' Complaint.

WHEREFORE, for the reasons stated above and in the accompanying Brief in Support, which is incorporated by reference, HealthPort respectfully requests that the Court dismiss Plaintiffs' breach of contract claim with prejudice, and grant any other appropriate relief.

Dated: October 15, 2010

Respectfully submitted,

K&L GATES LLP



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Attorneys for Defendant HealthPort

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

ANTHONY C. MENGINE LAW, INC. D/B/A CHIURAZZI & MENGINE, LLC; and CHARLOTTE HAGANS,	)	CIVIL DIVISION
	)	No. GD-09-012923
Plaintiffs,	)	(coordinated with GD-09-012911; GD-09-012919; GD-09-012922; GD-09-014785; GD-10-004369)
v.	)	
HEALTHPORT,	)	**HEALTHPORT TECHNOLOGIES LLC'S BRIEF IN SUPPORT OF PRELIMINARY OBJECTIONS**
Defendant.	)	Filed on behalf of Defendant HealthPort
	)	Counsel of Record for this Party:
	)	Richard W. Hosking Pa. I.D. #32982
	)	James C. Swetz Pa. I.D. #208717
	)	K&L GATES LLP K&L Gates Center 210 Sixth Avenue Pittsburgh, PA 15222-2613 412/355-6500 412/355-6501

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Defendant HealthPort Technologies, LLC ("HealthPort") submits this brief in support of its Motion for Judgment on the Pleadings as to Plaintiffs' Class Action Complaint ("Complaint").

I. INTRODUCTION

This is a breach of contract action seeking to recover alleged overpayment of bills for the cost of reproduction of patient medical records. HealthPort contends that the Complaint filed by Plaintiffs Chiurazzi & Mengine ("C&M"), a law firm, and Charlotte Hagans, an individual ("Hagans") (collectively, "Plaintiffs") relies on an incorrect construction of Pennsylvania's Medical Records Act, 42 Pa.C.S. §§ 6151-6160 ("the Act"); nonetheless Plaintiff's breach of contract claim is barred for the reasoned discussed below.

Specifically, the material facts set forth in Plaintiffs' Complaint fail to establish a claim for breach of contract for at least four reasons. *First*, the contract alleged by Plaintiffs is not between HealthPort and Plaintiffs; it is instead between Plaintiffs and the hospitals to which they allege they submitted their record requests. HealthPort fulfilled the subject medical record requests as an agent of the hospitals, and those hospitals were disclosed principals, as made clear by the allegations of Plaintiffs' Complaint and the invoices attached thereto. Under well-established principles of agency law, HealthPort, as the alleged designated agent of the hospitals, cannot be held individually liable for contracts to provide medical record copies between the hospitals and Plaintiffs. As such, Plaintiffs' breach of contract claim must fail as a matter of law.

Second, if any contract was formed between HealthPort and Plaintiffs, it is not as characterized by Plaintiffs *legal* conclusions in their Complaint. Rather, it was a unilateral contract to provide medical record copies for the fee amounts set forth in the invoices, as established by Plaintiffs' *factual* allegations. HealthPort discharged any contractual obligation it had by sending the records in return for Plaintiffs' payment of the invoices. The Court should

disregard Plaintiffs' bald legal assertions as to the nature of their alleged contract with HealthPort, and dismiss the breach of contract claim based on the alleged facts.

Third, the voluntary payment doctrine bars Plaintiffs' claims as alleged, because Plaintiffs voluntarily paid the invoices with full knowledge of the fees they were being charged, as set forth in the invoices attached to the Complaint. Plaintiffs may not avail themselves of the "fraud" exception to the voluntary payment doctrine here. Plaintiffs allege that they were aware the fees charged were those set forth under Pennsylvania regulations, and they paid them without pretense. This case is clearly distinguishable from *Liss & Marion, P.C. v. Recordex Acquisition Corp.*, 983 A.2d 652 (Pa. 2009). There, the voluntary payment doctrine did not apply, because the MRRC misrepresented the source of medical record copies. Here, there was no misrepresentation, and Plaintiffs have not and cannot allege any misrepresentation, because they were fully apprised of the rates they were charged for the paper copies sent to them.

Fourth, even assuming Plaintiffs' construction of the Act is correct, HealthPort complied with any duty it had under the Act, because it obtained "prior approval" for the fees it charged. When Plaintiffs received the invoices, they had the option of returning the records or paying the amount they believed was required under the Act. Instead, they paid the fee set forth in the invoice, and retained the records, thereby manifesting their approval. HealthPort breached no contractual duty that it owed to Plaintiffs even if the Act applies in the manner Plaintiffs allege.

For the foregoing reasons and as demonstrated more fully below, Plaintiffs' breach of contract claim must fail. HealthPort respectfully requests that the Court grant its Motion for Judgment on the Pleadings, dismiss Plaintiffs' breach of contract claim, and grant any other appropriate relief.

II. FACTUAL AND PROCEDURAL OVERVIEW[1]

A. Statement Of Material Facts

HealthPort is a medical record reproduction company ("MRRC") that contracts with hospitals to provide copies of patient medical records to authorized requesters. Compl. at ¶¶ 6, 13. In their Complaint, Plaintiffs allege that they have been repeatedly overcharged by HealthPort in relation to medical records requests under the Act. *Id.* at ¶ 3.

According to Plaintiffs, "[the Act] creates a 'ceiling' on any such charges by establishing a maximum amount that may be charged for 'search and retrieval' and a maximum 'per page' fee based on the number of paper records reproduced." *Id.* at ¶ 10. Plaintiffs contend that, as a result:

> Pennsylvania law, . . . imposes a duty on [medical records reproduction companies, like HealthPort] to establish procedures to estimate their actual costs for search, retrieval, reproduction and transmittal of medical records and then to charge [requesters] only that cost. Where the . . . estimated actual cost is lower than the statutory maximum amounts set forth in Pennsylvania law, the lower amount must be charged.

Id. at ¶ 11.

Plaintiffs generally allege that HealthPort violated the Act by "automatically charg[ing] the maximum possible search and retrieval fee; and the maximum possible fee for making photocopies of paper records without regard to its actual search, retrieval, reproduction and transmittal processes and the actual costs associated therewith." *Id.* at ¶ 24; *see also* Compl. at ¶¶ 25-26 (reciting the annual adjustments made by the Secretary of Health to the rates initially mandated in section 6152(a)(2)(i) of the MRA).

---

[1] For a more thorough rendition of the facts, discussion of the Act and description of the procedural history in this case, HealthPort respectfully refers the Court to HealthPort's Preliminary Objections and Brief in Support filed on March 30, 2010.

HealthPort timely filed an Answer and New Matter to the Complaint on July 19, 2010. Based on the pleadings, the following material facts are not in dispute:[2]

- HealthPort is an MRRC that entered into agreements with certain Pennsylvania hospitals, including the West Penn Allegheny Health System, Jefferson Regional Medical Center and J.C. Blair Memorial Hospital, to provide medical records to requesters. Compl. at ¶ 13; Answer and New Matter ¶ 13.
- Pursuant to agreements with the above hospitals, HealthPort contacts a requester directly, informs them of the total number of pages to be copies, and offers to provide these pages in exchange for payment of a specified fee. Compl. at ¶ 16; Answer and New Matter ¶ 16.
- In or around August 2008, C&M sent Jefferson Regional Medical Center an authorization from Patient "A" requesting a reproduction of Patient A's medical records. Compl. at ¶ 29; Answer and New Matter ¶ 29.
- In response to C&M's request, HealthPort issued the invoice attached as Exhibit 1 to the Complaint, which charged the fees set forth in 42 Pa.C.S. § 6152(a)(2)(i) and provided the requested records to C&M. Compl. at ¶¶ 30-31; Answer and New Matter ¶¶ 30-31.
- C&M paid HealthPort the requested fees. Compl. at ¶ 31; Answer and New Matter ¶ 31.

[2] Certain of these undisputed facts arise from allegations in the Complaint that are admitted in part and denied in part. The facts set forth here relate only to those portions of the allegations that were specifically admitted, and not those that were denied.

- In or around September 2008, Hagans sent J.C. Blair Memorial Hospital an authorization requesting a reproduction of her son's medical records. Compl. at ¶ 32; Answer and New Matter ¶ 32.
- In response to Hagans' request, HealthPort issued the invoice attached as Exhibit 2 to the Complaint, which charged the fees set forth in 42 Pa.C.S. § 6152(a)(2)(i) and provided the requested records. Compl. at ¶¶ 33-34; Answer and New Matter ¶¶ 33-34.
- In exchange for payment of the fees specified in HealthPort's invoice, HealthPort provided the requested records to Hagans. Compl. at ¶ 34; Answer and New Matter ¶ 34.

B. Procedural History

Plaintiffs filed the instant Complaint on July 15, 2009.[3] On March 30, 2010, HealthPort filed Preliminary Objections to Plaintiffs' Complaint, asserting, among other things, that Plaintiffs' breach of contract claim and request for declaratory relief must fail because Plaintiffs' construction of the Act was incorrect as a matter of law. On June 17, 2010, the Court sustained HealthPort's Preliminary Objections in part and dismissed Plaintiffs' quasi-contractual claims (Counts II-IV) and claims for punitive damages, but overruled the Preliminary Objections as to Plaintiffs' breach of contract and declaratory judgment claims.[4] The Court concurrently overruled MRO's Preliminary Objections on similar grounds on June 17, 2010, and certified the

[3] Plaintiffs' action against HealthPort has been coordinated with five (5) similar claims against the following medical records providers: the University of Pittsburgh Medical Center – Presbyterian Shadyside (GD-09-012919), IOD Incorporated (GD-09-012922), MRO Corporation (GD-09-012911), Magee-Womens Hospital of the University of Pittsburgh Medical Center (GD-09-014785) and Duplications, Incorporated (GD-10-004369).

[4] A copy of the June 17, 2010 Order as to HealthPort's Preliminary Objections is attached as Exhibit A.

MRO matter for interlocutory appeal as to the correct construction of the Act.[5] MRO's Petition for Permission to Appeal was subsequently granted by the Pennsylvania Superior Court.

On August 23, 2010, this Honorable Court held a status conference and issued an Order (i) permitting Plaintiffs to move for judgment on the pleadings and (ii) setting a briefing and argument schedule for determination of these motions during the pendency of MRO's interlocutory appeal.[6] Subsequently, on October 5, 2010, in response to Plaintiffs' and Defendants' Joint Stipulated Motion to Amend the August 23, 2010 Scheduling Order, the Court issued an Order amending the briefing schedule and permitting Defendants, including HealthPort, to move for judgment on the pleadings. [7]

Defendant HealthPort now files this Motion for Judgment on the Pleadings and Brief in Support, pursuant to the Court's October 5, 2010 Amended Order and Rule 1034 of the Pennsylvania Rules of Civil Procedure.

III. STANDARD FOR MOTION FOR JUDGMENT ON THE PLEADINGS

"After the pleadings are closed, but within such time as not to unreasonably delay trial, any party may move for judgment on the pleadings." Pa. R.C.P. 1034(a). A motion for judgment on the pleadings is similar to a demurrer, and should be entered when there are no disputed issues of fact and the moving party is entitled to judgment as a matter of law. *Consolidation Coal Co. v. White*, 875 A.2d 318, 325 (Pa. Super. 2005). In determining whether a disputed fact exists, the court may consider the pleadings and relevant documents attached thereto. *Mellon Bank N.A. v. Nat. Union Ins. Co. of Pittsburgh, Pa.*, 768 A.2d 865, 870 (Pa.

[5] A copy of the June 17, 2010 Order as to MRO's Preliminary Objections is attached as Exhibit B.

[6] A copy of the August 23, 2010 Order is attached as Exhibit C.

[7] A copy of the October 5, 2010 Order is attached as Exhibit D.

Super. 2001). Entry of judgment on the pleadings is appropriate where the court is free and clear from doubt that there is no issue of disputed fact and that trial would be unnecessary. *Bowman v. Sunoco, Inc.*, 986 A.2d 883, 886 (Pa. Super. 2009).

IV. ARGUMENT[8]

As demonstrated below, Plaintiffs' breach of contract claim must fail. First, HealthPort cannot be held personally liable for breach of contract, because, as alleged, HealthPort is acting as a designated agent of a disclosed principal – the hospitals – in fulfilling medical record requests. Compl. at ¶ 14. Under Pennsylvania law, HealthPort is an agent that is not liable on a contract between a disclosed principal and a third party unless it expressly agrees to assume such liability. As the alleged designated agent of the hospitals, HealthPort has not assumed any obligation for contracts between hospitals and medical record requesters, and, therefore, therefore, cannot be held in breach of any such contract as a matter of law. Further, even if there was a contract between HealthPort and the Plaintiffs, HealthPort's contractual obligation was discharged when it sent the records and Plaintiffs paid the invoices.

Moreover, even if there was a basis to impose contractual liability on HealthPort acting as an agent, Plaintiffs' breach of contract claim still fails pursuant to the voluntary payment doctrine and Plaintiffs' prior approval of HealthPort's fees. Accordingly, the Court should grant HealthPort's Motion for Judgment on the Pleadings, dismiss Plaintiffs' remaining breach of

[8] HealthPort continues to maintain that Plaintiffs' breach of contract and declaratory judgment claims must fail because (i) Plaintiffs' construction of the Act is incorrect and would have absurd consequences, and (ii) the only portion of the Act that applies to non-subpoena requests, like those at issue here, is 42 Pa. C.S. § 6155(b)(1), which does not apply to the "designated agent" (i.e. an MRRC) of a health care provider or facility. HealthPort respectfully refers the Court to its Preliminary Objections and Brief in Support, filed on March 30, 2010, for a more complete discussion of the problems arising from Plaintiffs' construction of the Act.

contract claim, and grant any other appropriate relief, based on the undisputed material facts in Plaintiffs' Complaint.

A. HealthPort Is An Agent That Is Not Liable For Contractual Obligations Between a Disclosed Principal And A Third-Party, In The Absence Of An Express Agreement To Assume Such Liability.

"It is a basic tenet of agency law that an individual acting as an agent for a disclosed [principal] is not personally liable on a contract between the [principal] and a third party unless the agent specifically agrees to assume liability." *Vernon D. Cox & Co. v. Giles*, 406 A.2d 1107, 1110 (Pa. Super. 1979). The Pennsylvania Supreme Court has held that, "[i]f the alleged contract is in the name of the agent, but the name of the principal is disclosed, there exists a strong presumption that it is the intention of the contracting parties that the principal and not the agent should be a party to the contract." *Viso v. Werner*, 369 A.2d 1185, 1187 (Pa. 1977). Thus, to determine whether HealthPort may be liable based on the purported contract at issue here, the Court must determine: (i) whether the hospitals involved in the transactions at issue were disclosed principals and (ii) whether HealthPort agreed to be individually liable to furnish medical records to requesters. HealthPort respectfully submits that, based on the allegations of Plaintiffs' Complaint and the attached invoices, the hospitals were disclosed principals, and that HealthPort did *not* agree to assume individual liability for contractual undertakings with third party requesters. As such, the contractual obligation here is one assumed by the hospitals, not HealthPort. Consequently, Plaintiffs' breach of contract claim must be dismissed as a matter of law.

1. The Hospitals Are Disclosed Principals.

A principal is a disclosed principal if "at the time of a transaction conducted by an agent, the other party thereto has notice that the agent is acting for a principal and of the principal's identity." *Bash v. Bell Tel. Co.*, 601 A.2d 825, 832 (Pa. Super. 1992). A person has notice that

the agent is acting for a principal if "he has actual knowledge of it, has reason to know it, should know it, or has been given notification of it." *Vernon D. Cox*, 406 A.2d at 1110. For instance, the Pennsylvania Supreme Court has found that, where a plaintiff knew that the defendant was involved with a business and the defendant used a business card with the business's name on it when dealing with the plaintiff, the plaintiff had notice that the defendant was acting in a representative capacity. *Sweitzer v. Whitehead*, 173 A.2d 116 (Pa. 1961).

Here, Plaintiffs' Complaint makes clear that Plaintiffs knew or should have known that HealthPort was acting as an agent of the hospitals in fulfilling medical record requests. Indeed, Plaintiffs actually *allege* that HealthPort is a "designated agent" of the hospitals pursuant to its agreements with the hospitals to furnish medical records. Compl. at ¶ 14. Plaintiffs C&M and Hagans requested records directly from Jefferson Regional Medical Center and J.C. Blair Memorial Hospital but HealthPort responded to those requests on behalf of those hospitals by providing records and invoicing the Plaintiffs. *Id.* at ¶¶ 29-34. This is firmly established by the invoices that Plaintiffs attached to their Complaint, which demonstrate that medical records were being provided on behalf of the hospitals in response to Plaintiffs' requests. *See* Ex. 1 to Compl. ("Per your request, enclosed are the medical records forwarded from Jefferson Regional Medical Center, Pittsburgh, PA."); Ex. 2 to Compl. ("Per your request, enclosed are the medical records forwarded from J.C. Blair Memorial Hosp., Huntingdon, PA."). Based on the facts as alleged, HealthPort was acting as an agent for both hospitals, and this agency relationship was fully disclosed to Plaintiffs.

2. HealthPort Did Not Agree To Be Personally Liable For Any Contractual Obligation Of The Hospitals To Provide Medical Records.

The burden is on Plaintiffs to allege and ultimately prove that the agent – namely, HealthPort – agreed to be individually liable on a contract formed between the disclosed principals (the hospitals) and the third-parties (C&M and Hagans). *See Bhakta v. Shah*, No. 07-CV-3065, 2008 WL 5101638, at *4 (E.D. Pa. Dec. 2, 2008) (applying Pennsylvania agency law principles). Where, as here, Plaintiffs have not and cannot allege that HealthPort agreed to assume individual liability for contracts arising between the hospitals and medical record requesters, their breach of contract claims must fail. As such, HealthPort may not be held liable for contracts between the hospitals and Plaintiffs, and the Court should dismiss Plaintiffs' breach of contract claim on the pleadings.

B. If A Contract With HealthPort Was Formed, It Was Governed By The Terms Of The Invoices, Not The Rates Allegedly Applicable To Record Requests In The Act.

Even if a contract was formed between HealthPort and Plaintiffs, it was a unilateral contract whereby HealthPort offered to produce records at the price set forth in the invoices attached to Plaintiffs' Complaint. Plaintiffs were free to return the records and not pay for them, thereby rejecting the offer. However, this is not what Plaintiffs alleged. According to the Complaint, Plaintiffs instead retained the records and remitted payment, thereby accepting HealthPort's offer to enter a unilateral contract. Compl. at ¶¶ 30-31; 33-34; *see First Home Savings Fank, FSB v. Nernberg*, 648 A.2d 9, 14 (Pa. Super. 1994) ("Unilateral contracts . . . involve only one promise and are formed when one party makes a promise in exchange for the other party's act or performance. Significantly, a unilateral contract is not formed until such time as the offeree completes performance."); *Greene v. Oliver Realty, Inc.*, 526 A.2d 1192, 1194 (Pa. Super. 1987) ("In a unilateral contract, there is only one promise. It is formed when

one party makes a promise in exchange for the other person's act or performance. . . A unilateral contract is formed by the very act which constitutes the performance.").

Thus, a unilateral contract was formed when Plaintiffs accepted HealthPort's offer by retaining the records and paying HealthPort. HealthPort's offer was the invoice, and, according to Plaintiffs own allegations, Plaintiffs accepted this offer when they retained these records without objection and paid the invoices with full knowledge of the fees stated in HealthPort's offer. Compl. at ¶¶ 29-34. Alternatively, if Plaintiffs' request for records is deemed the offer, then HealthPort's actions of providing the records along with its invoice was a counteroffer, which the Plaintiffs accepted by retaining the records and paying the invoices. In either case, the contract that was formed did not incorporate the fee amounts in the Act. Instead, it was governed by the terms stated in the invoices, when Plaintiffs accepted HealthPort's offer to provide the requested medical records for the stated fee. Accordingly, HealthPort fully discharged its obligation under the terms of the contract it entered with Plaintiffs. Plaintiffs' breach of contract action must fail, because Plaintiffs agreed to the fees they were charged.

C. Plaintiffs' Claims Are Barred By The Voluntary Payment Doctrine.

Plaintiffs' Complaint makes clear that, even if (i) the Act did impose a duty on an MRRC to charge a particular fee (which HealthPort disputes) and (ii) that duty is to charge an amount different than that set forth in the Act and its regulations, the voluntary payment doctrine applies and bars all of Plaintiffs' claims. No further factual inquiry is necessary, and this case is ripe for disposition on the pleadings based on Plaintiffs' knowing and voluntary payment of the invoices in question.[9]

[9] The Court noted in its June 17, 2010 Opinion and Order as to HealthPort's Preliminary Objections that "the voluntary payment doctrine . . . is an affirmative defense based on facts that the defendant must establish." Op. (Ex. A) at 2. Respectfully, HealthPort submits that the facts,

The voluntary payment doctrine is a well-established principle of Pennsylvania law providing that "[w]here, under a mistake of law, one voluntarily and without fraud or duress pays money to another with full knowledge of the facts, the money paid cannot be recovered." *Acme Markets, Inc. v. Valley View Shopping Center*, 493 A.2d 736, 737 (Pa. Super. 1985) *see also Kline v. Morrison*, 44 A.2d 267, 269 (Pa. 1945) ("It is well settled that money, not legally due, but paid voluntarily cannot be recovered back").[10]

Here, Plaintiffs are clearly not entitled to a refund. Plaintiffs voluntarily paid pursuant to the invoices, when, as alleged, they had full knowledge of the facts surrounding the transactions. Plaintiffs have alleged that, from 2005 through 2009, HealthPort "consistently" charged Plaintiffs the rates expressly contained in 42 Pa.C.S. § 6152(a)(2)(i), as adjusted by the Consumer Price Index. Compl. at ¶¶ 25-26. Each time HealthPort invoiced the Plaintiffs, it fully disclosed its fees and delivered the medical record copies. *Id.* at ¶¶ 29-30. HealthPort hid nothing from Plaintiffs, as established from the invoices attached as Exhibits 1 and 2 to

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as alleged by Plaintiffs, clearly demonstrate the applicability of the doctrine to defeat their claims.

[10] Indeed, numerous courts in other jurisdictions have held that the voluntary payment doctrine precludes claims for breach of contract for alleged overpricing of medical records, on factual allegations strikingly similar to those in this case. *See, e.g.*, *Boykin v. Smart Corp.*, 669 So. 2d 939, 941 (Ala. Civ. App. 1995) (holding voluntary payment doctrine barred plaintiffs' breach of contract and injunctive claims for recovery of money spent on medical records where "it [was] undisputed that plaintiffs received the copies of the requested medical records, received [defendant's] invoices for photocopying the requested medical records, and paid the invoices without objection."); *Morales v. CopyRight, Inc.*, 813 N.Y.S. 2d 731, 732 (N.Y. App. Div. 2006 (granting motion to dismiss for failure to state claim alleging overbilling of medical record reproduction costs where "complaint . . . alleges, inter alia, that all of the named plaintiffs paid their respective bills for the photocopying costs, but does not allege that payment was made as a result of fraud, mistake . . ., or with protest."); *Cotton v. Med-Cor Health Info. Solutions, Inc.*, 472 S.E.2d 92, 94 (Ga. Ct. App. 1996) (affirming trial court's dismissal of complaint where plaintiffs' allegations indicated that "when plaintiffs' made the payments, all material facts were known by them.").

Plaintiffs' Complaint, which clearly stated the fees being charged Plaintiffs. *Id.* at ¶¶ 30, 33. Plaintiffs could have obtained the records on their own, with patient authorization, rather than paying for the records through HealthPort in the first place. *See* 42 Pa.C.S. §§ 6152(a)(1) (giving health care facility the choice of responding to a subpoena with a notice setting forth the actual and reasonable expense of reproduction), and 6155 (obligating a health care provider to grant access to patient's medical records). Also, as indicated based on the fact of the invoices attached to Plaintiffs' Complaint, the records were sent along with the invoice, which negates any argument that Plaintiffs' had to pay HealthPort's charges in order to obtain the records. Plaintiffs instead made the knowing and voluntary decision to pay the invoices and obtain the records from HealthPort. Compl. at ¶¶ 31, 34.

Although *Liss & Marion* rejected the voluntary payment doctrine as a defense on the facts before it, that case is clearly distinguishable from the one before the Court. Here, Plaintiffs' Complaint makes clear that the voluntary payment doctrine applies, because there is no allegation that Plaintiffs were laboring under a mistake of fact. The *Liss & Marion* court held that plaintiffs lacked full knowledge of the facts, because they were not aware at the time of the transactions that medical records were being generated from electronic media, when, in reality, the MRRC defendant there was charging the rate applicable to reproductions from microfilm. *Liss & Marion*, 937 A.2d at 514. By contrast, here, Plaintiffs were fully informed of the amounts they were being charged for hard copies of medical records by virtue of the invoices, which were equivalent to the rates set forth in the Act's regulations. Plaintiffs' idiosyncratic interpretation of the Act is a "mistake of law" that does not entitle them to recover these payments under the voluntary payment doctrine.

Accordingly, this case is more like *Acme Markets*, in which the Pennsylvania Superior Court affirmed the trial court's decision sustaining preliminary objections to plaintiff's complaint on the grounds of the voluntary payment doctrine. In that case, as here, no factual development was necessary to determine that the doctrine applied to preclude plaintiff's claims. In *Acme Markets*, a tenant sued a landlord for recovery of payments allegedly made in error pursuant to the erroneous interpretation of two lease provisions. The plaintiffs alleged that the lease required certain payments for property maintenance and taxes "during the initial term" of the lease, but that the tenant had made these payments well past the expiration of the lease's initial term. *Acme Markets*, 493 A.2d at 737. The plaintiff tenant sought to recover these payments. The Pennsylvania Superior Court affirmed the order of the trial court sustaining preliminary objections to plaintiffs' complaint, reasoning:

> The mistake alleged by [plaintiff] is clearly a mistake of law and not a mistake of fact. The money it seeks to recover was voluntarily and deliberately paid by [plaintiff] to its lessor because of an interpretation of the lease agreement which [plaintiff], according to the complaint, mistakenly placed thereon. Such a mistake is a mistake of law. Because the payments were made under a mistake of law in interpreting the lease, there can be no recovery in this action.

The logic and reasoning of *Acme Markets* applies with equal force here. The Plaintiffs, laboring under a mistaken interpretation of the Act, voluntarily paid the invoices they were sent along with the medical records. *See* Compl. at ¶¶ 31, 34. This is no different than the mistaken interpretation of the lease alleged in *Acme Markets*. Furthermore, as in that case, no factual record is necessary to reach this conclusion; it is evident from the material facts alleged in Plaintiffs' Complaint. Plaintiffs' breach of contract claim must fail pursuant to the voluntary payment doctrine.

D. HealthPort Complied With Any Duty It Had Under The Act, By Obtaining Prior Approval For The Fees It Charged Plaintiffs.

Even if HealthPort *did* have some duty to charge a fee less than that explicitly provided for in the Act (which HealthPort disputes), Plaintiffs' Complaint makes clear that HealthPort complied with that duty by obtaining "prior approval" for the fees that it did charge. Indeed, it is undisputed in this case – and is repeatedly alleged in Plaintiffs' Complaint – that HealthPort and Plaintiffs entered a contract for the reproduction and provision of the medical records at the fee stated in the invoice. *See* Compl. at ¶¶ 29-34, Exs. 1 & 2 to Compl. Accordingly, even if there was any viable basis for believing that HealthPort had to fulfill medical record requests "at cost," HealthPort complied with the Act by obtaining approval for the rates that it did charge.

As the Pennsylvania Superior Court confirmed in the *Liss & Marion* case,[11] an MRRC like HealthPort only has one conceivable duty under the Act, and that is "the *duty to seek prior approval* of any charges for the copying of medical records not specifically provided for in the Act." *Liss & Marion, P.C. v. Recordex Acquisition Corp.*, 937 A.2d 503, 513 (Pa. Super. Ct. 2007) (emphasis added). The Pennsylvania Superior Court based this reasoning on the express terms of 42 Pa.C.S. § 6152(a)(2)(i) which states that "[n]o other charges for the retrieval, copying and shipping or delivery of medical records other than those set forth in this paragraph shall be permitted ***without prior approval of the party requesting the copying of medical records.***" *Id.* (quoting § 6152(a)(2)(i), emphasis in opinion).

Here, the allegations of Plaintiffs' Complaint make clear that the Plaintiffs approved of the charges as stated in HealthPort's invoices, because they paid these charges without protest, thereby manifesting their approval. In August and September of 2008, the Plaintiffs each sent

[11] The *Liss & Marion* Supreme Court ruling did not disturb this aspect of the Superior Court's holding.

patient authorizations requesting reproduction of medical records. Compl. at ¶¶ 19, 32. On September 2, 2008, HealthPort sent the medical records to the Chiurazzi & Mengine law firm, along with HealthPort's invoice. *Id.* at ¶ 30; Ex. 1 to Compl. The Complaint establishes that Plaintiff Charlotte Hagans received the medical records she requested and HealthPort's associated invoice on November 13, 2008. *Id.* at ¶ 33; Ex. 2 to Compl. Both Plaintiffs then paid for the records, *id.* at ¶¶ 31, 34, and neither Plaintiff alleges they objected to or returned those records to HealthPort.

Accordingly, HealthPort did not violate any duty here, because Plaintiffs allege in their Complaint that HealthPort provided the records with the invoices. Plaintiffs certainly had the option of not paying the fees stated in the invoice and returning the records. They did not and, therefore, HealthPort received "prior approval" for the fees it charged (i.e., fees exactly equal to those lawfully provided in the Act as authorized by the Secretary of Health regulations in effect during the relevant time periods).[12] Accordingly, even if the charges that HealthPort charged deviated from those it was required to charge under the Act (which they did not), HealthPort obtained the requisite "prior approval" to assess those charges.

[12] The United States Court of Appeals for the Sixth Circuit has held that plaintiffs had no claim against an MRRC for alleged charges in excess of the actual cost of shipping medical records based on an analogous Ohio statute because "[w]hen each plaintiff requested medical records from [defendant], received and retained the records, and remitted payment in accordance with the terms of the invoices, the result was a binding contract with [defendant]" that was expressly permitted by the statute." *See Bergmoser v. Smart Document Solutions, LLC*, 268 Fed. Appx. 392, 395 (6th Cir. 2008). As Plaintiffs have alleged, this is precisely what occurred here, because, as provided in the Act, HealthPort obtained prior approval for the rates it did charge Plaintiffs – the rates expressly set forth in the Act and its regulations.

V. CONCLUSION

For the foregoing reasons, the Court should grant HealthPort's Motion for Judgment on the Pleadings, dismiss Plaintiffs' breach of contract claim (Count I) with prejudice, and grant any other appropriate relief.

Dated: October 15, 2010

Respectfully submitted,

K&L GATES LLP

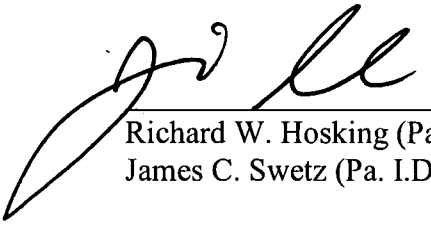

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EXHIBIT
11

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

WAYNE M. CHIURAZZI LAW INC., D/B/A CHIURAZZI & MENGINE, LLC,

Plaintiff

vs.

UPMC PRESBYTERIAN SHADYSIDE,

Defendant

CIVIL DIVISION

NO. GD09-012919

MEMORANDUM AND ORDER OF COURT

HONORABLE R. STANTON WETTICK, JR.

COORDINATED WITH:

WAYNE M. CHIURAZZI LAW INC. D/B/A CHIURAZZI & MENGINE, LLC,

Plaintiff

vs.

MRO CORPORATION,

Defendant

NO. GD09-012911

****

WAYNE M. CHIURAZZI LAW INC. D/B/A CHIURAZZI & MENGINE, LLC,

Plaintiff

vs.

IOD INCORPORATED,

Defendant

NO. GD09-012922

****

ANTHONY C. MENGINE LAW INC., D/B/A CHIURAZZI & MENGINE, LLC,

Plaintiff

vs.

MAGEE-WOMENS HOSPITAL OF UNIVERSITY OF PITTSBURGH MEDICAL CENTER,

Defendant

NO. GD09-014785

ANTHONY C. MENGINE LAW, INC. D/B/A CHIURAZZI & MENGINE, LLC; and CHARLOTTE HAGANS,

Plaintiffs

vs.

HEALTHPORT,

Defendant

NO. GD09-012923

****

WAYNE M. CHIURAZZI LAW, INC. d/b/a CHIURAZZI & MENGINE, LLC,

Plaintiff

vs.

DUPLICATIONS, INC.,

Defendant

NO. GD10-004369

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MEMORANDUM AND ORDER OF COURT

WETTICK, J.

The Motion for Judgment on the Pleadings of UPMC Presbyterian Shadyside ("UPMC") seeking dismissal of plaintiff's complaint is the subject of this Memorandum and Order of Court.

Previously, I considered the preliminary objections of UPMC seeking dismissal of each count of plaintiff's five-count complaint.

Through a February 4, 2010 Opinion and Order of Court, I dismissed Counts II, III, and IV of Plaintiff's Complaint. [1] I overruled defendant's preliminary objections as to Count I—Breach of Contract/Implied Contract and Count V—Relief Pursuant to Declaratory Judgments Act).

Counts I and V are based on allegations that UPMC charged plaintiff law firm for copies of medical charts and records an amount in excess of the maximum charges permitted by the Medical Records Act.[2] The relevant provisions of the Act (42 Pa.C.S. §6152(a)(1) and (2)(i)) read as follows:

---

[1]Counts II (Restitution), Count III (Constructive Trust), and Count IV (Unjust Enrichment) were dismissed because these were alternative theories of recovery that plaintiff was no longer pursuing.

[2]The Chiurazzi law firm has filed class action lawsuits against other entities that have furnished medical records at GD09-012911 (defendant is MRO Corporation), GD09-012922 (defendant is IOD Incorporated), and GD09-014785 (defendant is Magee-Womens Hospital of University of Pittsburgh Medical Center), GD09-012923 (HealthPort), and GD10-004369 (Duplications, Inc.). My rulings in this litigation will govern the motions for judgment on the pleadings filed by the defendants in these five cases.

> **(a) Election.—**
>
> (1) When a subpoena duces tecum is served upon any health care provider or an employee of any health care facility licensed under the laws of this Commonwealth, requiring the production of any medical charts or records at any action or proceeding, it shall be deemed a sufficient response to the subpoena if the health care provider or health care facility notifies the attorney for the party causing service of the subpoena, within three days of receipt of the subpoena, of the health care provider's or facility's election to proceed under this subchapter and of the estimated actual and reasonable expenses of reproducing the charts or records. However, when medical charts or records are requested by a district attorney or by an independent or executive agency of the Commonwealth, notice pursuant to this section shall not be deemed a sufficient response to the subpoena duces tecum.
>
> (2)(i) Except as provided in paragraph (ii), the health care provider or facility or a designated agent shall be entitled to receive payment of such expenses before producing the charts or records. The payment shall not exceed $15 for searching for and retrieving the records, $1 per page for paper copies for the first 20 pages, 75¢ per page for pages 21 through 60 and 25¢ per page for pages 61 and thereafter; $1.50 per page for copies from microfilm; plus the actual cost of postage, shipping or delivery. No other charges for the retrieval, copying and shipping or delivery of medical records other than those set forth in this paragraph shall be permitted without prior approval of the party requesting the copying of the medical records. The amounts which may be charged shall be adjusted annually beginning on January 1, 2000, by the Secretary of Health of the Commonwealth based on the most recent changes in the consumer price index reported annually by the Bureau of Labor Statistics of the United States Department of Labor.

The question of whether claims may be raised in a civil action to recover payments in excess of the amounts permitted by the Medical Records Act was answered by the Pennsylvania Supreme Court in *Liss & Marion, P.C. v. Recordex Acquisition Corp.*, 983 A.2d 652 (Pa. 2009).

Liss was a class action by the law firm seeking recovery for itself and all other individuals and entities who were billed and charged for copies of records greater than

the amount permitted by the Medical Records Act, as adjusted annually by the Secretary of Health based on the most recent change in the consumer price index. Recovery was sought through a four-count complaint. The trial court permitted the members of the class to pursue common law breach of contract claims based on the existence of a contract implied in fact that both parties expected the Medical Records Act to control the pricing of their contract. The trial court did not permit the class to pursue any other causes of action raised in the complaint.

Both the Pennsylvania Superior Court and the Pennsylvania Supreme Court affirmed the rulings of the trial court that a breach of contract action may be brought to recover charges that exceed the amounts permitted by the Medical Records Act and that the trial court correctly dismissed the remaining causes of action.

The primary issue that I addressed in my Opinion and Order of Court concerned the amounts permitted by the Medical Records Act.

Under the second sentence of §6157(a)(2)(i) of the Medical Records Act, charges may not exceed $1.50 per page for copies from microfilm and for copies not from microfilm, charges may not exceed the following amounts: $1 per page–pages 1-20; 75¢ per page–pages 21-60; and 25¢ per page–pages 61 and thereafter, as adjusted annually by the Secretary of Health. UPMC's charges are calculated based on the provisions of this second sentence of §6152(a)(2)(i), as adjusted.[3]

In their Complaint at ¶13, plaintiff alleges that the actual costs of storing, locating, reviving, reproducing, and transmitting records have decreased dramatically. Thus, the

[3]The fees, effective 1/1/11, are set forth in Attachment 1.

actual and reasonable expenses of UPMC for producing records or charts are significantly less than the prices provided for in §6152(a)(2)(i).

In its preliminary objections, UPMC contended that it is permitted to base charges for furnishing medical records on the provisions within §6152(a)(2)(i). It is plaintiff's position that the charges provided for in §6152(a)(2)(i) are the maximum prices that can be charged. However, where a healthcare facility's actual and reasonable expenses for providing records and charts are less than the maximum price, the Medical Records Act requires the healthcare facilities to charge only their actual and reasonable expenses.

I ruled in favor of plaintiff. I concluded that under the clear language of the Medical Records Act, a healthcare provider may never charge more than its actual and reasonable expenses.[4]

In that Opinion at 9, I referred to UPMC's contention that I should dismiss the complaint on the basis of the voluntary payment defense. I stated:

> UPMC correctly contends that this case differs from *Liss & Marion* because it does not involve invoices that contain misleading information. However, this means only that the issues that will be addressed in this litigation regarding the voluntary payment defense will differ from the issues presented where the hospital furnished false information to the persons obtaining copies of medical records.
>
> I cannot rule, as a matter of law, that the defense does apply. This is an affirmative defense that must be raised in the UPMC's Answer.

[4]Subsequently, in another case raising the same issue (*Wayne M. Chiurazzi Law Inc. v. MRO Corp.*, GD09-012911), I certified for interlocutory appeal the issue of whether a medical health provider may base charges for copying on the calculations set forth in the second sentence of §6152(a)(2)(i) where these charges exceed the healthcare provider's actual and reasonable costs. Petition for Permission to Appeal was subsequently granted by the Pennsylvania Superior Court.

UPMC raises three separate grounds in support of its Motion for Judgment on the Pleadings: (1) defendants obtained prior approval for the fee it stated in its invoices when plaintiffs paid the invoices and then retained the records without objection; (2) there was a unilateral contract between plaintiffs and defendants governed by the terms of the invoices that defendants sent to plaintiffs; and (3) the voluntary payment doctrine bars plaintiffs' claims because plaintiffs voluntarily and with full knowledge paid the fees stated in the invoices (which fees were based on the §6152(a)(2)(i) formula for calculating the charges) and retained the records without objection.

I. PRIOR APPROVAL

UPMC correctly states that under §6152(a)(2)(i), charges in excess of §6152(a)(2)(i) are permitted with "prior approval of the party requesting the copying of the medical records." However, in this case, there is no prior approval.

It is UPMC's position that the prior approval consisted of plaintiff's payments of the invoices submitted by UPMC that allegedly exceeded the charges permitted by the Medical Records Act. However, UPMC cannot base a prior approval defense upon payment of invoices that plaintiff believed to comply with UPMC's contractual obligation not to seek charges in excess of those permitted by the Medical Records Act.

At ¶23 of Plaintiff's Complaint, plaintiff alleges: "Unbeknownst to the Plaintiff, the invoice did not reflect charges based upon UPMC's actual or estimated actual expenses for locating, retrieving, reproducing and transmitting the medical records." At ¶24, plaintiff alleges that plaintiff believed that the invoice comported with the law.

Because the factual allegations in plaintiff's complaint do not establish that plaintiff agreed to make payments in excess of those permitted in §6152(a)(2)(i), I am denying UPMC's motion for judgment on the pleadings based on a prior approval defense.

II. UNILATERAL CONTRACT

UPMC contends that there was a unilateral contract between plaintiff and UPMC based on the terms of the invoices that UPMC sent plaintiff. Through this contention, UPMC seeks a ruling that is inconsistent with the ruling of the Pennsylvania Supreme Court in *Liss & Marion*, which imposes on a healthcare provider an implied contractual obligation to submit invoices seeking amounts that do not exceed the maximum charges permitted under the Medical Records Act. Under *Liss & Marion*, the submission of an invoice which, unbeknownst to the entity seeking the medical records, exceeds the maximum amount under the Medical Records Act (a charge in excess of actual and reasonable expenses according to my ruling in this litigation) constitutes a breach of UPMC's contractual obligations. See ¶¶23 and 24 of Plaintiff's Complaint discussed at pages 5-6 of this Memorandum.

III. VOLUNTARY PAYMENT DOCTRINE

Prior to *Liss & Marion*, the right to recover voluntary payments was most recently addressed by the Pennsylvania appellate courts in *Acme Markets, Inc. v. Valley View Shopping Center, Inc.*, 493 A.2d 736 (Pa. Super. 1985). In that case, a tenant of a shopping center sued to recover money which it had paid to its landlord for maintenance of the parking area. The lease provided for the tenant to pay a proportionate part of the

taxes and costs of maintaining the parking area only for the initial term of a lease giving the tenant the right to renew for five additional terms of five years. The tenant continued to make these payments after the initial term. It sought to recover these payments, contending that the payments had been made pursuant to a mistake of fact. The trial court dismissed the tenant's complaint, and the Superior Court affirmed.

The Superior Court stated that the case law provides that the law does not provide relief to persons who voluntarily make payments under a mistake of law. However, relief will be furnished for payments made under a mistake of fact. The Court described a *mistake of law* as follows:

> "A mistake of law occurs where a person is truly acquainted with the existence or nonexistence of facts, but is ignorant of, or comes to an erroneous conclusion as to, their legal effect." 70 C.J.S. *Payment* § 156(c) (1951). Where, under a mistake of law, one voluntarily and without fraud or duress pays money to another with full knowledge of the facts, the money paid cannot be recovered. *Ochiuto v. Prudential Insurance Co. of America*, 356 Pa. 382, 384, 52 A.2d 228, 230 (1947). Thus, money paid voluntarily, although under a mistake of law as to the interpretation of a contract, cannot be recovered. *William Sellers & Co. v. Clarke-Harrison, Inc.*, 354 Pa. 109, 113, 46 A.2d 497, 499 (1946). 493 A.2d at 737.

The Court ruled that the tenant had made payments pursuant to a mistake of law because the money which the tenant sought to recover was voluntarily and deliberately paid as a result of its mistaken interpretation of the lease agreement.

Also at page 12 of its Brief titled *Plaintiffs' Response to the Motions for Judgment on the Pleadings*, plaintiffs acknowledge that Pennsylvania recognizes the voluntary payment doctrine where voluntary payments have been made in ignorance of the law:

> Pennsylvania recognized the voluntary payment doctrine well over a century ago. *See Ege v. Koontz*, 3 Pa. 109, 111 (1846) ("It is well settled in England and in this country, that a voluntary payment,

> made with a full knowledge of the *facts*, but an ignorance of the *law* or *legal* effect of the circumstances, cannot be recovered back."); *Real Estate Sav. Inst. v. Linder*, 74 Pa. 371, 373 (1974) ("The general rule is well settled that one who voluntarily pays money with full knowledge or means of knowledge of all the facts, without any fraud having been practiced upon him, cannot recover it back by reason of the payment having been made in ignorance of law.") *and Sebastianelli v. Prudential Ins. Co. of Am.,* 337 Pa. 466, 470, 12 A.2d 113, 115 (1940).

At this stage of the proceedings, I cannot determine whether payments made in this and the related lawsuits were made under a mistake of fact or a mistake of law. UPMC correctly states that if plaintiffs were voluntarily making payments which they knew to be more than actual and reasonable expenses, these payments were made under mistakes of law. At the same time, plaintiffs correctly state that if they believed that UPMC's actual and reasonable expenses were not less than the amounts set forth in the invoices, the payments were made under mistakes of fact.

For these reasons, I enter the following Order of Court:

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA
CIVIL DIVISION

WAYNE M. CHIURAZZI LAW INC., D/B/A CHIURAZZI & MENGINE, LLC, Plaintiff vs. UPMC PRESBYTERIAN SHADYSIDE, Defendant	NO. GD09-012919

ORDER OF COURT

On this 28th day of February, 2011, it is ORDERED that defendant's motion for judgment on the pleadings is denied.

BY THE COURT:

WETTICK, J.

Copies mailed (dk) 3/1/11

NOTICES

DEPARTMENT OF HEALTH

Amendments to Charges for Medical Records

[40 Pa.B. 6986]
[Saturday, December 4, 2010]

Under 42 Pa.C.S. §§ 6152 and 6155 (relating to subpoena of records; and rights of patients), the Secretary of Health (Secretary) is directed to adjust annually the amounts which may be charged by a health care facility or health care provider upon receipt of a request or subpoena for production of medical charts or records. These charges apply to any request for a copy of a medical chart or record except as follows:

(1) Flat fees (as listed in this notice) apply to amounts that may be charged by a health care facility or health care provider when copying medical charges or records either: (a) for the purpose of supporting any claim or appeal under the Social Security Act or any Federal or State financial needs based program; or (b) for a district attorney.

(2) An insurer shall not be required to pay for copies of medical records required to validate medical services for which reimbursement is sought under an insurance contract, except as provided in: (a) the Worker's Compensation Act (77 P.S. §§ 1—1041.1 and 2501—2506) and the regulations promulgated thereunder; (b) 75 Pa.C.S. Chapter 17 (relating to motor vehicle financial responsibility law) and the regulations promulgated thereunder; or (c) a contract between an insurer and any other party.

The charges listed in this notice do not apply to an X-ray film or any other portion of a medical record which is not susceptible to photostatic reproduction.

Under 42 Pa.C.S. § 6152.1 (relating to limit on charges), the Secretary is directed to make a similar adjustment to the flat fee which may be charged by a health care facility or health care provider for the expense of reproducing medical charts or records where the request is: (1) for the purpose of supporting a claim or appeal under the Social Security Act or any Federal or State financial needs based benefit program; or (2) made by a district attorney.

The Secretary is directed to base these adjustments on the most recent changes in the Consumer Price Index reported annually by the Bureau of Labor Statistics of the United States Department of Labor. For the annual period of October 31, 2009, through October 31, 2010, the Consumer Price Index was 1.2%.

Accordingly, the Secretary provides notice that, effective January 1, 2011, the following fees may be charged by a health care facility or health care provider for production of records in response to subpoena or request:

	Not to Exceed
Amount charged per page for pages 1—20	$ 1.34
Amount charged per page for pages 21—60	$ .99
Amount charged per page for pages 61—end	$ .33
Amount charged per page for microfilm copies	$ 1.97
Flat fee for production of records to support any claim under Social Security	$25.24
Flat fee for supplying records requested by a district attorney	$19.92
* Search and retrieval of records	$19.92

In addition to the amounts listed previously, charges may also be assessed for the actual cost of postage, shipping and delivery of the requested records.

The Department is not authorized to enforce these charges.

Questions or inquiries concerning this notice should be sent to James T. Steele, Jr., Deputy Chief Counsel, Department of Health, Office of Legal Counsel, Room 825, Health and Welfare Building, 625 Forster Street, Harrisburg, PA 17120, (717) 783-2500.

ATTACHMENT 1

Persons with a disability who require an alternative format of this notice, (for example, large print, audiotape, Braille) should contact James T. Steele, Jr. at the address or phone number listed previously, or for speech and/or hearing impaired persons V/TT (717) 783-6514, or the Pennsylvania AT&T Relay Service at (800) 654-5984.

**Note*: Federal regulations enacted under the Health Insurance Portability and Accountability Act in 45 CFR Parts 160—164 state that covered entities may charge a reasonable cost based fee that includes only the cost of copying, postage and summarizing the information (if the individual has agreed to receive a summary) when providing individuals access to their medical records. The United States Department of Health and Human Services has stated that the fees may not include costs associated with searching for and retrieving the requested information. For further clarification on this issue, inquiries should be directed to the Office of Civil Rights, United States Department of Health and Human Services, 200 Independence Avenue, S.W., Room 509F, HHH Building, Washington, D.C. 20201, (866) 627-7748, http://www.hhs.gov/ocr/hipaa.

MICHAEL K. HUFF, R.N.,
Secretary

[Pa.B. Doc. No. 10-2325. Filed for public inspection December 3, 2010, 9:00 a.m.]

EXHIBIT
12

2011 WL 3505477
Superior Court of Pennsylvania.

WAYNE M. CHIURAZZI LAW INC., d/b/a Chiurazzi & Mengine, LLC, and David A. Neely, Appellees
v.
MRO CORPORATION, Appellant.

No. 1283 WDA 2010.Aug. 11, 2011.

Appeal from the Order Entered June 17, 2010, Court of Common Pleas, Allegheny County, Civil Division, at No. G.D. 09–012911.
BEFORE: PANELLA, SHOGAN and COLVILLE*, JJ.

* Retired Senior Judge assigned to the Superior Court.

Opinion

OPINION BY SHOGAN, J.:

*1 Appellant, MRO Corporation ("MRO") appeals from the order entered on June 17, 2010, in the Allegheny County Court of Common Pleas denying MRO's preliminary objections to the second amended complaint filed by Appellees, Wayne M. Chiurazzi Law Inc., doing business as Chiurazzi & Mengine, LLC, and David A. Neely (collectively "C & M"). On appeal, MRO challenges the trial court's holding that the Medical Records Act ("MRA" or "the Act"), 42 Pa.C.S.A. §§ 6151–6160, prohibits an entity that reproduces medical records without a subpoena from charging an amount that exceeds the actual and reasonable expenses of reproducing such medical records. We hold that the calculation of estimated actual and reasonable expenses for paper copies is not required by the statute and that the statutory schedule creates safe harbor rates for the estimated actual and reasonable expenses of producing such paper copies, as adjusted yearly by the Pennsylvania Secretary of Health. We further hold that the statutory schedule does not create safe harbor copying rates for non-paper copies, such as copies produced on CD–ROM and by electronic means.[1] Thus, until the legislature further addresses this issue, entities that reproduce medical records can be held responsible for calculating, and then charging, the estimated actual and reasonable copying expenses of producing such non-paper copies. Given the statute's use of the word "estimated," such calculations do not have to be done on a case-by-case basis. Nonetheless, C & M's claims in this case regarding the CD–ROM copying fees are barred by the prior approval provision of 42 Pa.C.S.A. § 6152(a)(2)(i). Accordingly, we reverse and remand.

1 The statutory schedule does, however, create a safe harbor of $15 for the search and retrieval of the original records from which such non-paper copies are made, as well as authorizing a charge for the actual cost of postage, shipping or delivery of such copies. 42 Pa.C.S.A. § 6252(a)(2)(i).

The trial court set forth the relevant facts and procedural history of this matter as follows:

> In this Memorandum and Order of Court, I address MRO Corporation's preliminary objections seeking dismissal of both counts within plaintiffs' second amended class action complaint.[1]
>
> > The Chiurazzi/Mengine Law Firm has filed similar class action lawsuits against other entities that furnished medical records at GD09–012922 (defendant is IOD, Inc.), GD09–014785 (defendant is Magee Womens Hospital of the University of Pittsburgh Medical Center), GD09–012919 (defendant is UPMC Presbyterian Shadyside), and GD09–012923 (defendant is Health Port).
> >
> > Count I of plaintiffs' complaint is a breach of contract/implied contract and Count II is a count titled Relief Pursuant to Declaratory Judgments Act.
> >
> > Each count is based on allegations that MRO charged plaintiffs, for producing medical charts and records, an amount in excess of the maximum charges permitted by the Medical Records Act.[2] The relevant provisions of the Act (42 Pa.C.S. § 6152(a)(1) and (2)(i)) read as follows:
> >
> > *2 (a) Election.—
> >
> > > (1) When a subpoena duces tecum is served upon any health care provider or an employee of any health care facility licensed under the laws of this Commonwealth, requiring the production

> of any medical charts or records at any action or proceeding, it shall be deemed a sufficient response to the subpoena if the health care provider or health care facility notifies the attorney for the party causing service of the subpoena, within three days of receipt of the subpoena, of the health care provider's or facility's election to proceed under this subchapter and of the estimated actual and reasonable expenses of reproducing the charts or records. However, when medical charts or records are requested by a district attorney or by an independent or executive agency of the Commonwealth, notice pursuant to this section shall not be deemed a sufficient response to the subpoena duces tecum.
>
> (2)(i) Except as provided in paragraph (ii), the health care provider or facility or a designated agent shall be entitled to receive payment of such expenses before producing the charts or records. The payment shall not exceed $15 for searching for and retrieving the records, $1 per page for paper copies for the first 20 pages, 75¢ per page for pages 21 through 60 and 25¢ per page for pages 61 and thereafter; $1.50 per page for copies from microfilm; plus the actual cost of postage, shipping or delivery. No other charges for the retrieval, copying and shipping or delivery of medical records other than those set forth in this paragraph shall be permitted without prior approval of the party requesting the copying of the medical records. The amounts which may be charged shall be adjusted annually beginning on January 1, 2000, by the Secretary of Health of the Commonwealth based on the most recent changes in the consumer price index reported annually by the Bureau of Labor Statistics of the United States Department of Labor.

Plaintiffs do not allege that they were charged any amounts for the production of medical records that exceeded the charges provided for in the second sentence of § 6152(a)(2)(i) as adjusted annually by the Secretary of Health as provided for in the fourth sentence of this provision. Plaintiffs do allege that the amounts which they were charged significantly exceeded the actual and reasonable expenses of reproducing the medical records.

> Plaintiffs contend that a health care facility may only charge its actual and reasonable expenses where these expenses are less than the amount set forth in the second sentence of § 6152(a)(2)(i) as adjusted. Defendant, on the other hand, contends that it may impose any charge that does not exceed the amounts permitted within the second sentence as adjusted.
>
> If defendant's construction of the Medical Records Act is correct, this case and all related litigation will be dismissed. However, if plaintiffs' construction of the Medical Records Act is correct, this litigation will require consideration of several (possibly complicated) factual and legal issues, including what are actual and reasonable expenses, the applicability of the voluntary payment doctrine, and the applicability of the prior approval provision of § 6152(a)(2)(i).

*3 Trial Court Opinion, 6/17/10, at 1–3 (footnotes in original).

The trial court went on to deny MRO's preliminary objections, and MRO sought permission to pursue an interlocutory appeal pursuant to 42 Pa.C.S.A. § 702(b). The trial court concluded that the issue "involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the matter." Order, 6/17/10. In an order filed on August 18, 2010, this Court granted MRO's petition for permission to appeal.

On appeal, MRO raises four issues for this Court's consideration:

> 1. Is an entity that reproduces medical records without a subpoena required to charge its "actual and reasonable expenses" for its services, thereby foregoing recovery of any profit, rather than charging the safe-harbor prices specified in Section 6152(a)(2)(i) of the Act?
>
> 2. Even if a health care entity producing records is limited to recovery of its own "actual and reasonable expenses," does that limitation apply to an independent for-profit company that reproduces records for the health care entities, thereby preventing such a company from recovering a profit?
>
> 3. May the producing entity charge the prices specified in Section 6152(a)(2)(i) under the section's "prior approval" provision if it gives

> the customer an invoice setting forth the prices and the customer reviews and pays the invoice without objection before receiving the records?
>
> 4. Does the Medical Records Act permit a medical records reproduction company or other producing party to collect and remit sales tax in connection with its services?

Appellant's Brief at 3.

The standard of review we apply when reviewing a trial court's denial of preliminary objections is well settled.

> [O]ur standard of review of an order of the trial court overruling or granting preliminary objections is to determine whether the trial court committed an error of law. When considering the appropriateness of a ruling on preliminary objections, the appellate court must apply the same standard as the trial court.
>
> Preliminary objections in the nature of a demurrer test the legal sufficiency of the complaint. When considering preliminary objections, all material facts set forth in the challenged pleadings are admitted as true, as well as all inferences reasonably deducible therefrom. Preliminary objections which seek the dismissal of a cause of action should be sustained only in cases in which it is clear and free from doubt that the pleader will be unable to prove facts legally sufficient to establish the right to relief. If any doubt exists as to whether a demurrer should be sustained, it should be resolved in favor of overruling the preliminary objections.

Feingold v. Hendrzak, 15 A.3d 937, 941 (Pa.Super.2011) (quoting *Haun v. Community Health Systems, Inc.,* 14 A.3d 120, 123 (Pa.Super.2011)).

MRO's first three issues are interrelated and concern the propriety of fees charged pursuant to 42 Pa.C.S.A. § 6152. Specifically, MRO asserts that the trial court's conclusion that MRO is only permitted to bill actual and reasonable expenses is a misreading of the Act, threatens to put private reproduction companies out of business, and conflicts with *Liss & Marion, P.C. v. Recordex Acquisition Corp.,* 603 Pa. 198, 983 A.2d 652 (2009). We will address these issues concurrently.

*4 In *Liss,* the Supreme Court of Pennsylvania addressed the reproduction of documents pursuant to the Act.

Background

In 1986, the General Assembly amended provisions of Title 42 relating to the admission of evidence permitting litigants to introduce certified copies of original medical records at trial without having to present preliminary testimony as to their foundation, identity, and authenticity. 42 Pa.C.S. §§ 6151–6160. Known as the Medical Records Act (MRA), the enactment streamlines the records request process and caps the prices that medical care providers or their designated agents can charge for copying. 42 Pa.C.S. § 6152.

> Recordex Acquisition Corp. and its parent corporation Sourcecorp, Inc. (Appellants) have contracts with approximately forty Philadelphia-area hospitals to provide medical record copying services. A hospital receives a subpoena or a request for medical records from a litigant or his attorney and chooses whether to remit the originals or a certified copy of those records. 42 Pa.C.S. § 6152. If the hospital chooses to provide copies, it refers the request to Appellants, who retrieve the medical record and make a copy for the requester. Appellants invoice the requester directly, either before or after fulfilling the request.
>
> Hospitals generally store patient records in six forms including, paper, microfilm, and electronic. "Electronic" records are either original computer generated charts or optical image files of charts scanned by hospital personnel and saved on hospital computers. Appellants' invoices listed copies from paper as "paper," copies from microfilm as "microfilm," "microfiche," or "fiche," [1] and copies from electronic records as "fiche/optical" or "fiche/image." Admitted Facts for Summary Judgment (AF) at 12. In their invoices, Appellants billed copies from both electronic and microfilm records at the microfilm rate (rate M). AF at ¶¶ 4, 16. Rate M is the highest permissible charge for certified copies under the MRA and applies only to microfilm. 42 Pa.C.S. § 6152(a)(2).

In February 2003, the law firm of Feldman, Shepherd, Wohlgelernter, Tanner, Weinstock, and Dodig (Feldman firm) filed this class action lawsuit on behalf of a client it represented in a

personal injury action and others similarly situated. The five-count complaint alleged that Appellants overcharged the client and others similarly situated by billing for copies of electronic records at rate M rather than at a lower default rate (rate D).

> Appellee, Liss & Marion, P.C., is a law firm that represents plaintiffs on a contingency fee basis. Appellee was added to the lawsuit in March 2003. Appellee had represented several litigants who requested medical records from the hospitals under contract with Appellants. Following each request, Appellee typically received the certified copies of the records and an invoice directly from Appellants. On a few occasions, Appellants billed Appellee before remitting the certified copies. Appellee did not negotiate or challenge any of the invoices before joining this class action. AF at ¶¶ 13–14.
>
> *5 Appellants filed preliminary objections and sought dismissal of the complaint. The trial court sustained the objections in part and allowed the lawsuit to proceed only as a breach of contract action. In the breach of contract count, the contention was that the MRA-authorized rates were implied into contracts evidenced by Appellants' invoices and that by charging more than rate D for copies of electronic records, Appellants breached those contracts. In their answer to the complaint, Appellants denied the allegations and raised a "voluntary payment" defense.
>
> In July 2004, the trial court certified the following class:
>
> > All individuals and entities who, with respect to a request or a subpoena for medical records or charts of health care provider or employee of any health care provider licensed under the laws of the Commonwealth of Pennsylvania, were billed for or paid to one or both of the defendants either or each of the following: (1) a charge for copies of records greater than the amounts prescribed by the Secretary of Health under the Medical Records Act ("MRA"), 42 Pa.C .S. § 6152 et seq.; and (2) an unauthorized and/or unreasonable charge for copies from media not specifically provided for in the MRA. The class shall exclude class counsel, their law firm, and any lawyer or employee of their law firm.
> >
> > Trial Ct. Order, 7/9/2004. The trial court named Appellee as the class representative and the Feldman firm as class counsel.[2]

In April and May 2005, the parties filed cross motions for summary judgment. After a hearing, the trial court entered summary judgment in favor of the class and ordered a full accounting at the Appellants' expense. Ultimately, the trial court entered judgment on a molded verdict in favor of the class for $594,301.05. The Superior Court affirmed the judgment. *Liss & Marion, P.C. v. Recordex Acquisition Corp.,* 937 A.2d 503 (Pa.Super.2007). It held that Appellee had met the prerequisites for class certification. *Id.* at 510. Further, the Superior Court concluded that the trial court properly entered summary judgment in favor of the class. *Id.* at 514.

> We granted permission to appeal on the following issues:
>
> > 1) Does a private cause of action for breach of an implied contract arise out of a violation of the [MRA]?
> >
> > 2) Does the [MRA] require that copying of any records other than those stored on microfilm be billed **at the rate specified** for copying records stored on paper?
> >
> > 3) Do common issues of fact and law predominate among members of the class certified by the trial court?

Liss, 603 Pa. at 206–207, 983 A.2d at 656–657 (footnotes in original) (emphasis added).[2] The *Liss* Court held that there is a private cause of action for breach of contract, and that any paper copies of electronic documents are subject to the same per-page price as set forth in the statute—the only exception is where the copies are from microfilm. *Id.* at 216, 983 A.2d 662–663. Thus, all paper copies are subject to a cap at the lower rate unless they are from microfilm, and only when those paper copies are from microfilm may the higher rate be applied. *Id.*

2 As will be discussed below, we emphasize the Supreme Court's nomenclature for the fee. The Court referred to the rate, not as an actual or reasonable expense or cost, but as the **rate specified** in the fee schedule in the Act. This underlies our conclusion that the fee schedule provides a reasonable cost, and not merely an allowable cost cap.

*6 C & M argue that *Liss* is inapplicable because it did not present the same question at issue here. First, the plaintiffs in *Liss* apparently received paper copies of the documents. More importantly, C & M argue that the Court in *Liss* did not specifically answer whether the "estimated actual and reasonable expenses" language in section 6152(a)(1) prevents the use or applicability of the fee schedule unless those actual expenses exceed the amounts listed in the fee schedule. C & M's Brief at 19. While we can agree that much of the discussion in *Liss* is distinguishable from and inapplicable to the case at bar, we conclude that *Liss* is controlling as to the fees that are charged under the Act for paper copies of medical records.

Initially, we note that the records reproduced in this case did not involve the use of a subpoena. Nonetheless, like the Court in *Liss* and the trial court in the instant case, we conclude that section 6152(a) applies pursuant to the reference to section 6152(a)(2)(i) in section 6155(b)(1).3

3 **(b) Rights to records generally.**—
(1) A patient or his designee, including his attorney, shall have the right of access to his medical charts and records and to obtain photocopies of the same, without the use of a subpoena duces tecum, for his own use. A health care provider or facility shall not charge a patient or his designee, including his attorney, a fee in excess of the amounts set forth in section 6152(a)(2)(i) (relating to subpoena of records).
42 Pa.C.S.A. § 6155(b)(1).

Ultimately, though, the issue is not about the use of subpoenas or the original media from which the records are transferred. Rather, the issue is whether the rates provided under the Act are *per se* reasonable fees that constitute safe harbor rates, or whether they are just a cap on actual expenses that must be calculated on a case-by-case basis and which could vary widely. As the trial court succinctly stated:

> [C & M] contend that a health care facility may only charge its actual and reasonable expenses where these expenses are less than the amount set forth in the second sentence of § 6152(a)(2)(i) as adjusted. [MRO] on the other hand, contends that it may impose any charge that does not exceed the amounts permitted within the second sentence as adjusted.

Trial Court Opinion, 6/17/10, at 3.

The Court in *Liss* began its discussion of the rate issue by stating: "[h]aving established that Appellee properly stated a contract claim against Appellants, we turn next to the question of whether Appellants breached the parties' contract by charging rate M [(copies from microfilm)] rather than rate D [(copies from all media other than microfilm)] for copies from electronic records." *Liss,* 603 Pa. at 215, 983 A.2d at 662. As can be seen from this quote from *Liss,* the Supreme Court labels the fees as rates, and not price caps for the varied and case specific actual and reasonable expenses. Nowhere does the Court interpret the Act as requiring that a record reproducer bill only the actual and reasonable cost for paper copies; the Court concludes that the Act refers to a billing rate. Moreover, the Court ultimately calls the fee set for copying from any media other than microfilm ("rate D") the "default rate" and states that the reproducer of the records is "entitled to receive rate D per page." *Id.* at 216–217, 983 A.2d at 662–663. Also, the language of the Act itself uses "shall not exceed" for copying charges as opposed to "actual cost" language for shipping charges. This suggests copying charges are not cost-based.

*7 For these reasons, we agree with MRO that *Liss* is dispositive with respect to the rates charged for producing paper copies. We also find support for our position in the language of the statute. 42 Pa.C.S.A. § 6152(a)(1) refers to the *estimated* actual and reasonable expenses. Thus, even accepting the trial court's conclusion that the "such expenses" language of § 6152(2)(i) refers to that language, it is referring to an estimate. Thus, it is reasonable to conclude that the rates that follow create safe harbor rates for the estimated actual and reasonable expenses of producing paper copies. Accordingly, we are constrained to conclude that the trial court erred in denying MRO's preliminary objections holding that MRO was required to charge at an "actual and reasonable rate" and was not permitted to charge at the default rate ("rate D") provided by the Act for producing paper copies of medical records.

We reiterate that *Liss* did not involve, and thus did not address, copies of medical records reproduced on a CD–ROM or other electronic media without receiving paper copies. The rates set forth in the Act address **paper** copies and do not contemplate the reduced and diminishing costs incurred in reproducing medical records in an electronic format. *See* 42 Pa.C.S.A. § 6152(a)(2)(i).

However, we note that the rate charged in the instant case for the electronic reproduction of the

records from Heritage Valley Medical Center on CD–ROM was not prohibited under the voluntary payment doctrine[4] and the prior approval provision set forth in § 6152(a)(2)(i). MRO's invoice clearly stated that records of more than 100 pages would be reproduced on CD–ROM. Second Amended Complaint, Exhibit 2. C & M admit that they received the invoice and paid for the CD–ROM without protest. Second Amended Complaint, at 9, ¶¶ 33–36. As the Court in *Liss* explained, the reproduction of medical records is a matter of contract, and "the MRA rates embody the public policy of the Commonwealth regarding the amounts to be charged by the industry for copying medical records.... The parties are free to negotiate other terms." *Liss,* at 211 n. 6, 983 A.2d 659 n. 6. Therefore, there was no violation of the Act with respect to the rate charged for the reproduction of records onto CD–ROM.

4 This Court has defined the voluntary payment doctrine as follows: "Where, under a mistake of law, one voluntarily and without fraud or duress pays money to another with full knowledge of the facts, the money paid cannot be recovered.... Thus, money paid voluntarily, although under a mistake of law as to the interpretation of a contract, cannot be recovered." *Acme Markets, Inc. v. Valley View Shopping Center, Inc.,* 493 A.2d 736, 737 (Pa.Super.1985) (internal citation omitted).

MRO offers the tangential, if not alternative, argument that, were this Court to conclude that a medical records reproduction company is limited to recovering only actual and reasonable expenses, such a ruling would not apply to MRO because it is an independent for-profit company and not a health care provider under 42 Pa.C.S.A. § 6152(a)(1). MRO's Brief at 46. As explained above, we concluded that the Act does not limit medical records reproducers to actual and reasonable expenses for paper copies under 42 Pa.C.S.A. § 6152(a)(1). Rather, the Act provides for safe harbor fees for paper copies where 42 Pa.C.S.A. § 6152(a)(1) and (a)(2)(i) are read in conjunction. However, we address this issue briefly to iterate that MRO is a covered entity under the Act. The Act states: "the health care provider or facility or **a designated agent** shall be entitled to receive payment of such expenses before producing the charts or records." 42 Pa.C.S.A. § 6152(a)(2)(i) (emphasis added). MRO is an agent of the health care provider and, thus, specifically contemplated and covered by the billing provisions in the Act.[5]

5 Given our disposition regarding C & M's prior approval of the charges for CDROMs, we need not decide whether the rates charged by a medical records reproducer of non-paper copies can include a profit, as it is not necessary in the decision reached today. However, we implore the Legislature to revisit the Act and speak to this issue directly as it is likely to be a point of contention in future litigation.

***8** Finally, MRO maintains that the trial court erred in not dismissing C & M's claim that MRO violated the Act by collecting sales tax. MRO argues that it was not only permitted, but required to collect sales tax on the reproduced records provided. MRO's Brief at 54. MRO cites to Section 202(a) of the Pennsylvania Tax Code, which states:

Imposition of tax

(a) There is hereby imposed upon each separate sale at retail of tangible personal property or services, as defined herein, within this Commonwealth a tax of six per cent of the purchase price, which tax shall be collected by the vendor from the purchaser, and shall be paid over to the Commonwealth as herein provided.

72 P.S. § 7202(a). C & M counter that the Act only permits charges for searching and retrieving records, a per-page charge for copies, and a charge for shipping. C & M's Brief at 72.

However, MRO asserts that, even if it erroneously collected sales tax, C & M's action against MRO on this point is misplaced as C & M's action is properly against the Commonwealth for a refund of those taxes which were collected, held in trust, and turned over to the Commonwealth. We agree.

Pursuant to 72 P.S. § 7253, a taxpayer who has been improperly charged Pennsylvania sales tax must file a petition for refund with the Commonwealth. *Lilian v. Commonwealth of Pennsylvania,* 467 Pa. 15, 354 A.2d 250 (1976); *Silberman v. Commonwealth,* 738 A.2d 508 (Pa.Cmwlth.1999).[6]

6 While the Superior Court is not bound by decisions of the Commonwealth Court, such decisions provide persuasive authority. *Petow v. Warehime,* 996 A.2d 1083, 1089 (Pa.Super.2010).

For the reasons set forth above, we reverse the order dismissing the preliminary objections and

remand to the trial court for the entry of an order granting MRO's preliminary objections and dismissing C & M's complaint.

Order reversed. Case remanded with instructions. Jurisdiction relinquished.

COLVILLE, J., files a Dissenting Opinion.

DISSENTING OPINION BY COLVILLE, J.:

*8 I dissent.

MRO filed amended preliminary objections to C & M's second amended complaint. MRO's preliminary objections raised several grounds in support of its contention that C & M's complaint is legally insufficient. Central to this appeal, MRO maintained that a demurrer is appropriate because MRO "complied with [Section 6155 of the MRA] by charging fees that did not exceed the amounts set forth in [Subsection 6152(a)(2)(i) of the MRA.]" MRO's Amended Preliminary Objections to C & M's Second Amended Class Action Complaint, 04/06/10, at ¶ 22.

MRO's preliminary objections did raise other grounds in an attempt to have the court grant a demurrer. For instance, in its complaint, C & M alleged that MRO charged a sales tax for its services and that such charges are not permitted under Pennsylvania law. MRO argued that Counts I and II of the complaint, *i.e.,* counts that, in part, concern the charging and payment of sales tax, should be dismissed because MRO is required to charge a sales tax. MRO further argued that, if C & M believes that they are entitled to recover the sales tax, they must petition the Department of Revenue for such relief. In addition, MRO contended in a separate preliminary objection that, even if C & M's claims are legally sufficient, the claims are barred by the voluntary payment doctrine.

*9 In response to MRO's preliminary objections, the trial court entered the following order:

> On this 17th day of June, 2010, upon consideration of [MRO's] preliminary objections seeking dismissal of [C & M's] Second Amended Complaint **on the ground that [C & M] were not charged any amount for production of medical records that exceeded the amounts set forth in the second sentence of 42 Pa.C.S.[A.] § 6152(a)(i), as adjusted,** it is hereby ORDERED that these preliminary objections are overruled based on my construction of the relevant provisions of the [MRA] as not allowing charges that exceed actual and reasonable expenses.
>
> I am of the opinion that this order of court overruling [MRO's] preliminary objections involves a controlling question of law as to which there is a substantial ground for difference of opinion and that an immediate appeal from this order may materially advance the ultimate termination of the matter.

Trial Court Order, 06/18/10 (emphasis added). This Court later granted MRO's petition for permission to appeal the court's order.

The order subject to this appeal only overruled MRO's preliminary objections which claimed that a demurrer was required because the amounts MRO charged C & M did not violate Subsection 6152(a)(2)(i) of the MRA. As I interpret the trial court's order, the court has yet to rule on the remainder of MRO's preliminary objections. Thus, in my view, the sole controlling question of law before this Court is whether the trial court correctly interpreted the MRA such that MRO could only receive payment for its actual and reasonable expenses.[1]

1 My beliefs in this regard are bolstered by the trial court's opinion, which only addressed its interpretation of the MRA. In fact, in its opinion, the court states, *inter alia:*

> If [MRO's] construction of the [MRA] is correct, this case and all related litigation will be dismissed. However, if [C & M's] construction of the MRA is correct, this litigation will require consideration of several (possibly complicated) factual and legal issues, including what are actual and reasonable expenses, **the applicability of the voluntary payment doctrine,** and the applicability of the prior approval provision of [Subsection 6152(a)(2)(i).

Trial Court Opinion, 06/18/10, at 3 (emphasis added); *id.* at 12 ("For these reasons, I am overruling [MRO's] preliminary objections seeking dismissal of [C & M's] complaint **on the ground that [MRO's] charges did not exceed the amounts provided for in the second sentence of 42 Pa.C.S.[A.] § 6152(a)(2)(i).")** (emphasis added and footnote omitted).

I do not believe that a Pennsylvania appellate court, including the Supreme Court in *Liss & Marion, P.C. v. Recordex Acquisition Corp.,* 983 A.2d 652 (Pa.2009), has addressed the issue currently before

this Court. Thus, I would turn to the Statutory Construction Act, 1 Pa.C.S.A. § 1501 *et. seq.,* for guidance in interpreting the pertinent provisions of the MRA.[2]

2 "Statutory interpretation implicates a question of law. Thus, [this Court's] scope of review [would be] plenary, and [its] standard of review [would be] *de novo.*" *U.S. Bank. Nat. Ass'n v. Parker,* 962 A.2d 1210, 1211 n. 1 (Pa.Super.2008) (citation and quotation marks omitted).

> Under the Statutory Construction Act, the object of all statutory construction is to ascertain and effectuate the General Assembly's intention. When the words of a statute are clear and free from all ambiguity, the letter of the statute is not to be disregarded under the pretext of pursuing its spirit.
> *Parker,* 962 A.2d at 1212 (citations omitted).

Subsection 6155 of the MRA, which governs the manner in which MRO was to determine its charges, states in relevant part, "A health care provider or facility shall not charge a patient or his designee, including his attorney, a fee in excess of the amounts set forth in section 6152(a)(2)(i) (relating to subpoena of records)." 42 Pa.C.S.A. § 6155(b). Pursuant to the clear and unambiguous language employed in Subsection 6152(a)(2)(i) of the MRA, designated agents of health care providers, such as MRO, "shall be entitled to receive payment of **such expenses** before producing the charts or records." 42 Pa.C.S.A. § 6152(a)(2)(i) (emphasis added).

***10** The only reference to "expenses" in Section 6152 that precedes Subsection 6152(a)(2)(i)'s "such expenses" terminology can be found in Subsection 6152(a), wherein the General Assembly specifically references "estimated actual and reasonable expenses." 42 Pa.C.S.A. § 6152(a) ("[I]t shall be deemed a sufficient response to the subpoena if the health care provider or health care facility notifies the attorney for the party causing service of the subpoena ... of the **estimated actual and reasonable expenses** of reproducing the charts or records.") (emphasis added).

Furthermore, after mandating that entities such as MRO receive payment of "such expenses," Subsection 6152(a)(2)(i) provides,

> **The payment shall not exceed** $15 for searching for and retrieving the records, $1 per page for paper copies for the first 20 pages, 75¢ per page for pages 21 through 60 and 25¢ per page for pages 61 and thereafter; $1.50 per page for copies from microfilm; plus the actual cost of postage, shipping or delivery.

42 Pa.C.S.A. § 6152(a)(2)(i) (emphasis added). In my view, by stating that "the payment shall not exceed" the various prices listed, the plain language of Subsection 6152(a)(2)(i) sets a cap on the amounts entities such as MRO can charge with respect to their expenses; the subsection does not set a default rate that such entities may or should charge.

In short, I am of the opinion that the clear and unambiguous language of the pertinent provisions of the MRA evinces the General Assembly's intent to require entities such as MRO to receive payment only for their estimated actual and reasonable expenses; these expenses cannot exceed the limits expressed in Subsection 6152(a)(2)(i). Consequently, because the trial court's interpretation of the MRA comports with the Statutory Construction Act, I would affirm the order and remand for further proceedings.

Parallel Citations

2011 PA Super 169

Footnotes

1 Previously, I entered a court order dated February 4, 2010 addressing defendant's preliminary objections to plaintiffs' initial complaint. On March 3, 2010, I granted reconsideration. Thereafter, plaintiffs filed an amended and second amended complaint. The second amended complaint includes an additional plaintiff who received copies of medical records reproduced on a CD–ROM without receiving paper copies.

2 Defendant's preliminary objections to the Second Amended Complaint include the issues for which reconsideration was granted.

1 42 Pa.C.S. § 6152 refers to "microfilm" while Appellants' invoices refer to "fiche." However, microfilm, microfiche, and fiche are the same medium.

2 The trial court did not certify the class originally proposed by Appellee, which would have included clients who requested records through their attorneys in addition to the attorneys themselves. The court concluded that the clients' claims would be "duplicative" of the attorneys' claims so it limited the class as stated. Trial Ct. Memo., 7/12/2004, at 10.

End of Document

EXHIBIT
13

JUDICIAL CODE (42 PA.C.S.) - SUBPOENA OF RECORDS

Act of Jul. 5, 2012, P.L. 1138, No. 139 Cl. 42

Session of 2012
No. 2012-139

SB 1535

AN ACT

Amending Title 42 (Judiciary and Judicial Procedure) of the Pennsylvania Consolidated Statutes, in rules of evidence, further providing for subpoena of records.

The General Assembly of the Commonwealth of Pennsylvania hereby enacts as follows:

Section 1. Section 6152(a)(1) and (2) of Title 42 of the Pennsylvania Consolidated Statutes are amended to read:

§ 6152. Subpoena of records.

(a) Election.--

(1) When a subpoena duces tecum is served upon any health care provider or an employee of any health care facility licensed under the laws of this Commonwealth, requiring the production of any medical charts or records at any action or proceeding, it shall be deemed a sufficient response to the subpoena if the health care provider or health care facility notifies the attorney for the party causing service of the subpoena, within three days of receipt of the subpoena, of the health care provider's or facility's election to proceed under this subchapter [and of the estimated actual and reasonable expenses of reproducing the charts or records]. However, when medical charts or records are requested by a district attorney or by an independent or executive agency of the Commonwealth, notice pursuant to this section shall not be deemed a sufficient response to the subpoena duces tecum.

(2) (i) Except as provided in subparagraph (ii), the health care provider or facility or a designated agent shall be entitled to receive payment of [such expenses] **the amounts under this subsection** before producing the charts or records **pursuant to a subpoena**. The payment shall [not exceed $15] **be $20.62** for searching for and retrieving the records, [$1] **$1.39** per page [for paper copies] for the first 20 pages, [75¢] **$1.03** per page for pages 21 through 60 and [25¢] **34¢** per page for pages 61 and thereafter **for paper copies or reproductions on electronic media whether the records are stored on paper or in electronic format;** [$1.50] **$2.04** per page for copies from microfilm; plus the actual cost of postage, shipping or delivery. No other charges for the retrieval, copying and shipping or delivery of medical records other than those set forth in this paragraph shall be permitted without prior approval of the party requesting the copying of the medical records. The amounts which may be charged shall be adjusted annually beginning on January 1, [2000] **2013,** by the Secretary of Health of the Commonwealth based on the most recent changes in the consumer price index reported annually by the Bureau of Labor Statistics of the United States Department of

Labor.

(ii) Payment to a health care provider or facility for searching for, retrieving and reproducing medical charts or records requested by a district attorney shall [not exceed $15] **be $20.62,** search and retrieval fee, plus the actual cost of postage, shipping or delivery as described in subparagraph (i), as adjusted by the Secretary of Health of the Commonwealth, unless otherwise agreed to by the district attorney.

* * *

Section 2. This act shall take effect in 60 days.

APPROVED--The 5th day of July, A.D. 2012.

TOM CORBETT

EXHIBIT
14

IN THE SUPREME COURT OF PENNSYLVANIA

No. 1 WAP 2012

WAYNE M. CHIURAZZI LAW INC. d/b/a CHIURAZZI & MENGINE, LLC and DAVID A. NEELY,

Plaintiffs/Appellants,

v.

MRO CORPORATION,

Defendant/Appellee.

APPLICATION FOR LEAVE TO PROVIDE SUPPLEMENTAL AUTHORITY AND TO SUMMARILY AFFIRM THE SUPERIOR COURT'S DECISION OR, IN THE ALTERNATIVE, TO DISMISS THIS APPEAL AS IMPROVIDENTLY GRANTED IN LIGHT OF THAT AUTHORITY

Appellee MRO Corporation requests leave to call to this Court's attention a recent enactment of the General Assembly that should be dispositive of this appeal, and MRO moves for summary affirmance of the decision below or, in the alternative, for dismissal of this appeal in light of this new authority. In support of this application, MRO states:

1. Plaintiffs brought this action for alleged violations of the Medical Records Act, 42 Pa. C.S. §§ 6151-6160, because they contend that MRO charged them more for copies of

medical records than is permitted by the Act. Their action is based on a misconstruction of the statute. In particular:

a. MRO charged prices based on the price schedule in Section 6152(a)(2)(i) of the Act.

b. Plaintiffs contend that charging prices based on the statute's price schedule was unlawful because the statute instead requires prices to be based only on the out-of-pocket cost of providing the records. Plaintiffs base this argument on a sentence in Section 6152(a)(1) that says a party providing records pursuant to a subpoena is to notify the subpoenaing party of "the estimated actual and reasonable expenses of reproducing the charts and records." Plaintiffs contend that, under Section 6155(b)(1) of the Act, the prices that may be charged if there is no subpoena must equal the prices that could be charged if there were a subpoena.

2. Plaintiffs' argument was rejected by the Superior Court, which ordered that this action be dismissed. In its opinion, the Superior Court "implore[d] the Legislature to revisit the Act" and to clarify the issues presented by this litigation. *Wayne M. Chiurazzi Law, Inc. v. MRO Corp.*, 27 A.3d 1272, 1281 n.5 (2011), *allow. of appeal granted*, 39 A.3d 267 (Pa. Feb. 22, 2012).

3. The Legislature has now acted on the Superior Court's request by amending the Medical Records Act in Act No. 2012-139, *http://www.legis.state.pa.us/CFDOCS/Legis/PN/Public/btCheck.cfm?txtType=PDF&sessYr=2011&sessInd=0&billBody=S&billTyp=B&billNbr=1535&pn=2299* (S.B. 1535, 2011-12 Reg. Sess., Pr. No. 2299), which was signed into law by Governor Corbett on July 5, 2012. A copy of Act No. 2012-139 is attached to this application. Act 2012-139 clarifies the Medical Records Act by:

a. Deleting the words "the estimated actual and reasonable expenses of reproducing the charts and records" from Section 6152(a)(1), thereby removing from the sta-

tute the words on which plaintiffs have relied for their argument that the Act requires prices to be based on out-of-pocket costs; and

b. Amending Section 6152(a)(2)(i) to state that a provider of records pursuant to a subpoena "shall be entitled to receive payment of the amounts" in the statute's price schedule and that "[t]he payment shall be" of those specified amounts.

4. Act No. 2012-139 makes clear that there is no basis for plaintiffs' argument that prices for medical records must be different from those in the price schedule in Section 6152(a)(2)(i). The Act now unequivocally specifies that the "amounts" to which a producing party is entitled if there is a subpoena are those listed in that schedule, and it deletes from the Act the words "actual and reasonable expenses" that had been the basis for plaintiffs' contrary argument. The Act also makes clear that the amounts in the price schedule apply if records are produced without a subpoena, since Section 6155(b)(1) (which the Legislature did not amend) continues to allow a fee that is consistent with "the amounts set forth in section 6152(a)(2)(i)."

5. Act No. 2012-139 also amends 6152(a)(2)(i) to clarify that the price schedule in Section 6152(a)(2)(i) applies regardless of whether the producing entity provides the requesting party "paper copies or reproductions on electronic media" and regardless of "whether the records are stored on paper or in electronic format." The Superior Court's decision had confused that issue. *See* 27 A.3d at 1275, 1281.

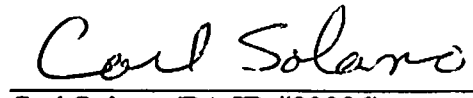
6. In light of Act No. 2012-139, this Court should summarily affirm the decision of the Superior Court that directed that this action be dismissed, since the Legislature has now made clear that the Superior Court's construction of the statute is consistent with that of the General Assembly.

7. In the alternative, the Court should dismiss this appeal because its allowance was improvidently granted. The Legislature has responded to the Superior Court's request by clarifying the Medical Records Act and confirming that the Legislature did not intend for it to be interpreted as plaintiffs have contended. As a result of this amendment, the issues presented

by this appeal will not arise in the future. Accordingly, there is no reason for this Court to devote further resources to this appeal.

WHEREFORE, MRO Corporation respectfully requests that the Court allow it to submit to the Court the copy of Act No. 2012-139 that is attached to this application and that, in light of Act No. 2012-139, the Court either summarily affirm the decision below or dismiss this appeal as improvidently granted.

Respectfully submitted,



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Dated: July12, 2012.

ACT NO.
2012-139

PRIOR PRINTER'S NO. 2221 PRINTER'S NO. 2299

THE GENERAL ASSEMBLY OF PENNSYLVANIA

SENATE BILL

No. 1535 Session of 2012

INTRODUCED BY GREENLEAF, FERLO, RAFFERTY, PIPPY, BOSCOLA, ARGALL, YUDICHAK, BAKER AND MENSCH, MAY 29, 2012

SENATOR CORMAN, APPROPRIATIONS, RE-REPORTED AS AMENDED, JUNE 18, 2012

AN ACT

Amending Title 42 (Judiciary and Judicial Procedure) of the Pennsylvania Consolidated Statutes, in rules of evidence, further providing for subpoena of records.

The General Assembly of the Commonwealth of Pennsylvania hereby enacts as follows:

Section 1. Section 6152(a)(1) and (2) of Title 42 of the Pennsylvania Consolidated Statutes are amended to read:

§ 6152. Subpoena of records.

(a) Election.--

(1) When a subpoena duces tecum is served upon any health care provider or an employee of any health care facility licensed under the laws of this Commonwealth, requiring the production of any medical charts or records at any action or proceeding, it shall be deemed a sufficient response to the subpoena if the health care provider or health care facility notifies the attorney for the party causing service of the subpoena, within three days of receipt of the subpoena, of the health care provider's or facility's

election to proceed under this subchapter [and of the estimated actual and reasonable expenses of reproducing the charts or records]. However, when medical charts or records are requested by a district attorney or by an independent or executive agency of the Commonwealth, notice pursuant to this section shall not be deemed a sufficient response to the subpoena duces tecum.

(2) (i) Except as provided in subparagraph (ii), the health care provider or facility or a designated agent shall be entitled to receive payment of [such expenses] THE AMOUNTS UNDER THIS SUBSECTION before producing the charts or records pursuant to a subpoena ~~or authorization under the Health Insurance Portability and Accountability Act of 1996 (Public Law 104-191, 110 Stat. 1936)~~. The payment shall [not exceed $15] be $20.62 for searching for and retrieving the records, [$1] $1.39 per page [for paper copies] for the first 20 pages, [75¢] $1.03 per page for pages 21 through 60 and [25¢] 34¢ per page for pages 61 and thereafter for paper copies or reproductions on electronic media whether the records are stored on paper or in electronic format; [$1.50] $2.04 per page for copies from microfilm; plus the actual cost of postage, shipping or delivery. No other charges for the retrieval, copying and shipping or delivery of medical records other than those set forth in this paragraph shall be permitted without prior approval of the party requesting the copying of the medical records. The amounts which may be charged shall be adjusted annually beginning on January 1, [2000] 2013, by the Secretary of Health of the Commonwealth based on the most recent changes in the

consumer price index reported annually by the Bureau of Labor Statistics of the United States Department of Labor.

(ii) Payment to a health care provider or facility for searching for, retrieving and reproducing medical charts or records requested by a district attorney shall [not exceed $15] <u>be $20.62</u>, search and retrieval fee, plus the actual cost of postage, shipping or delivery as described in subparagraph (i), as adjusted by the Secretary of Health of the Commonwealth, unless otherwise agreed to by the district attorney.

* * *

Section 2. This act shall take effect in 60 days.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the Application for Leave To Provide Supplemental Authority and To Summarily Affirm the Superior Court's Decision or, in the Alternative, To Dismiss This Appeal as Improvidently Granted in Light of That Authority was served upon the following counsel of record by United States First Class Mail, postage prepaid, this 12th day of July, 2012, which service satisfies the requirements of Rule 121 of the Pennsylvania Rules of Appellate Procedure:

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EXHIBIT
15

IN THE SUPREME COURT OF PENNSYLVANIA

WAYNE M. CHIURAZZI LAW INC. D/B/A CHIURAZZI & MENGINE, LLC; and DAVID A. NEELY, ESQUIRE,	)	Docket No.: 1 WAP 2012
Appellants,	)	
vs.	)	
MRO CORPORATION,	)	
Appellee.	)	

RESPONSE TO THE MOTION TO SUMMARILY AFFIRM OR TO DISMISS IN LIGHT OF SUPPLEMENTAL AUTHORITY

Appeal from the August 11, 2011 Order of The Superior Court of Pennsylvania, Docket No. 1283 WDA 2010, Reversing the Interlocutory Order of The Court of Common Pleas of Allegheny County, Pennsylvania, Docket No. GD-09-012911

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IN THE SUPREME COURT OF PENNSYLVANIA

WAYNE M. CHIURAZZI LAW INC. D/B/A CHIURAZZI & MENGINE, LLC; and DAVID A. NEELY, ESQUIRE,	)	
Appellants,	)	Docket No.: 464 WAL 2011
vs.	)	
MRO CORPORATION,	)	
Appellee.	)	

RESPONSE TO THE MOTION TO SUMMARILY AFFIRM OR TO DISMISS IN LIGHT OF SUPPLEMENTAL AUTHORITY

Appellants hereby respond to Appellee MRO Corporation's ("MRO") Motion To Summarily Affirm Or, Alternatively, To Dismiss In Light Of Supplemental Authority. As fully demonstrated below, MRO's motion is based upon an erroneous premise: that Act No. 2012-139 (hereinafter "2012 SB 1535") constitutes a retroactive clarification of a patient's rights under §§ 6152(a)(1) and 6152(a)(2)(i) of the Medical Records Act. 42 Pa. C.S. §§ 6152(a)(1) and 6152(a)(2)(i). To the contrary, 2012 SB 1535 constitutes an extensive change to the substantive rights of patients under the MRA that operates prospectively only. Accordingly, this legislative act does not dispose of the issues presented in this appeal. In support of this Response, Appellants state as follows:

STATEMENT OF THE CASE

1. The MRA, as originally enacted in 1986, provided that in response to a subpoena, a healthcare provider must respond by notifying the requestor of the "estimated actual and reasonable cost of reproducing." 42 Pa. C.S. § 6152

(1986 version). *See* Appendix to Appellants' Reply Brief, Ex. 1 1986 Legislative History of HB 2072, p. A6. It further afforded patients a right of access to medical records for their own use. 42 Pa. C.S. § 6155. Reply Appendix, Ex. 1 1986 Legislative History, p. A7.

2. The MRA was amended in 1998. These amendments did not alter or revise the language "estimated actual and reasonable cost of reproducing" language; they simply added "caps" or "upper limits" to it by the addition of a new section, § 6152(a)(2)(i). Reply Appendix, 1998 Legislative History, p. A61-A64.

3. Thus, in 1998 the General Assembly explicitly adopted a two-tiered approach to charges for medical records: The charges had to be based upon the medical records reproducer's "estimated actual and reasonable" costs of reproduction; but "such expenses" would not be allowed to "exceed" or surpass the amounts set forth in the second sentence of § 6152(a)(2)(i). Reply Appendix, 1998 Legislative History, p. A61.

4. On July 15, 2009, this action was filed. The Appellants sought compensatory and declaratory relief and alleged, *inter alia,* that MRO, in responding to requests for copies of medical records, breached an implied in fact contract by failing to implement procedures to estimate and charge Appellants and others similarly situated based upon the "estimated actual and reasonable cost of reproducing" their medical records. This Court in *Liss & Marion,* 603 Pa. 198, 983 A.2d 652 (2009) held that the MRA created implied in fact contractual duties and obligations that, if violated, gave rise to an implied in fact breach of contract cause of action.

5. On June 17, 2010 the Court of Common Pleas of Allegheny (Wettick, J.) overruled MRO's preliminary objections, finding that the MRA requires health care providers or their agents to disclose and base charges for copies of medical records on the "estimated actual and reasonable cost of reproducing" their medical records as provided in § 6152(a)(1) of the MRA. Appendix to Brief Of Appellants, p. A1. The Trial Court certified this issue for permissive appeal pursuant to 42 Pa. C.S. § 702(b). Appendix to Brief Of Appellants, p. A13.

6. On August 11, 2011, a divided Superior Court reversed the decision of the Trial Court. Appendix to Brief Of Appellants, p. A15-A27. The Superior Court's majority decision failed to construe and apply the phrase "estimated actual and reasonable cost of reproducing" in § 6152(a)(1) of the MRA. Instead, the Superior Court found that the second sentence of § 6152(a)(1)(i) of the MRA created so-called "safe harbor" rates that were authorized to be charged, without regard to the "estimated actual and reasonable cost of reproducing" the medical records. Appendix to Brief Of Appellants, p. A23-A24. Contrary to MRO's characterization, the Superior Court did *not* implore the General Assembly to "clarify the issues presented by this litigation." (MRO Motion at para. 2). Instead, the Superior Court said that the MRA did not explicitly address whether a copying company, acting as an agent for a health care provider in responding to a request for copies of medical records, could include a "profit" as part of the cost to be charged. Appendix to Brief Of Appellants, p.A24, fn. 5.

7. On February 22, 2012, this Court granted Appellants' Petition For Allowance of Appeal. *Chiurazzi v. MRO Corp.,* No. 464 WAL 2011. In its Order, this Court identified the issues to be presented as follows:

> (1) Does the Medical Records Act, 42 Pa. C.S. § 6152(a)(1) and (a)(2)(i), require medical records reproducers to disclose their estimated actual and reasonable expenses of reproducing the charts or records, and to limit their copying charges to these amounts or the statutory ceiling rates, whichever is less?
>
> (2) If so, where a medical records reproducer failed to disclose and charge its estimated actual and reasonable expenses and instead charges the MRA's ceiling rates, do the "voluntary payment" and "prior approval" defenses bar the records requestor from bringing a subsequent breach of contract claim to recoup the unlawful over-payment?

8. On May 29, 2012, 2012 Senate Bill 1535 was introduced in the General Assembly. Exhibit 1 attached hereto, Legislative History of 2012 SB 1535. Ultimately, 2012 SB 1535 passed through the General Assembly and was signed into law on July 5, 2012. 2012 SB 1535 changed a patient's right of access to medical records in the following material respects: *First,* 2012 SB 1535 eliminated the right of a patient to obtain copies of medical records based upon the "estimated actual and reasonable expenses of reproducing" the medical records. 2012 SB 1535 accomplished this by amending § 6152(a)(1) as follows:

> . . . it shall be deemed a sufficient response to the subpoena if the health care provider or health care facility notifies the attorney for the party causing service of the subpoena, within three days of receipt of the subpoena, of the health care provider's or facility's election to proceed under this subchapter [and of the estimated actual and reasonable expenses of reproducing the charts or records].[1]

---

[1] Bracketed terms in an amendatory statute are the ones being eliminated:

> In ascertaining the correct reading, status and interpretation of an amendatory statute, the matter inserted within brackets shall be omitted, and the matter in italics or underscored shall be read and interpreted as part of the statute.

1 P. S. § 1951.

9. *Second,* 2012 SB 1535 eliminated the reference back to "estimated actual and reasonable expenses of reproducing" in the first sentence of § 6152(a)(2)(i) by removing the "such expenses" language and replacing it with the phrase "the amounts under this subsection". Under 2012 SB 1535, the first sentence of § 6152(a)(2)(i) now provides as follows:

> Except as provided in subparagraph (ii), the health care provider or facility or a designated agent shall be entitled to receive payment of [such expenses] THE AMOUNTS UNDER THIS SUBSECTION before producing the charts or records pursuant to a subpoena.

10. *Third,* 2012 SB 1535 amended the second sentence of § 6152(a)(2)(i) by taking away the "shall not exceed" language and then providing for a single amount to be charged. 2012 SB 1535 also substantially changed the second sentence of § 6152(a)(2)(i) by creating new, applicable charges for records stored in electronic media. 2012 SB 1535 made this change by providing that the per page rate for records stored in paper format would also be the applicable charge for records stored electronically. 2012 SB 1535 thus revises the second sentence of § 6152(a)(2)(i) as follows:

> The payment shall [not exceed $15] be $20.62 for searching for and retrieving the records, [$1] $1.39 per page [for paper copies] for the first 20 pages, [75¢] $1.03 per page for pages 21 through 60 and [25¢] 34¢ per page for pages 61 and thereafter for paper copies or reproductions on electronic media whether the records are stored on paper or in electronic format; [$1.50] $2.04 per page for copies from microfilm; plus the actual cost of postage, shipping or delivery.

11. *Fourth,* 2012 SB 1535 provides that it will take effect in 60 days.

2012 SB 1535 Constitutes A Prospective Diminution To The Substantive Right Of Patient Access To Medical Records

11. MRO repeatedly depicts SB 1535 as "clarifying" legislation that operates retrospectively to conform the actual language of the MRA to the interpretation of the Superior Court. MRO Motion at paragraphs 3, 4, 5, 6 and 7. At core, MRO is basically saying that the General Assembly has decided this case. Certainly, MRO must know that the General Assembly has no such power to decide pending cases. *HSP Gaming, L.P. v. City of Philadelphia*, 598 Pa. 118, 161-62, 954 A.2d 1156, 1182 (2008) *citing St. Joseph Lead Co. v. Potter Twp.*, 398 Pa. 361, 157 A.2d 638, 642 (1959) ("[I]t is elementary that the legislature cannot create authority retroactively simply by passing 'clarifying' legislation. The intent of the legislature must be determined as of the time the original act was passed."). As this Court explained, "Of course, the General Assembly may react to litigation or to court decisions and change the law going forward. But the General Assembly cannot arrogate the authority of the Judiciary to interpret legislation to control the outcome of cases pending before the courts." *HSP Gaming, supra.*

12. Whether, in fact, SB 1535 has retroactive effect depends upon application of the Statutory Construction Act, an exercise that MRO studiously avoids. Under the SCA, "No statute shall be construed to be retroactive unless clearly and manifestly so intended by the General Assembly." 1 P.S. § 1926. *Gehris v. Com., Dept. of Transp.*, 471 Pa. 210, 214-15, 369 A.2d 1271, 1273 (1977). Moreover, it must be presumed "That the General Assembly does not intend to violate the Constitution of the United States or of this Commonwealth."

1 P.S. § 1922(3). Furthermore, Section 1953 of the SCA, 1 Pa.C.S. § 1953, pertaining to the construction of amendatory statutes such as SB 1535, provides that "new provisions shall be construed as effective only from the date when the amendment became effective." The general rule of construction is that statutes, other than those affecting procedural matters, must be construed prospectively except where the legislative intent that they shall act retrospectively is so clear as to preclude all question as to the intention of the legislature. *Farmers Nat. Bank & Trust Co. of Reading, to Use of Adams v. Berks County Real Estate Co.*, 333 Pa. 390, 393-94, 5 A.2d 94, 95 (1939).

13. The legislature "knows well how to provide that a statute should be applied retrospectively or prospectively" in order to make its intent plain. *Brangs v. Brangs*, 407 Pa. Super. 43, 54, 595 A.2d 115, 121 (1991). As this Court explained in *Com. v. Gribble*, 550 Pa. 62, 89-90, 703 A.2d 426, 440 (1997).

> This Court has held that an act stating that it "shall take effect immediately" does not show a clear and manifest intention by the General Assembly for the act to apply retroactively. *Scott v. Retirement Board of Allegheny County*, 439 Pa. 249, 266 A.2d 644 (1970). In contrast, where an act stated that it shall apply to "all criminal cases and appeals pending on the effective date of this act", we found that the General Assembly intended the law to apply retroactively. *Commonwealth v. Young*, 536 Pa. 57, 65 n. 6, 637 A.2d 1313, 1316 n. 6 (1993), *cert. denied*, 511 U.S. 1012, 114 S.Ct. 1389, 128 L.Ed.2d 63 (1994).

14. Under 2012 SB 1535, no "clear and manifest" intention can be discerned making the amendment retroactive. Instead, SB 1535 merely provides that it will take effect in 60 days, a clear indication that it has prospective effect only. *Cf. Konidaris v. Portnoff Law Associates, Ltd.*, 598 Pa. 55, 60, 953 A.2d 1231, 1233 (2008), where the amendment at issue provided specifically that it

"shall be retroactive to January 1, 1996." Here, the General Assembly did not make the amendment retroactive to 1986 or even 1998 and, therefore, SB 1535 is clearly prospective in scope.

15. Moreover, it must be presumed, pursuant to 1 P.S. § 1922(3), that the General Assembly knew that to provide SB 1535 with retroactive effect would have rendered it unconstitutional. *Ieropoli v. AC&S Corp.*, 577 Pa. 138, 156, 842 A.2d 919, 930 (2004) ("Under Article 1, Section 11, however, a statute may not extinguish a cause of action that has accrued. *Gibson,* 415 A.2d at 82–83. Therefore, as Appellants' causes of action accrued before the Statute was enacted, we hold that the Statute's application to Appellants' causes of action is unconstitutional under Article 1, Section 11."). Specifically, the General Assembly would have known that making 2012 SB 1535 retroactive would violate the Remedies Clause of the Pennsylvania Constitution. Pa. Const. Art. I, § 11. As this Court observed in *Konidaris, supra,* 598 Pa. at 75, 953 A.2d at 1243, the language of the Remedies Clause protects "every man['s]" ability to recover for, *inter alia,* tort or contract injuries . . .". Here, Appellants seek to enforce contract rights, therefore, the General Assembly cannot by legislative fiat take such rights away once they have accrued. *See Kondiaris,* 598 Pa. at 72-73, 953 A.2d at 1240-41.

Given That 2012 SB 1535 Has No Bearing On The Issues Presented In This Appeal, The Motion To Summarily Affirm Or Dismiss Lacks Merit

16. Accordingly, this Court should overrule MRO's request that the decision of the Superior Court be summarily affirmed because 2012 SB 1535 has purportedly "clarified" the MRA such that the Superior Court's opinion is now correct. MRO Motion at para. 6. As demonstrated, the General Assembly has no

power to retroactively conform the MRA to satisfy the conclusions of the Superior Court.

17. For the same reasons, this Court should overrule MRO's request that this appeal be dismissed as improvidently granted. Actions of the General Assembly subsequent to the grant of permission to appeal have no bearing on the course of this appeal for otherwise justice would be denied, as explained by this Court in *Menges v. Dentler*, 33 Pa. 495, 498 (1859):

> The law which gives character to a case, and by which it is to be decided (excluding the forms of coming to a decision), is the law that is inherent in the case, and constitutes part of it when it arises as a complete transaction between the parties. If this law be changed or annulled, the case is changed, and justice denied, and the due course of law violated.

18. The law inherent in this case and the reasons that justify this appeal in this Court remain intact. The issues presented, as stated above, are important issues of first impression in this Commonwealth. The issues presented are of substantial public importance because they focus on the rights of patients to full and fair access to their own medical records. This basic right of patient access has been an important public policy concern for many years. *See Reply Brief Of Appellants, pp. 10-12.* Accordingly, it is respectfully suggested that the admonition of this Court made over 150 years ago in *Menges v. Dentler*, 33 Pa. at 498 with respect to the guarantee of the Remedies Clause remains particularly a propos today:

> These provisions are, therefore, imperative limitations of legislative authority, and imperative impositions of judicial duty. To the judiciary they say:--You shall administer justice to all men by due course of law, and without sale, denial, or delay; and to the legislature they say:--You shall not intermeddle with such functions. In England, these words prohibited the king from interfering with judicial proceedings, so as to exclude all royal arbitrariness, and insure that cases should be decided by law. Here,

they prohibit all legislative and executive interference, for the same reasons.

WHEREFORE, it is respectfully requested that MRO's Motion To Summarily Affirm Or To Dismiss be over-ruled.

Respectfully submitted,

by: _____

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Regular Session 2011-2012
Senate Bill 1535

History

Sponsors: GREENLEAF, FERLO, RAFFERTY, PIPPY, BOSCOLA, ARGALL, YUDICHAK, BAKER and MENSCH

Printer's No.: 2299*, 2221

Short Title: An Act amending Title 42 (Judiciary and Judicial Procedure) of the Pennsylvania Consolidated Statutes, in rules of evidence, further providing for subpoena of records.

Actions:

PN 2221	Referred to JUDICIARY, May 29, 2012
	Reported as committed, June 5, 2012
	First consideration, June 5, 2012
	Re-referred to APPROPRIATIONS, June 11, 2012
PN 2299	Re-reported as amended, June 18, 2012
	Second consideration, June 19, 2012
	Third consideration and final passage, June 20, 2012 (47-0)
	In the House
	Referred to JUDICIARY, June 21, 2012
	Reported as committed, June 26, 2012
	First consideration, June 26, 2012
	Laid on the table, June 26, 2012
	Removed from table, June 27, 2012
	Second consideration, June 28, 2012
	Re-referred to APPROPRIATIONS, June 28, 2012
	Re-reported as committed, June 29, 2012
	Third consideration and final passage, June 29, 2012 (196-3)
	Signed in Senate, June 29, 2012
	Signed in House, June 30, 2012
	Presented to the Governor, June 30, 2012
	Approved by the Governor, July 5, 2012
	Act No. 139

* denotes Current Printer's Number

PRINTER'S NO. 2221

THE GENERAL ASSEMBLY OF PENNSYLVANIA

SENATE BILL

No. 1535 Session of 2012

INTRODUCED BY GREENLEAF, FERLO, RAFFERTY, PIPPY, BOSCOLA, ARGALL AND YUDICHAK, MAY 29, 2012

REFERRED TO JUDICIARY, MAY 29, 2012

AN ACT

Amending Title 42 (Judiciary and Judicial Procedure) of the Pennsylvania Consolidated Statutes, in rules of evidence, further providing for subpoena of records.

The General Assembly of the Commonwealth of Pennsylvania hereby enacts as follows:

Section 1. Section 6152(a)(1) and (2) of Title 42 of the Pennsylvania Consolidated Statutes are amended to read:

§ 6152. Subpoena of records.

(a) Election.--

(1) When a subpoena duces tecum is served upon any health care provider or an employee of any health care facility licensed under the laws of this Commonwealth, requiring the production of any medical charts or records at any action or proceeding, it shall be deemed a sufficient response to the subpoena if the health care provider or health care facility notifies the attorney for the party causing service of the subpoena, within three days of receipt of the subpoena, of the health care provider's or facility's election to proceed under this subchapter [and of the estimated actual and reasonable expenses of reproducing the charts or records]. However, when medical charts or records are requested by a district attorney or by an independent or executive agency of the Commonwealth, notice pursuant to this section shall not be deemed a sufficient response to the

section shall not be deemed a sufficient response to the subpoena duces tecum.

(2) (i) Except as provided in subparagraph (ii), the health care provider or facility or a designated agent shall be entitled to receive payment of such expenses before producing the charts or records pursuant to a subpoena or authorization under the Health Insurance Portability and Accountability Act of 1996 (Public Law 104-191, 110 Stat. 1936). The payment shall [not exceed $15] be $20.62 for searching for and retrieving the records, [$1] $1.39 per page [for paper copies] for the first 20 pages, [75¢] $1.03 per page for pages 21 through 60 and [25¢] 34¢ per page for pages 61 and thereafter for paper copies or reproductions on electronic media whether the records are stored on paper or in electronic format; [$1.50] $2.04 per page for copies from microfilm; plus the actual cost of postage, shipping or delivery. No other charges for the retrieval, copying and shipping or delivery of medical records other than those set forth in this paragraph shall be permitted without prior approval of the party requesting the copying of the medical records. The amounts which may be charged shall be adjusted annually beginning on January 1, [2000] 2013, by the Secretary of Health of the Commonwealth based on the most recent changes in the consumer price index reported

annually by the Bureau of Labor Statistics of the United States Department of Labor.

(ii) Payment to a health care provider or facility for searching for, retrieving and reproducing medical charts or records requested by a district attorney shall [not exceed $15] be $20.62, search and retrieval fee, plus the actual cost of postage, shipping or delivery as described in subparagraph (i), as adjusted by the Secretary of Health of the Commonwealth, unless otherwise agreed to by the district attorney.

* * *

Section 2. This act shall take effect in 60 days.

PRIOR PRINTER'S NO. 2221 PRINTER'S NO. 2299

THE GENERAL ASSEMBLY OF PENNSYLVANIA

SENATE BILL

No. 1535 Session of 2012

INTRODUCED BY GREENLEAF, FERLO, RAFFERTY, PIPPY, BOSCOLA, ARGALL, YUDICHAK, BAKER AND MENSCH, MAY 29, 2012

SENATOR CORMAN, APPROPRIATIONS, RE-REPORTED AS AMENDED, JUNE 18, 2012

AN ACT

Amending Title 42 (Judiciary and Judicial Procedure) of the Pennsylvania Consolidated Statutes, in rules of evidence, further providing for subpoena of records.

The General Assembly of the Commonwealth of Pennsylvania hereby enacts as follows:

Section 1. Section 6152(a)(1) and (2) of Title 42 of the Pennsylvania Consolidated Statutes are amended to read:

§ 6152. Subpoena of records.

(a) Election.--

(1) When a subpoena duces tecum is served upon any health care provider or an employee of any health care facility licensed under the laws of this Commonwealth, requiring the production of any medical charts or records at any action or proceeding, it shall be deemed a sufficient response to the subpoena if the health care provider or health care facility notifies the attorney for the party causing service of the subpoena, within three days of receipt of the subpoena, of the health care provider's or facility's

---

election to proceed under this subchapter [and of the estimated actual and reasonable expenses of reproducing the charts or records]. However, when medical charts or records are requested by a district attorney or by an independent or

executive agency of the Commonwealth, notice pursuant to this section shall not be deemed a sufficient response to the subpoena duces tecum.

(2) (i) Except as provided in subparagraph (ii), the health care provider or facility or a designated agent shall be entitled to receive payment of [such expenses] THE AMOUNTS UNDER THIS SUBSECTION before producing the charts or records pursuant to a subpoena ~~or authorization under the Health Insurance Portability and Accountability Act of 1996 (Public Law 104-191, 110 Stat. 1936)~~. The payment shall [not exceed $15] be $20.62 for searching for and retrieving the records, [$1] $1.39 per page [for paper copies] for the first 20 pages, [75¢] $1.03 per page for pages 21 through 60 and [25¢] 34¢ per page for pages 61 and thereafter for paper copies or reproductions on electronic media whether the records are stored on paper or in electronic format; [$1.50] $2.04 per page for copies from microfilm; plus the actual cost of postage, shipping or delivery. No other charges for the retrieval, copying and shipping or delivery of medical records other than those set forth in this paragraph shall be permitted without prior approval of the party requesting the copying of the medical records. The amounts which may be charged shall be adjusted annually beginning on January 1, [2000] 2013, by the Secretary of Health of the Commonwealth based on the most recent changes in the consumer price index reported annually by the Bureau of Labor Statistics of the United States Department of Labor.

(ii) Payment to a health care provider or facility for searching for, retrieving and reproducing medical charts or records requested by a district attorney shall [not exceed $15] be $20.62 search and retrieval fee

[not exceed $15] be $20.82, search and retrieval fee, plus the actual cost of postage, shipping or delivery as described in subparagraph (i), as adjusted by the Secretary of Health of the Commonwealth, unless otherwise agreed to by the district attorney.

* * *

Section 2. This act shall take effect in 60 days.

PROOF OF SERVICE

I hereby certify that I am this day serving the foregoing **RESPONSE TO THE MOTION TO SUMMARILY AFFIRM OR TO DISMISS IN LIGHT OF SUPPLEMENTAL AUTHORITY** upon the persons and in the manner indicated below which service satisfies the requirements of Pa.R.A.P.121:

Service by First Class Mail addressed as follows:

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Dated: July 30 2012

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and David A. Neely

EXHIBIT
16

IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

WAYNE M. CHIURAZZI LAW INC., D/B/A CHIURAZZI & MENGINE, LLC, AND DAVID NEELY,	:	No. 1 WAP 2012
Appellants	:	Application for Leave to Provide Supplemental Authority and to Summarily Affirm the Superior Court's Decision, or, In the Alternative, to Dismiss the Appeal as Improvidently Granted in Light of that Authority
v.	:	
MRO CORPORATION,	:	
Appellee	:	

ORDER

PER CURIAM

AND NOW, this 24th day of August, 2012, the Application for Leave to Provide Supplemental Authority and to Summarily Affirm the Superior Court's Decision, or, In the Alternative, to Dismiss the Appeal as Improvidently Granted in Light of that Authority is **DENIED**.

A True Copy John A. Vaskov, Esquire
As Of 8/24/2012

Attest: John A Vaskov
Deputy Prothonotary
Supreme Court of Pennsylvania

EXHIBIT
17

626 Pa. 303
Supreme Court of Pennsylvania.

WAYNE M. CHIURAZZI LAW INC. d/b/a Chiurazzi & Mengine, LLC; and David A. Neely, Esquire, Appellants
v.
MRO CORPORATION, Appellee.

Argued Oct. 16, 2012.
|
Decided June 16, 2014.

Synopsis

Background: Law firm that had obtained medical records on behalf of clients brought class action against medical records reproduction service provider, alleging that rates records provider had charged for reproduction of the records exceeded amounts allowed under the Medical Records Act (MRA). The Court of Common Pleas, Allegheny County, Civil Division, No. G.D. 09–012911, 2010 WL 6570228, Stanton R. Wettick, Jr., J., denied records provider's preliminary objections. Records provider filed interlocutory appeal. The Superior Court, No. 1283 WDA 2010, 27 A.3d 1272, reversed and remanded. Law firm sought discretionary review, which was granted.

[Holding:] On an issue of first impression, the Supreme Court, No. 1 WAP 2012, Castille, C.J., held that MRA required records provider to limit copying charges to actual expenses, rather than simply charging statutory ceiling rate.

Reversed and remanded.

Saylor, J., filed opinion concurring in part and dissenting in part in which McCaffery, J., joined.

West Headnotes (8)

[1] Payment
Mistake of Law

The defense of voluntary payment is a defense that one who has voluntarily paid money with full knowledge, or means of knowledge of all the facts, without any fraud having been practiced upon him, cannot recover it back by reason of the payment having been made under a mistake or error as to the applicable rules of law.

[2] Appeal and Error
Plenary, free, or independent review

The Supreme Court's scope of review over questions of law is plenary.

[3] Appeal and Error
De novo review

The Supreme Court's standard of review when reviewing questions of law is de novo.

1 Cases that cite this headnote

[4] Statutes
Plain Language; Plain, Ordinary, or Common Meaning

A statute's plain language generally provides the best indication of legislative intent.

[5] Statutes
Purpose and intent; determination thereof

Only where the words of a statute are not explicit will the Supreme Court resort to other considerations to discern legislative intent. 1 Pa.C.S.A. § 1921(c).

[6] Statutes
Departing from or varying language of statute

Statutes
Superfluousness

When interpreting a statute, the Supreme Court is not permitted to ignore the language of a statute, nor may the Court deem any language to be superfluous. 1 Pa.C.S.A. § 1921(c).

2 Cases that cite this headnote

[7] Health

Regulation of Rates and Charges

Medical Records Act (MRA) required businesses that reproduced medical records for patients and their representatives to limit their copying charges to their estimated actual and reasonable expenses of reproducing requested charts or records, subject to a statutory ceiling rate, rather than permitting such businesses to simply charge the statutory ceiling rate; language of MRA spoke to a records reproducer providing "the estimated actual and reasonable expenses of reproducing the charts or records requested," MRA's reference to "such expenses" referred to estimated actual and reasonable expenses, and fact that MRA spoke of providing the "estimated" actual and reasonable expenses of reproducing the records, rather than an exact figure, did not support the notion that a uniform rate was intended. 42 Pa.C.S.A. § 6152(a)(1), (a)(2)(i).

1 Cases that cite this headnote

[8] Appeal and Error

Interlocutory rulings and appeals

Once an interlocutory order is certified and accepted, it neither confers a right, nor extends an invitation, to a party to add other interlocutory issues, not passed upon below, to the appeal.

Attorneys and Law Firms

****276** Paul Adams Lagnese, Esq., David McCaffery Paul, Esq., Berger & Lagnese, L.L.C., James Pietz, Esq., Pittsburgh, for Wayne M. Chiurazzi Law Inc., et al.

Clifford Alan Rieders, Esq., Rieders, Travis, Humphrey, Harris, Waters & Waffenschmidt, Williamsport, for Pennsylvania Association for Justice.

Jennifer Ann Callery, Esq., Carl A. Solano, Esq., Philadelphia, Schnader Harrison Segal & Lewis, L.L.P., for MRO Corporation.

Lisa Whitcomb Clark, Esq., David Edwin Loder, Esq., Melissa Sobel Snyder, Esq., Duane Morris, L.L.P., Philadelphia, for The Hospital & Healthsystem Association of Pennsylvania.

Richard William Hosking, Esq., K & L Gates, L.L.P., Pittsburgh, James Christopher Swetz, Esq., Stroudsburg, for Healthport Technologies LLC.

BEFORE: CASTILLE, C.J., SAYLOR, EAKIN, BAER, TODD, McCAFFERY, ORIE MELVIN, JJ.

OPINION

Chief Justice CASTILLE.

***306** This appeal involves the discretionary review of a matter that proceeded as an interlocutory appeal by permission in the Superior Court. The primary issue is whether Sections 6152(a)(1) and (a)(2)(i) of the Medical Records Act ("MRA" or "Act"), 42 Pa.C.S. §§ 6151–6160, require businesses such as appellee MRO Corporation ("MRO"), which reproduce medical records for patients and their representatives, to limit their copying charges to their estimated actual and reasonable expenses of reproducing requested charts or records (subject to a statutory ceiling rate), or whether such businesses may simply charge the statutory ceiling rate. In addition, appellants ask us to review the Superior Court's finding that, where a medical records reproducer fails to disclose and charge its estimated actual and reasonable expenses and instead charges the MRA's ceiling rates which the records requestor then pays, the defenses of "voluntary payment" and "prior approval" bar the records requestor from maintaining a breach of contract claim to recoup alleged overpayments. For the reasons set forth below, we reverse the Superior Court and remand the matter to the trial court for proceedings consistent with this Opinion.

- I -

The MRA was enacted in 1986. The Act recognizes that a patient has a right to his own medical records; authorizes the use of certified copies of original medical records at trials and ***307** other proceedings without the necessity of preliminary testimony respecting foundation, identity and authenticity; streamlines the process for securing copies of medical records; and, of pertinence here, addresses what medical records providers can charge for the copies provided. *Id.* §§ 6151, 6152.1, 6155(b).

This appeal concerns the version of the MRA in effect when this action arose in 2009. Most pertinently, Sections 6152(a)(1) and (a)(2)(i) then provided:

> ****277 (a) Election.—**
>
> (1) When a subpoena duces tecum is served upon any health care provider or an employee of any health care facility licensed under the laws of this Commonwealth, requiring the production of any medical charts or records at any action or proceeding, it shall be deemed a sufficient response to the subpoena if the health care provider or health care facility notifies the attorney for the party causing service of the subpoena, within three days of receipt of the subpoena, of the health care provider's or facility's election to proceed under this subchapter **and of the estimated actual and reasonable expenses of reproducing the charts or records.** However, when medical charts or records are requested by a district attorney or by an independent or executive agency of the Commonwealth, notice pursuant to this section shall not be deemed a sufficient response to the subpoena duces tecum.
>
> (2)(i) Except as provided in subparagraph (ii), the health care provider or facility or a designated agent shall be entitled to receive payment of such expenses before producing the charts or records. The payment shall not exceed $15 for searching for and retrieving the records, $1 per page for paper copies for the first 20 pages, 75¢ per page for pages 21 through 60 and 25¢ per page for pages 61 and thereafter; $1.50 per page for copies from microfilm; plus the actual cost of postage, shipping or delivery. No other charges for the retrieval, copying and shipping or delivery of medical records other than those set forth in this paragraph shall be permitted without prior approval of the party ***308** requesting the copying of the medical records. The amounts which may be charged shall be adjusted annually beginning on January 1, 2000, by the Secretary of Health of the Commonwealth based on the most recent changes in the consumer price index reported annually by the Bureau of Labor Statistics of the United States Department of Labor.

42 Pa.C.S. § 6152(a)(1), (a)(2)(i) (emphasis added). After this Court granted review, the General Assembly amended the Act effective September 4, 2012 and deleted the conjunctive language highlighted in subsection (a)(1) above ("and of the estimated actual and reasonable expenses of reproducing the charts or records") which is central to the present dispute. As a number of similar actions remain pending, however, [1] resolution of the issues before us remain of broad importance. [2]

- II -

Based in King of Prussia, Pennsylvania, MRO is a medical records reproduction company that has exclusive agreements ****278** with certain Pennsylvania hospitals and hospital systems, including their affiliated physician practice groups, imaging centers and clinics, to provide medical records to requestors. Appellants are attorneys with offices in Pittsburgh who filed this class action in July of 2009 on behalf of medical records requestors, including patients, patient designees, representatives ***309** and attorneys, alleging that MRO overcharged for reproduction of medical records.

On March 15, 2010, appellants filed a Second Amended Class Action Complaint. Appellants alleged that the MRA required a medical records reproducer to provide records "for a fee derived from the actual and reasonable cost of searching for, retrieving, reproducing and transmitting the records," but MRO instead charged fees exceeding its actual and reasonable costs, resulting in MRO profiting from the sale of hospital patient medical records. Second Amended Complaint at 1. Appellants alleged that MRO had become the exclusive source through which a requestor must obtain copies of medical records from facilities with which MRO contracted.

Appellants alleged that technological advances have greatly reduced the costs of storage and reproduction of medical records. Prior to the use of computer technology in hospital medical record keeping, when a request was made for copies of medical records, the patient's medical chart (which consisted of numerous sheets of paper, sometimes printed on front and back and/or in tri- or bi-fold format, two-hole punched and held together by a metal clip), was retrieved from an in-house or off-site storage location. The party producing photocopies would need to take the sheets of paper out of clips, photocopy the records by hand, reassemble the chart and return it to storage, then assemble and mail the copies to the requestor. Now, however, medical records are increasingly created and stored in electronic form, the records can be retrieved and printed instantly, copied to CD–ROM, or electronically transmitted to the requestor. Thus, appellants alleged, although the cost of storing, locating, retrieving, copying and transmitting medical records has

decreased dramatically, MRO's fees have not reflected those actual, lower costs for the reproduction of records.

Appellants further noted that the MRA requires an entity such as MRO to provide a records requestor with its estimated actual and reasonable expenses of reproducing the requested records. Appellants alleged that MRO did not follow that procedure, but instead automatically charged the statutory ***310** maximum search and retrieval fee and the maximum fee for photocopies of paper records, with no consideration of its actual costs.

Based upon these allegations, appellants asserted two counts for relief, one for breach of contract/implied contract and the second pursuant to the Declaratory Judgments Act, 42 Pa.C.S. §§ 7531–7541. The breach of contract count alleged that contracts existed between MRO and the appellant requestors, which required MRO to reproduce medical records in a manner consistent with the MRA, and that MRO failed to comply with the Act, thereby breaching the contracts. Appellants demanded monetary damages; an order enjoining MRO from charging in excess of its actual and reasonable expenses of reproduction; an accounting of sums billed to records requestors since June 15, 2005; prejudgment interest; and punitive damages. On the second count, appellants sought a declaration that MRO's conduct constituted a breach of contract, as well as costs and attorney's fees. [3]

****279** MRO filed preliminary objections, claiming, in relevant part to this interlocutory matter, that appellants invoked the "estimated actual and reasonable expenses" language of Section 6152(a)(1), yet the record requests appellants made were pursuant to Section 6155, which governs a patient's request for his own records. MRO noted that the MRA provided two means for requesting records: (1) a subpoena *duces tecum* under Section 6152; or (2) a patient authorization seeking the patient's records under Section 6155(b)(1). [4] MRO argued that ***311** Section 6155(b)(1) does not include an " estimated actual and reasonable expenses of reproducing" qualifier, and thus permits a records reproducer to charge any fee not in excess of the rate ceiling set forth in Section 6152(a)(2)(i). MRO noted that appellants admitted that the fees MRO charged did not exceed the Section 6152(a)(2)(i) rate ceiling; therefore, MRO argued, it had complied with Section 6155. MRO also argued that its practice of automatically charging the statutory ceiling rate was authorized by the Court in *Liss & Marion, P.C. v. Recordex Acquisition Corp.,* 603 Pa. 198, 983 A.2d 652 (2009).

[1] MRO further raised the defense of voluntary payment, i.e., a defense that, "one who has voluntarily paid money with full knowledge, or means of knowledge of all the facts, without any fraud having been practiced upon him ... cannot recover it back by reason of the payment having been made under a mistake or error as to the applicable rules of law." *Liss,* 983 A.2d at 661 (Pa.2009) (quoting *In re Kennedy's Estate,* 321 Pa. 225, 183 A. 798, 802 (1936)). MRO claimed that appellants had received invoices from MRO and voluntarily paid them, triggering the voluntary payment doctrine defense.

Appellants answered MRO's preliminary objections, arguing that the MRA limits a medical records reproducer to its actual and reasonable expenses regardless of whether the request was via subpoena or patient authorization. Appellants argued that Section 6155(b)(1)'s reference to the "amounts set forth in section 6152(a)(2)(i)" necessarily encompassed the section's "estimated actual and reasonable expenses" language. Further, appellants argued that the *Liss* Court found that medical records reproducers must comply with Section 6152(a)(2)(i) regardless of whether records are sought by subpoena because the records requests in *Liss* were by patient authorization. Thus, appellants concluded, Section 6155 requires a medical records reproducer to identify and charge its actual and reasonable expenses of reproduction or the maximum rates set forth in Section 6152(a)(2)(i), **whichever is less. *312** Appellants did not respond to MRO's voluntary payment doctrine defense.

On June 17, 2010, the Court of Common Pleas of Allegheny County, per the Honorable R. Stanton Wettick, Jr., overruled MRO's preliminary objections. The trial ****280** court's accompanying opinion framed the issue succinctly:

> [Appellants] contend that a health care facility may only charge its actual and reasonable expenses where those expenses are less than the amount set forth in the second sentence of § 6152(a)(2)(i) as adjusted. [MRO], on the other hand, contends that it may impose any charge that does not exceed the amounts permitted within the second sentence as adjusted.
>
> If [MRO's] construction of the Medical Records Act is correct, this case and all related litigation will be dismissed. However, if [appellants'] construction of the Medical Records Act is correct, this litigation will require consideration of several (possibly complicated) factual and legal issues, including what are actual and reasonable expenses, the applicability of the voluntary payment

> doctrine, and the applicability of the prior approval provision of § 6152(a)(2)(i).

Tr. Ct. Op. at 3.

In its ensuing analysis, the trial court first discussed the effect of the *Liss* decision, stating that, pursuant to *Liss,* appellants could pursue a breach of contract action against MRO based on their allegations that MRO's charges exceeded the permissible charges under the Act, and that MRO could not charge in excess of the default rate for the copies at issue because the copies were not from microfilm. The trial court noted that appellants did not allege that MRO charged more than the statutory maximum rate, but that its charges did not reflect their lower actual costs of reproduction. The court further observed that the issue before it was not presented in *Liss,* because the dispute in that case only concerned which rate, the default rate or the microfilm rate, applied.

***313** The trial court reasoned that the ordinary meaning of Section 6152 (a)(1) is that "*actual expenses* means expenses existing in fact, and *reasonable expenses* means that the costs are not padded." *Id.* at 6 (emphasis in original). The court then looked to Section 6152(a)(2)(i), which states that, "the health care provider or facility or a designated agent shall be entitled to receive payment of such expenses before producing the charts or records." The court interpreted the term "such expenses" as obviously referring back to the "actual and reasonable expenses of reproduction" language in the prior paragraph. Thus, the trial court concluded, Section 6152(a)(2)(i)'s reference to "such" expenses "clearly and unambiguously provides that charges shall be based on actual and reasonable expenses." *Id.* The court then explained its reasoning in rejecting MRO's argument that it could charge any amount up to the statutory ceiling rate, as follows:

> The second sentence of § 6152(a)(2)(i) does not provide that a health care provider is entitled to receive additional payments in excess of actual expenses. To the contrary, while the previous provision of § 6152 entitles the health care provider to receive actual and reasonable expenses, this second sentence of § 6152(a)(2)(i) places a cap on what may be charged as actual and reasonable expenses by providing that the payment of actual and reasonable expenses "shall not exceed" the amounts set forth in this sentence. Or, in other words, this sentence applies only to health care providers whose actual expenses exceed the amounts set forth in the pricing schedule.
>
> * * *
>
> I recognize that there can be legislation which provides for charges to be based on reasonable expenses and which thereafter includes a formula to calculate reasonable expenses. However, the Medical Records Act is not such legislation. ****281** Nothing in the language of the Act suggests that the charges in the second sentence are presumed to be actual expenses. To the contrary, the use of the language "shall not exceed" modifies a health care provider's entitlement to recover actual expenses by setting the maximum ***314** amount that may be charged where the actual expenses exceed this amount.

Id. at 7–8 (footnote omitted).

The trial court further noted the statutory construction precepts that (1) the General Assembly intends the entire statute to be effective, and thus, a statute should be construed to give effect to all of its provisions, and (2) provisions are to be read *in pari materia* when they relate to the same issues and should be construed together where possible. *Id.* at 8, citing 1 Pa.C.S. §§ 1922(2), 1932. MRO's interpretation of the MRA, the court observed, would substitute the word "charges" for "actual expenses," with the result that the records provider would notify the requestor of estimated charges rather than its estimated actual and reasonable expenses of reproduction. The court opined that it was obliged to construe the actual word in the statute, "expenses," and not MRO's substitute language, "charges." *Id.* at 8–9.

Respecting MRO's argument that the "actual and reasonable expenses" language applies only to records sought via subpoena and not records requested via patient authorization, the trial court stressed the language in Section 6155(b)(1) stating that a provider shall not charge "a fee in excess of the amounts set forth in section 6152(a)(2)(i) (relating to subpoena of records)." This language does not refer only to the second sentence of Section 6152(a)(2)(i) (the pricing schedule), but also embraces the "such expenses" language that, the trial court had concluded, means actual and reasonable expenses of reproduction. The trial court also pointed to *Liss,* where records were sought through patient authorization, and yet the Court applied Section 6152. Finally, the trial court determined that to allow a records provider to charge more for records sought via patient authorization than via subpoena would produce an unreasonable result. *Id.* at 10–12. The trial court did not address or decide the voluntary payment and prior approval defenses MRO raised, instead confining its decision to the potentially controlling issue of statutory construction.

***315** In response to MRO's request, the trial court certified its interlocutory order for immediate appeal pursuant to 42 Pa.C.S. § 702(b), which governs interlocutory appeals by permission. The court's certification stated that the order construing the Act as prohibiting charges that exceed the records provider's actual and reasonable expenses "involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal may materially advance the ultimate termination of the matter." On August 18, 2010, the Superior Court granted MRO permission to appeal the interlocutory order.

Thereafter, in a published opinion, a divided 2–1 Superior Court panel reversed and remanded for entry of an order granting MRO's preliminary objections and dismissing the complaint. *Wayne M. Chiurazzi Law Inc. v. MRO Corp.,* 27 A.3d 1272 (Pa.Super.2011). The panel majority noted that MRO raised four issues:

> 1. Is an entity that reproduces medical records without a subpoena required to charge its "actual and reasonable expenses" for its services, thereby foregoing recovery of any profit, rather than charging the safeharbor prices specified in Section 6152(a)(2)(i) of the Act?
>
> ****282** 2. Even if a health care entity producing records is limited to recovery of its own "actual and reasonable expenses," does that limitation apply to an independent for-profit company that reproduces records for the health care entities, thereby preventing such a company from recovering a profit?
>
> 3. May the producing entity charge the prices specified in Section 6152(a)(2)(i) under the section's "prior approval" provision if it gives the customer an invoice setting forth the prices and the customer reviews and pays the invoice without objection before receiving the records?
>
> 4. Does the Medical Records Act permit a medical records reproduction company or other producing party to collect and remit sales tax in connection with its services?

***316** *Id.* at 1276–77. The latter two questions were not passed upon by Judge Wettick, nor were they the subject of his certification of the interlocutory order. [5]

The panel majority deemed the first three issues to be interrelated. The court summarized MRO's position as being that the trial court misread the MRA in holding that MRO is only permitted to bill its actual and reasonable expenses, subject to a statutory cap; and the trial court's reading, MRO said, threatened to put private companies like MRO out of business and conflicted with the *Liss* decision. Addressing the issues concurrently, the appellate court began its analysis with an extended block quotation from the "Background" section of the *Liss* opinion, a quotation that ended with the issues presented in *Liss.* Within that *Liss* quotation, the court below emphasized that the pertinent issue in *Liss* was stated in terms of whether the MRA required "that copying of any records other than those stored on microfilm be billed **at the rate specified** for copying records stored on paper." 27 A.3d at 1279, quoting *Liss,* 983 A.2d at 657 (emphasis added by panel majority below). As relevant here, the court then noted that appellants argued that *Liss* was distinguishable because the case "did not specifically answer whether the 'estimated actual and reasonable expenses' language in section 6152(a)(1) prevents the use or applicability of the fee schedule unless those actual expenses exceed the amounts listed in the fee schedule." *Id.* The court disagreed, stating that "*Liss* is controlling as to the fees that are charged under the Act for paper copies of medical records." *Id.*

The majority explained its conclusion as follows. First, the court rejected MRO's distinction premised upon whether a subpoena was employed. The court agreed with *Liss* and Judge Wettick that Section 6152(a) applies as a result of the reference in Section 6155(b)(1) to the "amounts" that may be ***317** charged as set forth in Section 6152(a)(2)(i). Nor, in the court's view, did it matter in what medium the requested records were stored and from which copies were transferred. Rather, the court viewed the issue similarly to the trial court, *i.e.,* as posing a basic question of "whether the rates provided under the Act are *per se* reasonable fees that constitute safe harbor rates, or whether they are just a cap on actual expenses that must be calculated on a case-by-case basis...." 27 A.3d at 1280. In answering the question, the court deemed it significant that *Liss* ****283** had labeled the pricing schedule a "rate" rather than a "price cap" in its analysis:

> The Court in *Liss* began its discussion of the rate issue by stating: "[h]aving established that Appellee properly stated a contract claim against Appellants, we turn next to the question of whether Appellants breached the parties' contract by charging rate M [(copies from microfilm)] rather than rate D [(copies from all media other than microfilm)] for copies from electronic records." *Liss,* 603 Pa. at 215, 983 A.2d at 662. As can be seen from this quote from *Liss,* the Supreme Court labels the fees as rates, and not price caps for the varied and case specific actual and

> reasonable expenses. Nowhere does the Court interpret the Act as requiring that a record reproducer bill only the actual and reasonable cost for paper copies; the Court concludes that the Act refers to a billing rate. Moreover, the Court ultimately calls the fee set for copying from any media other than microfilm ("rate D") the "default rate" and states that the reproducer of the records is "entitled to receive rate D per page." *Id.* at 216–217, 983 A.2d at 662–663. Also, the language of the Act itself uses "shall not exceed" for copying charges as opposed to "actual cost" language for shipping charges. This suggests copying charges are not cost-based.

Id. The court then concluded that *Liss* was dispositive regarding the "rate" to be charged for paper copies—the rate is the pricing schedule in Section 6152(a)(2)(i).

The majority added that it found further support for its conclusion in the first sentence of Section 6152(a)(1), which ***318** refers to "estimated" actual and reasonable expenses of reproducing records:

> [E]ven accepting the trial court's conclusion that the "such expenses" language of § 6152[(a)](2)(i) refers to that language, it is referring to an estimate. Thus, it is reasonable to conclude that the rates that follow create safe harbor rates for the estimated actual and reasonable expenses of producing paper copies.

Id. The court held that the trial court erred in denying MRO's preliminary objections on grounds that MRO was limited to charging its actual and reasonable expenses of reproduction rather than the maximum statutory rate.

The majority qualified its finding by holding that the statutory pricing schedule does not apply to non-paper copies of records such as those produced by electronic means or on CD–ROM. In the court's view, until the General Assembly addresses that issue, medical records reproducers are limited to charging their estimated actual and reasonable copying expenses for producing non-paper copies. *Id.* at 1281. The court noted that *Liss* did not address, and the MRA did not contemplate, the reduced and diminishing costs of reproducing medical records in an electronic format and copies reproduced on CD–ROM or other electronic media. Nonetheless, adverting to the third issue raised by MRO, the court concluded that appellants' claim that they were overcharged for non-paper records was barred by the voluntary payment doctrine and the prior approval provision of Section 6152(a)(2)(i). The court reasoned:

> MRO's invoice clearly stated that records of more than 100 pages would be reproduced on CD–ROM.... [Appellants] admit that they received the invoice and paid for the CD–ROM without protest.... As the Court in *Liss* explained, the reproduction of medical records is a matter of contract, and "the MRA rates embody the public policy of the Commonwealth regarding the amounts to be charged by the industry ****284** for copying medical records.... The parties are free to negotiate other terms." *Liss,* [603 Pa.] at 211 n. 6, 983 A.2d at 659 n. 6. Therefore, there was no violation of the ***319** Act with respect to the rate charged for the reproduction of records onto CD–ROM.

Id. at 1281. [6]

Senior Judge Robert Colville dissented. The dissent first noted that the only issue decided and certified by the trial court for interlocutory appeal was the statutory construction question of whether the MRA limits MRO to charging its actual and reasonable expenses of reproduction, subject to a cap. The dissent stressed that other issues raised in preliminary objections, including the voluntary payment defense and a tax question, were not decided by the trial court, and remained pending below. Thus, the dissent would not have reached additional issues raised by MRO that were not certified and accepted for appeal. The panel majority did not respond to the dissent's articulation of the proper scope of the permissive interlocutory appeal.

Turning to the merits, the dissent began by noting that neither *Liss* nor any other appellate decision had addressed or resolved the certified question, and thus it was one of first impression. Tracking the trial court's analysis, the dissent opined that the plain language of the MRA supported the trial court's determination:

> Subsection 6155 of the MRA, which governs the manner in which MRO was to determine its charges, states in relevant part, "A health care provider or facility shall not charge a patient or his designee, including his attorney, a fee in excess of the amounts set forth in section 6152(a)(2)(i) (relating to subpoena of records)." 42 Pa.C.S.A. § 6155(b). Pursuant to the clear and unambiguous language employed

in Subsection 6152(a)(2)(i) of the MRA, designated agents of health care providers, such as MRO, "shall be entitled to receive payment of **such expenses** before producing the charts or records." 42 Pa.C.S.A. § 6152(a)(2)(i) (emphasis added).

***320** The only reference to "expenses" in Section 6152 that precedes Subsection 6152(a)(2)(i)'s "such expenses" terminology can be found in Subsection 6152(a), wherein the General Assembly specifically references "estimated actual and reasonable expenses." 42 Pa.C.S.A. § 6152(a) ("[I]t shall be deemed a sufficient response to the subpoena if the health care provider or health care facility notifies the attorney for the party causing service of the subpoena ... of the **estimated actual and reasonable expenses** of reproducing the charts or records.") (emphasis added).

Furthermore, after mandating that entities such as MRO receive payment of "such expenses," Subsection 6152(a)(2)(i) provides,

> **The payment shall not exceed** $15 for searching for and retrieving the records, $1 per page for paper copies for the first 20 pages, 75¢ per page for pages 21 through 60 and 25¢ per page for pages 61 and thereafter; $1.50 per page for copies from microfilm; plus the actual cost of postage, shipping or delivery.

42 Pa.C.S.A. § 6152(a)(2)(i) (emphasis added). In my view, by stating that "the payment shall not exceed" the various prices listed, the plain language of Subsection 6152(a)(2)(i) sets a cap on the amounts entities such as MRO can ****285** charge with respect to their expenses; the subsection does not set a default rate that such entities may or should charge.

27 A.3d at 1284 (Colville, J., dissenting).

- III -

Appellants sought review in this Court, which was granted to consider the following two questions:

> (1) Does the Medical Records Act, 42 Pa.C.S. § 6152(a)(1) and (a)(2)(i), require medical records reproducers to disclose their estimated actual and reasonable expenses of reproducing the charts or records, and to limit their copying charges to these amounts or the statutory ceiling rates, whichever is less?
>
> ***321** (2) If so, where a medical records reproducer failed to disclose and charge its estimated actual and reasonable expenses and instead charges the MRA's ceiling rates, do the "voluntary payment" and "prior approval" defenses bar the records requestor from bringing a subsequent breach of contract claim to recoup the unlawful over-payment?

Wayne M. Chiurazzi Law, Inc. v. MRO Corp., 614 Pa. 572, 39 A.3d 267 (2012).

[2] **[3]** The first question involves statutory construction, while the second relates to legal defenses. As both issues involve pure questions of law, our scope of review is plenary, and our standard of review is *de novo. Commonwealth v. Janssen Pharmaceutica, Inc.,* 607 Pa. 406, 8 A.3d 267, 271 (2010).

A.

Respecting the statutory construction issue, appellants' primary argument tracks that of the trial court and the Superior Court dissent. Thus, appellants pose that the plain language of the MRA imposes two duties upon records reproducers. The first duty, in Section 6152(a)(1), is to disclose the estimated actual and reasonable expenses of reproducing the medical records to the requestor. The second duty, imposed by Section 6152(a)(2)(i), is to limit the charges to the estimated actual and reasonable expenses or the statutory pricing schedule limit, whichever is less. Section 6152(a)(2)(i) also entitles the records reproducer to receive payment of the expenses before the charts or records are produced. According to appellants, when the two subsections are read together, the Act clearly contemplates that records reproducers are entitled to receive payment of their estimated actual and reasonable expenses of reproducing records prior to handing over the records, but this advance payment may not exceed the Act's statutory maximum amounts for search, retrieval, reproduction and delivery.

Appellants contend that the Superior Court majority misinterpreted the two subsections as allowing records reproducers ***322** to refrain from notifying requestors of the estimated actual and reasonable expenses in advance of copying the records and then to charge the statutory pricing schedule maximum at all times. Appellants cite the panel majority's statement, unsupported by authority, that: "the calculation of estimated actual and reasonable expenses for paper copies is not required by the statute." Brief of

Appellants, 18 (quoting *Wayne M. Chiurazzi Law Inc.,* 27 A.3d at 1274). Appellants argue that the majority's statement is contradicted by the plain language of Section 6152(a)(1) as well as *Liss,* 983 A.2d at 658, which stated that a records reproducer must provide the requestor with an estimate of the actual and reasonable expenses of reproduction. Appellants also challenge the majority's conclusion that the "such expenses" language in Section 6152(a)(2)(i) refers only to an estimate, which led the majority ****286** to conclude that the pricing schedule rates are " safe harbor" rates. Appellants argue that this reading cannot be squared with the plain language of the statute because it renders Section 6152(a)(1)'s requirement that the reproducer notify the requestor of estimated actual and reasonable expenses a nullity, a reading which violates the presumption that the Legislature does not intend statutory surplusage, as well as the requirement that statutes be read *in pari materia.*

Based upon their plain language interpretation of the MRA, appellants postulate that the Act provides certain conditions under which statutory maximum rates may be invoked: (1) the records reproducer must disclose to the requestor the estimated actual and reasonable expenses of reproducing the requested records (Section 6152(a)(1)); (2) those estimated expenses must be charged and collected by the records reproducer (Section 6152(a)(2)(i)); and (3) only if the estimated expenses equal or exceed the statutory pricing schedule maximum may the reproducer charge the maximum rates (Section 6152(a)(2)(i)). Appellants claim that the majority's contrary interpretation ignores the governing statutory language.

Appellants also argue that the majority misunderstood *Liss.* Appellants explain that the *Liss* plaintiffs never claimed that the defendant records reproducer was limited to charging the ***323** lesser of its estimated actual and reasonable expenses or the statutory maximum rate. Instead, the dispute in *Liss* arose from the records producer charging the plaintiffs the MRA's maximum microfilm rate for records produced not from microfilm but from electronic originals. The issue before the *Liss* Court was which of two distinct rates identified in the second sentence of Section 6152(a)(2)(i) applied, the paper rate or the higher microfilm rate. Thus, appellants contend, the *Liss* Court's use of the term "rate" has to be read against the dispute as presented in its factual and contested legal context; the majority below was mistaken to take the language out of context and construe the case as if it had resolved the different issue presented here. Appellants also assert that reading *Liss* as the panel majority did suggests that the *Liss* Court intended to alter the plain terms of the MRA without any analysis of the statutory language requiring a records reproducer to notify the requestor of its "estimated actual and reasonable expenses" incurred in "reproducing the charts or records," as well as the language providing for the payment of "such expenses."

Alternatively, appellants argue that, assuming that the statute is ambiguous, the history of the MRA shows that it was intended to ensure that patients could obtain copies of their medical records on a "cost basis," and that the Act correspondingly was not "intended" to provide medical records producers ... with "[a] profit stream derived from the pockets of Pennsylvania patients desiring access to their own medical records." Brief of Appellants, 29–30. Appellants assert that in 1977, years before the original enactment of the MRA, the Pennsylvania Department of Health adopted regulations that deemed hospital medical records to be the property of the hospital, while also recognizing a right of patients to access their own records. The regulations established that a patient or his designee could be charged for reproduction costs, but required that "the charges shall be reasonably related to the cost of making the copy." *Id.,* citing 28 Pa.Code § 115.29. From this regulatory regime, appellants argue that, when the MRA was enacted, it was established that hospitals were not ***324** permitted to profit from their ownership of medical records by padding charges for patient-requested copies.

****287** Appellants then read the 1986 MRA amendments as confirming "cost-basis patient access," embodied in Section 6152(a)'s reference to "the estimated actual and reasonable expenses of reproducing the charts or records." Appellants note that the original enactment spoke only of "health care facilities" in Section 6152(a) and not health care providers or the designated agents of facilities or providers; the Act did not contain statutory caps on the amounts charged for reproducing copies; and Section 6155(b) spoke only of the patient's right of access, without providing a means of access.

Appellants next construe the 1998 MRA amendments as "strengthening and broadening" an actual cost-basis approach, since the amendments: (1) broadened Section 6152(a) to embrace subpoenas served upon health care providers; (2) altered Section 6155(b)'s statement of the right to records generally by adding language that the patient's designee also has a right to access, access does not require a subpoena, and "[a] health care provider or facility shall not charge a patient or his designee, including his attorney, a fee in excess of the amounts set forth in Section 6152(a)

(2)(i) (relating to subpoena of records)"; and (3) added a completely new Section 6152(a)(2)(i), which provided statutory maximum rates and caps for reproductions.

Appellants say that it is significant that these amendments did not remove the cost-basis limitation they discern in Section 6152(a)(1)'s requirement to provide "estimated actual and reasonable expenses" of reproducing records. Appellants assert that the first sentence of new Section 6152(a)(2)(i) reinforces a cost-based approach because it states: "Except as provided in subparagraph (ii), the health care provider or facility or a designated agent shall be entitled to receive payment of such expenses before producing the charts or records." Tracking the trial court's view, appellants assert that the new "such expenses" language has to refer back to the "estimated actual and reasonable expenses" outlined in Section 6152(a)(1); that the term has no meaning otherwise; and indeed, the **only** ***325** prior reference to " expenses" in the MRA is in Section 6152(a)(1). Appellants then stress that the second sentence of Section 6152(a)(2)(i), before setting forth the pricing schedule's rate caps, begins by stating that "The payment shall not exceed" the rates then set forth. Appellants argue that this formulation cannot support the notion that the General Assembly intended to establish a uniform "safe harbor" rate the record reproducer can charge in all cases. If that result had been intended, appellants note that, "The Legislature could have originally avoided in 1986, or stricken in 1998, any mention in the MRA of charges being limited to 'the estimated actual and reasonable expenses incurred' in the reproduction of medical records; of records providers being entitled to receive payment of 'such expenses'; or of provider charges for actual and reasonable expenses 'not to exceed' certain amounts.... [T]he Pennsylvania Legislature could have simply stated in the MRA the specific amounts that records providers are permitted to charge for reproduced records, period." Brief of Appellants, 38. Finally, appellants contend that their reading of the statute and its history and purpose comports with the public policy behind the MRA which, they claim, is to ensure that patients have easy, affordable access to their medical records, based upon a transparent disclosure of actual costs.

The Pennsylvania Association for Justice ("PAJ") has filed an *amicus curiae* brief in support of appellants. PAJ argues that important policy considerations support appellants' interpretation of the MRA. ****288** PAJ notes that, while hospitals may own medical records, no one has a greater stake in those records than the patient and the actual content of the records belongs to the individual patient. PAJ further submits that the "Patient's Bill of Rights" adopted by the Pennsylvania Department of Health makes clear that hospitals must provide patients with access to information contained in their medical records. *See* 28 Pa.Code § 103.22. In PAJ's view, this right is illusory if obstacles, including unreasonable economic hurdles, impede access. Noting that changes in the management of health information occasioned by innovations in technology ***326** have drastically reduced the costs of responding to record requests, PAJ argues that restricting charges to actual and reasonable expenses is appropriate.

MRO responds that the MRA does not limit medical records reproducers to charging their actual expenses and, had that been the intention of the General Assembly, the Act would simply state that the charge for record copies cannot exceed the cost of reproduction. In MRO's view, the MRA created a detailed uniform pricing schedule and mandated that prices comply with the schedule, and appellants seek to supplant the schedule with a requirement that charges cannot exceed the actual cost of reproduction, which would "require a fact-bound inquiry each time records are produced and will vary depending on the number of records at issue and their location, storage medium (paper, microfilm, or whatever), production requirements, and other factors—a recipe for disputes and litigation." Brief for Appellee, 12.

MRO does not dispute that the MRA requires the records reproducer to disclose to the requestor "the estimated actual and reasonable expenses" of reproduction. But, MRO argues that the "expenses" so disclosed do not represent actual costs of reproduction; rather, MRO argues that "expenses" refers to the cost to the party making the request, and that expense is determined by the pricing schedule. In MRO's view, the pricing schedule establishes the "expense" to be estimated and then passed on to the requestor.

MRO points to what it says are "contextual elements" to support its reading. Thus, MRO cites the last sentence in Section 6152(a)(2)(i), which provides for annual adjustments to the pricing schedule based on the consumer price index: "The amounts which may be charged shall be adjusted annually beginning on January 1, 2000, by the Secretary of Health of the Commonwealth based on the most recent changes in the consumer price index reported annually by the Bureau of Labor Statistics of the United States Department of Labor." MRO deems it significant that, in mandating the adjustments, the statute refers to the pricing schedule as "amounts which may be charged." MRO also argues that Section 6152(a)(2)(i) ***327** uses the terms "expenses"

and "charges" interchangeably, which MRO interprets as conveying a legislative intent that "expenses" (as used throughout the MRA) means prices authorized to be charged for the records, not out-of-pocket costs actually incurred in reproducing records in a given case. MRO adds that, if the General Assembly had intended to limit chargeable expenses to actual costs, it could have used precise language as it did in Section 6152(a)(2)(i) when discussing what a records reproducer could charge for delivery, i.e., "the actual cost of postage, shipping or delivery."

MRO further cites provisions in the MRA limiting the costs that can be charged for reproducing records to be used to seek Social Security or similar benefits (Section 6152.1(a)(1)) and requests by district attorneys (****289** Section 6152(a)(2)(ii)). MRO argues that these provisions were included to reduce costs in those instances, but the provisions still do not limit records reproducers to charging their out-of-pocket costs. [7] Finally, MRO contends that Section 6152(a)(1) does not discuss costs at all; instead, the Act simply requires notification of "estimated actual and reasonable expenses" of reproduction. If the MRA had been intended to restrict records reproducers to out-of-pocket costs of reproduction, MRO concludes, the Legislature was aware of how to accomplish such a limitation, but it did not do so.

MRO also renews its claim, rejected by both courts below, that Section 6152 is inapposite because it addresses subpoenas for records, while the records requests here were attorneys' requests for clients' medical records from hospitals. Those ***328** requests are governed by Section 6155(b) which, according to MRO, limits the costs to the pricing schedule. Because Section 6155(b) itself makes no reference to estimated actual or reasonable expenses, but instead speaks of limiting the "fee" for copying to the "amounts set forth in section 6152(a)(2)(i)," MRO argues, this reference is only to the pricing schedule. This is so, MRO insists, because the only "amounts" set forth in Section 6152(a)(2)(i) are the "amounts which may be charged"—the pricing schedule. According to MRO, out-of-pocket costs play no role in pricing under the Act, especially where subpoenas are not at issue.

MRO also disputes appellants' statutory construction argument, claiming that the legislative history and other extrinsic aids confirm its own reading. MRO proposes that: the original Act contained the requirement that a records reproducer provide the "estimated actual and reasonable expenses" of securing records, but the Act did not specify what amounts could be charged; this gap led to class action lawsuits alleging that hospitals were charging too much; and the 1998 MRA amendment "resolved the issue" by adopting a "uniform" pricing schedule. MRO asserts that all floor statements concerning the 1998 legislation agreed that the amendments set a uniform pricing schedule, and no legislator suggested that its purpose was to limit charges to out-of-pocket expenses. Regardless of whether the amendments defined or displaced the concept of "expenses," MRO asserts, the intention was to adopt a uniform pricing schedule.

MRO then argues that appellants' "actual cost" reading has "no historical basis." MRO maintains that appellants' claim that the initial Act was intended to codify a 1977 hospital licensing regulation of the Health Department is unsupported by citation; the claim, even if true, is irrelevant since the 1998 legislation is at issue; the legislative history of the 1998 amendments includes an uncontradicted floor comment that no such regulations exist; and the Health Department has issued annual notices treating the pricing schedule as controlling. MRO adds that appellants' construction of the Act would threaten the ****290** financial viability of records reproducers like ***329** MRO. MRO asserts that hospitals and other medical providers have outsourced this function to cut their own costs, a practice which benefits patients and their attorneys.

MRO also argues that appellants' actual cost construction creates a statutory framework that is not feasible and is impossible to administer. MRO notes that nothing in the MRA defines the term "actual and reasonable expenses," leaving companies to guess what they can charge and risk litigation whenever a requestor contends that the expense calculation should have proceeded differently. MRO notes the large number of variables affecting costs, such as the medium in which the records are stored and labor costs. In addition, records reproducers would be required to create sophisticated cost-accounting systems, so as to defend against accusations of over-charging, systems which themselves would increase "expenses." In MRO's view, the 1998 amendments were designed to put an end to such litigation by adopting a uniform pricing system. MRO concludes this portion of its argument by arguing that it is unreasonable to construe the Act as requiring a limitation to "actual expenses;" the legislative history points to a contrary intent; and appellants' contrary argument is unreasonable.

Finally, MRO argues that appellants' theory is at odds with this Court's decision in *Liss*. MRO interprets *Liss* as teaching that the Section 6152 pricing schedule, and not the estimated

actual and reasonable expenses of record reproduction, controls pricing under the MRA. MRO contends that the records reproducer in *Liss* argued that the "estimated actual and reasonable expense" language, and not the pricing schedule, determined pricing under the Act, an argument the Court rejected when it found that the pricing schedule controls. MRO concludes that the panel majority below correctly held that *Liss* is controlling and dispositive, and under *Liss,* a records reproducer may always charge the rates set forth in the Act's pricing schedule.

The Hospital and Healthsystem Association of Pennsylvania ("HHAP") has filed an *amicus* brief in support of MRO. HHAP notes that while the controlling question of law here ***330** arises in a case where the records provider was a for-profit medical records company, there are other pending cases involving hospitals that handle record requests on their own. HHAP argues that it is important to recognize the interests of hospitals serving as their own medical records providers.

On the merits, HHAP echoes MRO's argument that the 1998 amendments to the MRA were added precisely to address the problem of the lack of uniformity in the costs of copying medical records. HHAP states that the provisions were adopted after careful legislative consideration, a public process in which HHAP participated. HHAP contends that the panel majority's holding that the Act sets forth "safe harbor" rates for estimated actual and reasonable expenses is a correct interpretation that is consistent with the legislative intent to promote uniformity by establishing a "reasonable" charge. Like MRO, HHAP highlights legislative floor comments expressing concerns over nonstandard and excessive charges for records, and the absence of any discussion or indication of support for an "actual expenses" restriction. HHAP maintains that the legislative history confirms that the object of the legislation was to create fixed statutory rates while protecting the financial viability of medical records reproduction companies. [8]

****291** In HHAP's view, appellants seek to revisit an issue settled by the 1998 MRA amendments; if appellants succeed, the cost uniformity established in 1998 will be "wiped away;" and in practice, the price of each records request will have to be separately estimated, taking into account the variable factors MRO notes, which imposes an unwieldy, inefficient and labor-intensive burden on record reproducers. HHAP notes that the burden is especially heavy with hospitals, whose primary mission is to deliver quality health service as affordably as possible. Obliging hospitals to devote the time and resources ***331** required to assess the actual cost of each request, rather than allowing legislative safe harbor rates to obtain, impedes this mission. Finally, HHAP notes that the General Assembly has already determined in the pricing schedules what is a reasonable copying charge, and that the legislation provides for annual rate adjustments, tied to the consumer price index; "requiring hospitals to undertake the immense task of estimating the cost of each request is even more unreasonable when considering these multiple levels of oversight for determining copying rates." HHAP Brief, 10. [9]

In their Reply Brief, appellants take issue with MRO's argument that Section 6152(a)(1)'s obligation that records producers provide "estimated actual and reasonable expenses" merely refers to what it will ultimately cost the requestor, and does not refer to the producer's actual expenses. Appellants note that MRO's construction ignores the complete phrase in the statute, which speaks of "... expenses of reproducing the charts or records." Appellants argue that the reference to reproducing the records makes clear that the expenses adverted to are the costs resulting from actual reproduction of the records—*i.e.,* MRO's actual reproduction costs. Appellants rebut MRO's argument that the use of the word "estimated" proves a legislative focus on the **requestor's** cost by arguing that the General Assembly merely recognized that it is not feasible to expect records reproducers to know in advance the actual cost of reproducing the records.

In a further textual rebuttal, appellants argue that Section 6152(a)(2)(i) makes deliberate and artful use of mandatory and permissive language. Thus, the first sentence says the records reproducer "shall be entitled to receive payment of such expenses before producing the charts or records;" and the second sentence likewise uses mandatory language in stating that the payment of expenses "shall not exceed" the listed ***332** amounts which, appellants argue, furthers the "reasonable" expense limitation in the statute and establishes an "outer limit" for expenses. In contrast, appellants stress that the fourth sentence of the provision, addressing annual adjustments to the pricing schedule, uses permissive language, as it speaks of amounts that "may be charged." Appellants maintain that the use of this permissive language confirms that the Legislature did not intend the pricing schedule to apply at all times, uniformly.

****292** Responding to MRO's legislative history argument, appellants again stress that the MRA's original "estimated actual and reasonable costs of reproducing the charts or

records" language was not altered, revised or removed by the 1998 amendments, but instead the General Assembly merely added "caps" or "upper limits" to what records producers could charge, which addressed the concern with inflated costs. Appellants note that the Legislature easily could have, but did not, adopt a "flat fee" approach to these charges, as it did in Section 6152.1 of the Act, which addresses charges for records requests relating to claims under the Social Security Act. Appellants also note that the legislative floor debates contain no reference to a single flat fee schedule, but rather are consistent with the understanding that a cap on fees was being proposed. With respect to the claim that appellants' construction of the Act would threaten the financial viability of for-profit records producers like MRO, appellants note that, at this stage of the proceedings, what MRO charges and collects from its clients is a key factual question yet to be examined via discovery, much less resolved by a factfinder. Further, in appellants' view, this concern is a red herring because, in its contracts with its clients, MRO can seek to obtain medical records-related income streams, and profits, from sources other than Pennsylvania's patients.

Finally, appellants also dispute MRO's argument that an "actual expenses" standard is not feasible, arguing that this point presents a simple factual issue. Appellants further argue that the components of actual expenses are not difficult to ascertain, and would comprise costs relating to search and ***333** retrieval (including labor costs), copying or reproduction itself, and postage, shipping and handling.

[4] **[5]** **[6]** The appellate briefing has been thorough, complex and well done. This Court's approach to questions of statutory construction is well-settled:

> "The object of all interpretation and construction of statutes is to ascertain and effectuate the intention of the General Assembly. Every statute shall be construed, if possible, to give effect to all its provisions." 1 Pa.C.S. § 1921(a); *Commonwealth v. McCoy,* 599 Pa. 599, 962 A.2d 1160, 1167–68 (2009). A statute's plain language generally provides the best indication of legislative intent. *McCoy,* 962 A.2d at 1166; *Ephrata Area Sch. Dist. v. County of Lancaster,* 595 Pa. 111, 938 A.2d 264, 271 (2007); *Pennsylvania Fin. Responsibility Assigned Claims Plan v. English,* 541 Pa. 424, 664 A.2d 84, 87 (1995) ("Where the words of a statute are clear and free from ambiguity the legislative intent is to be gleaned from those very words."). Only where the words of a statute are not explicit will we resort to other considerations to discern legislative intent. *Ephrata Area Sch. Dist., supra; see also* 1 Pa.C.S. § 1921(c); *In re Canvass of Absentee Ballots of Nov. 4, 2003 Gen. Election,* 577 Pa. 231, 843 A.2d 1223, 1230 (2004). Moreover, in this analysis, "[w]e are not permitted to ignore the language of a statute, nor may we deem any language to be superfluous." *McCoy,* 962 A.2d at 1168. Governing presumptions are that the General Assembly intended the entire statute at issue to be effective and certain, and that the General Assembly does not intend an absurd result or one that is impossible of execution. *See* 1 Pa.C.S. § 1922(1)-(2).

Board of Revision of Taxes, City of Philadelphia v. City of Philadelphia, 607 Pa. 104, 4 A.3d 610, 622 (2010).

****293** Preliminarily, we agree with appellants and the trial court, and we necessarily disagree with the Superior Court panel majority below, that the question before us has not already been answered in the *Liss* case. The point need not detain us long. "We have emphasized many times ... that a decision is ***334** to be read against its facts and will not be applied uncritically to subjects which were not directly before the Court." *Mitchell Partners, L.P. v. Irex Corp.,* 617 Pa. 423, 53 A.3d 39, 46 (2012), citing *Six L's Packing Co. v. WCAB* (*Williamson*), 615 Pa. 615, 44 A.3d 1148, 1158 & n. 11 (2012). Having set forth at some length what was at issue and actually decided in *Liss,* the parties' competing positions respecting the decision, and the competing views articulated by the courts below, it is enough to note that, when the Court in *Liss* spoke to the proper "rate" to be charged, it did not purport to reject a claim that a records reproducer is required to charge the lesser of its estimated actual and reasonable expenses or the statutory pricing schedule rate. Nor did the *Liss* Court purport to hold that the Act established a safe harbor rate that could be charged in all cases. Instead, the issue before the *Liss* Court was which of two distinct rates, identified in the second sentence of Section 6152(a)(2)(i), applied—the paper rate or the higher microfilm rate. The panel majority below erred in construing the case as if it resolved the different issue presented here; thus, the primary ground for the Superior Court's decision is not sustainable.

[7] Turning to this question of statutory construction as a first impression matter, MRO's construction of the Act is intricate and ingenious in some respects, and it articulates what may be a rational and legitimate approach to the general question of how best and fairly to regulate the expenses of securing medical records. However, we simply do not believe that the structure and plain language of the provisions of the Act at issue here support MRO's construction. To be sure, as Judge Wettick recognized and MRO and its *amici* explain, it is no doubt within the power of the

General Assembly to establish a statutory rate for copies of medical records (and perhaps such an intention is reflected in the General Assembly's decision to amend the statute in 2012 to delete the clause concerning "estimated actual and reasonable expenses"—but that question is not before us). But, as appellants' counter-presentation makes apparent, there is likewise something to be said for a cost-based-with-a-cap system. The question of ***335** which approach to employ is a matter for the General Assembly in the first instance. Our task is to determine which approach is conveyed by the language in the Act before us.

In our view, the plain and unambiguous language of the Act—read in a way to avoid surplusage and to give effect to all provisions—fully supports the construction employed by the trial judge and the Superior Court dissent, and elaborated upon by appellants here. Having already summarized the competing views at length, we merely stress the following factors, evident in the language and structure of the MRA, that convince us that this legislative scheme establishes that the expenses chargeable for medical records are the reproducer's actual and reasonable expenses, but subject to a statutory cap. First, the language of Section 6152(a)(1) speaks to a records reproducer providing "the estimated actual and reasonable expenses of reproducing the charts or records" requested. We agree with appellants that the natural reading of this Section is not that it refers to what it will cost the requestor, with that cost, or charge, determined by the reproducer employing a uniform statutory ****294** rate—which is MRO's reading—but rather to the actual expenses involved in reproducing the records involved. As Judge Wettick noted, MRO's construction would instead substitute the word "charges" for the formulation actually employed, which is expenses in reproduction, and which is a different concept.

Second, the language of Section 6152(a)(2)(i) reaffirms the focus on actual and reasonable expenses of reproduction. The provision begins by stating that the reproducer shall be entitled to "receive payment of such expenses" before providing the records. This is not a stand-alone provision, but a new **subsection** to Section 6152(a), and the reference to "such expenses" is obviously a reference back to the "estimated actual and reasonable expenses" described in (a)(1)—the only other mention of expenses, as it happens. The statutory pricing schedule only then follows, but introduced by the important qualifier that the payment shall not **exceed** the amounts set forth as the pricing schedule. This language and structure plainly suggests that the pricing schedule serves as ***336** a cap on the actual and reasonable expenses of reproduction. Such, anyway, is the natural and logical reading of the provisions.

Third, we agree with both courts below that the fact that the records here were requested under Section 6155, governing rights of patients, rather than by subpoena under Section 6152(a), does not change the analysis. Section 6155 explicitly states that the records reproducer shall not charge "a fee in excess of the amounts set forth in section 6152(a)(2)(i) (relating to subpoena of records)." This cross-reference to, and effective incorporation of, Section 6152(a)(2)(i) is simply not limited to the pricing schedule set forth in the second sentence. Moreover, use of the word "amounts" suggests awareness that the prior section approved actual and reasonable expenses, but subject to a statutory rate cap.

Fourth, we do not believe that the fact that Section 6152(a)(1) speaks of providing the "estimated" actual and reasonable expenses of reproducing the records, rather than an exact figure, supports the notion that a uniform rate was intended. This reads too much into the statute. As appellants note, the use of the word "estimated" merely suggests a recognition that the records reproducer may not know in advance the actual cost of reproducing the records.

The other points debated by the parties are equivocal at best. For example, it is true, as MRO notes, that the statute does not simply declare that the charge for record copies cannot exceed the cost of reproduction. But, it is also true, as appellants argue, that the statute just as easily could have simply set forth "the specific amounts that records providers are permitted to charge for reproduced records, period," if that had been the legislative intention. The fact remains that the legislation includes references to estimated actual and reasonable expenses of reproduction, records providers being entitled to receive payment of "such expenses," and a limitation that charges cannot "exceed" the pricing schedule.

Similarly, MRO's argument that the interpretation of Judge Wettick (and appellants) supposedly threatens the financial ***337** viability of for-profit records producers is not a reason to look behind the plain language of the statute. Moreover, to the extent the point is relevant, appellants offer the plausible rebuttal that the question of what MRO charges and collects from its clients is a factual question not yet resolved and, in any event, it is not self-evident that all profit to be made in providing this service to hospitals and other facilities must

necessarily be passed on to ****295** Pennsylvania's patients requesting their records.

Nor are we persuaded that the plain language reading of the statute is defeated because the statute does not specifically define what is meant by actual and reasonable expenses. As Judge Wettick succinctly explained, "*actual expenses* means expenses existing in fact, and *reasonable expenses* means that the costs are not padded." Tr. Ct. Op. at 6 (emphasis in original). More importantly, as appellants note, this too would appear to be a factual matter which should admit of a reasonable solution below. [10]

Finally, respecting the parties' competing views of the legislative history and other matters of statutory construction, having determined that the issue is resolvable under the plain language of the statute, we need not engage in that pursuit. We note only that the competing presentations addressing extra-textual matters appear plausible on their face, which would suggest prudence before going behind the language actually at issue.

Accordingly, for the reasons set forth above, on this question, we reverse the Superior Court and reinstate the determination of the trial judge.

***338 B.**

[8] The second question accepted for review concerns a presumably independent ground of decision supporting the panel's determination that the trial court should be reversed and the complaint dismissed, *i.e.,* the panel's holding that the voluntary payment and prior approval defenses bar appellants' complaint. The preliminary difficulty we have, however, is that the Superior Court should never have addressed these issues. This was not an appeal as of right, but an interlocutory appeal by permission, certified by the trial court, and ultimately approved for review by the Superior Court. The trial court certified the single issue resolved by its order: whether the MRA prohibited a records reproducer such as MRO from charging a records requestor in excess of its own actual and reasonable expenses in reproduction. The court did not certify, and the Superior Court did not accept, additional issues respecting defenses that the trial court had yet to pass upon. Moreover, the defenses were deliberately not passed upon by the trial judge in his efficient and methodical approach to this class action litigation. The opinion by the trial judge specifically noted the existence of the defenses, which the court appreciated could be complicated; and the court rightly noted that those complicated issues would only have to be reached if MRO's construction of the statute proved to be correct—which is precisely why the judge certified the statutory construction issue for appeal.

> [A]s a general rule, appellate courts have jurisdiction only over final orders. *See* 42 Pa.C.S. § 742 (providing appellate jurisdiction to Superior Court over "final orders"); *id.,* § 762 (same for Commonwealth Court); *Commonwealth v. Wells,* 553 Pa. 424, 719 A.2d 729 (1998). That general rule, however, is subject to exceptions which give appellate courts jurisdiction to review ****296** interlocutory orders under limited circumstances. *See* 42 Pa.C.S. § 702 (governing appellate jurisdiction over interlocutory orders); *see also* Pa.R.A.P. 311 (interlocutory appeals as of right); Pa.R.A.P. 312 (interlocutory appeals by permission).

***339** *Commonwealth v. White,* 589 Pa. 642, 910 A.2d 648, 653 (2006). Once an interlocutory order is certified and accepted, it neither confers a right, nor extends an invitation, to a party to add other interlocutory issues, not passed upon below, to the appeal. The issue is not just a question of the proper limitations upon an intermediate appellate court's jurisdiction. Proceeding to address issues neither decided below nor certified and accepted for review also causes the appellate court to proceed without the benefit of the trial judge's views—which is what happened here.

Although it appears that appellants did not object to MRO's addition of non-certified issues to its appellate brief below, and the issues are briefed again here on the merits, we are disinclined to reach them under these circumstances. No doubt many parties would prefer to have interlocutory issues resolved ahead of time, but the parties' strategic litigation decisions are not what frames the proper jurisdiction of the appellate courts. Notably, here, the panel majority never explained why it proceeded to address the non-certified issues even in the face of Judge Colville's dissent properly stressing that the issues were not before the court. In our view, having

affirmed the trial court's decision of the statutory construction question, the proper disposition is to permit the trial court to pass upon the additional claims in the first instance. Accordingly, the Superior Court's decision concerning the non-certified issues is vacated, and those issues are left to the trial court to resolve on remand.

- IV -

The order and judgment of the Superior Court is reversed and the matter is remanded to the trial court for proceedings consistent with this Opinion. Jurisdiction is relinquished.

Former Justice ORIE MELVIN did not participate in the consideration or decision of this case.

***340** Justices EAKIN, BAER and TODD join the opinion.

Justice SAYLOR files a concurring and dissenting opinion in which Justice McCAFFERY joins.

Justice SAYLOR, concurring and dissenting.

I join Part III(B) of the majority opinion, holding that the Superior Court exceeded the scope of the interlocutory appeal and remanding for the trial court to address the defenses raised by MRO. I also agree with other portions of the majority's decision, including its determinations that: *Liss & Marion, P.C. v. Recordex Acquisition Corp.,* 603 Pa. 198, 983 A.2d 652 (2009), is not dispositive of this case; the version of the Medical Records Act under review (the "MRA") capped expenses, rather than providing a uniform statutory rate; and, the manner of request, whether by subpoena or otherwise, did not alter the pricing scheme. However, I respectfully dissent relative to the majority's interpretation and application of the "estimated actual and reasonable expenses" language of former Section 6152(a)(1) of the MRA. 42 Pa.C.S. § 6152(a)(1) (superseded). [1]

****297** Initially, I am not convinced that the statutory language was unambiguous, since the parties offer reasonable and plausible alternative interpretations. *See Malt Beverages Distribs. Ass'n v. Pa. Liquor Control Bd.,* 601 Pa. 449, 463, 974 A.2d 1144, 1153 (2009) ("[W]e find that each party's interpretation of the statutory language is plausible and, therefore, the statute is ambiguous."). The majority clarifies some of the ambiguity by adopting the trial court's view that "*actual expenses* means expenses existing in fact, and *reasonable expenses* means that the costs are not padded." Majority Opinion at 295 (quoting ***341** *Wayne M. Chiurazzi Law Inc. v. MRO Corp.,* No. GD 09–012911, *slip op.* at 6 (C.P. Allegheny, June 17, 2010)) (emphasis in original). Nevertheless, as I see it, the statute as a whole did not easily lend itself to a plain language interpretation.

Additionally, I disagree with the majority's conclusion that third-party reproducers were limited to charging only their actual costs of reproduction. The majority states that "the language of Section 6152(a)(1) speaks to a *records reproducer* providing 'the estimated actual and reasonable expenses of reproducing the charts or records' requested." Majority Opinion at 293 (quoting 42 Pa.C.S. § 6152(a)(1) (superseded)) (emphasis added). However, the limiting language of Section 6152(a)(1) did not broadly reference records reproducers; instead, it specified that the "health care provider [ ] or facility[ ]" shall notify the requester of the "estimated actual and reasonable expenses" of reproduction. 42 Pa.C.S. § 6152(a)(1) (superseded). In fact, the term "designated agent" (*i.e.,* a third-party reproducer such as MRO) did not appear in Section 6152(a)(1), but rather, only in the first sentence of Section 6152(a)(2)(i), which merely entitled the health care entity or agent to receive payment of "such expenses" prior to reproduction. 42 Pa.C.S. § 6152(a)(2)(i) (superseded) ("[T]he health care provider or facility or a *designated agent* shall be entitled to receive payment of such expenses before producing the charts or records." (emphasis added)). Although the majority determines, correctly in my view, that the phrase "such expenses" referenced the "expenses" of the prior section, that did not alter the statute's discrete limitation on the expenses of the health care entity. [2] Thus, reading these provisions together demonstrates that the health care facility was to notify the requester of the reasonable expenses that *it* incurred to have the records reproduced, whether the copies were made by the provider itself or a third party, subject to the statutory cap.

***342** To further elaborate, given the MRA's focus on the health care entity's expenses, I favor reading this ambiguous statute as previously having imposed on a health care provider or facility a duty to charge a requester only its actual and reasonable expenses of reproducing the charts or records, subject to the statutory cap. Thus, if the facility or provider made the copies itself, it was limited to charging only the actual costs of reproduction, without profit or padding. On the other hand, if the reproduction was outsourced to a designated agent, it was the reproducer's charged rate,

including its profit margin, which equated to the health care entity's expense for reproduction. However, the designated ****298** agent scenario was not without limitations, since the health care entity was still burdened with the responsibility to seek a reasonable charge when outsourcing the copying. The determination of whether a health care provider or facility has met this burden will necessarily entail a factual inquiry, which may include, *inter alia,* an examination of the relationship between the reproducer and the health care entities it serves, the designated agent's profitability, and the impact that the use of computers, electronic records, and the Internet has on the costs of obtaining and copying records. In this regard, considering the statutory text, its context, and history, I perceive no legislative intent to preclude a third-party reproducer from making a profit. *See, e.g.,* Pa. House Legislative Journal, Jan. 20, 1998, at 25 (remarks of Hon. Lita Cohen) ("This agreed-to language ... will lower the cost of litigation while adequately protecting the revenue base for the copying companies."). [3]

In sum, I do not believe that the MRA limited third-party records reproducers to recovery of only their actual costs of reproduction. Thus, I would reverse the Superior Court and remand for the trial court's examination as to the reasonableness of the expenses incurred by the health care providers and ***343** facilities. [4]

Justice McCAFFERY joins this concurring and dissenting opinion.

All Citations

626 Pa. 303, 97 A.3d 275

Footnotes

1 A number of similar class actions against Pittsburgh area entities that furnish medical records apparently remain pending.

2 In the wake of the amendment to the Act, MRO filed an application for summary affirmance of the Superior Court's decision or, in the alternative, dismissal of this appeal as improvidently granted. MRO argued that the 2012 amendment made clear the General Assembly's intention respecting the version of the Act at issue here. Appellants responded that the amended Act cannot retroactively determine this appeal because the Legislature has no power to direct the outcome of pending cases, and, in any event, the amendments have no retroactive application because the Legislature did not expressly provide for retroactive application. This Court has already denied the application by *per curiam* order, and we will not revisit the issue. *See generally Commonwealth v. Diodoro,* 601 Pa. 6, 970 A.2d 1100, 1108 ("the legislative actions of a later General Assembly are not probative of the legislative intent of a prior General Assembly."), *cert. denied,* 558 U.S. 875, 130 S.Ct. 200, 175 L.Ed.2d 127 (2009).

3 The Second Amended Complaint also contained additional claims not relevant to our discretionary review of the narrow interlocutory appeal, including that: (1) MRO improperly charged appellants sales tax; (2) appellants had no other means of obtaining the requested documents and were therefore powerless against MRO's billing practices; and (3) the required elements of a class action were present.

4 Section 6155(b)(1) provides:

> A patient or his designee, including his attorney, shall have the right of access to his medical charts and records and to obtain photocopies of the same, without the use of a subpoena duces tecum, for his own use. A health care provider or facility shall not charge a patient or his designee, including his attorney, a fee in excess of the amounts set forth in section 6152(a)(2)(i) (relating to subpoena of records).

42 Pa.C.S. § 6155(b)(1).

5 In its Superior Court brief, MRO acknowledged that its third and fourth questions had not been passed upon or certified, as its Statement of Questions provided that the "answer below" to each question was: "Not specifically addressed, but impliedly answered No." MRO Superior Court Brief, 3. In fact, the trial court did not address or decide these questions at all, directly or impliedly.

6 The panel also addressed two other issues not pertinent to this appeal—MRO's claim that the MRA applies only to health care providers and not to independent for-profit companies, and the question of whether MRO was permitted to charge sales tax.

7 Section 6152.1(a)(1) provides: "[A] health care provider or facility shall not charge more than a flat fee of $19 for the expense of reproducing medical charts or records, plus the actual cost of postage, shipping or delivery, if the charts or records are requested for the purpose of supporting a claim or appeal under any provision of the Social Security Act (49 Stat. 620, 42 U.S.C. § 301 et seq.) or any Federal or State financial needs-based benefit program." Section 6152(a)(2)(ii) states: "Payment to a health care provider or facility for searching for, retrieving and reproducing medical charts

or records requested by a district attorney shall be $20.62, search and retrieval fee, plus the actual cost of postage, shipping or delivery as described in subparagraph (i), as adjusted by the Secretary of Health of the Commonwealth, unless otherwise agreed to by the district attorney."

8 In support of its last point, HHAP cites, *inter alia,* the floor comments of Representative Cohen: "This legislation sets forth a uniform schedule to satisfy the interests of patients, doctors, hospitals, and medical record service companies that provide this valuable service." HHAP Brief, 7, quoting Pa. Legislative Journal–House (January 20, 1998), at 24.

9 A second *amicus* brief in support of MRO was filed by Healthport Technologies, LLC. Healthport, like MRO, is a private medical records reproduction company, and is a defendant in a virtually identical case in Allegheny County that has been placed on hold pending this appeal. Healthport largely echoes the statutory interpretation and policy arguments set forth by MRO and HHAP.

10 Judge Wettick noted that, if MRO's construction of the Act were rejected, "several (possibly complicated) factual and legal issues" would require consideration, "including what are actual and reasonable expenses." Tr. Ct. Op. at 3. The question of whether actual and reasonable expenses may include a profit margin when a third-party records reproducer acts as the agent for a health care provider or facility is a matter that we view to be available for consideration upon remand, assuming that the issues discussed in Part III(B), *infra,* are not deemed dispositive on remand.

1 As noted by the majority, *see* Majority Opinion at 277 & n. 2, the operative language of Section 6152(a)(1) was deleted by the General Assembly, effective September 4, 2012. *See* Act of July 5, 2012, P.L. 1138, No. 139, § 1 (as amended, 42 Pa.C.S. § 6152(a)(1)).

2 Section 6152(c) of the MRA also supported this emphasis on the health care entities' expenses, since it mandated that the health care provider or facility deliver the requested reproductions within thirty days of the "payment of *its* expenses." 42 Pa.C.S. § 6152(c) (emphasis added).

3 In this regard, I differ with the majority's position that whether a third party's profit margin may be encompassed within "actual and reasonable expenses" is a "factual matter" that is "available for consideration upon remand." Majority Opinion at 295 & n. 10. To the contrary, I view this as a question of statutory construction that should be answered based on the above analysis.

4 This assumes, of course, that the other issues discussed in Part III(B) of the majority opinion do not require dismissal of the complaint in the first instance. *See* Majority Opinion at 295–96.

EXHIBIT
18

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

DAVID M. LANDAY,

Plaintiff,

vs.

HEALTHPORT,

Defendant.

CIVIL DIVISION

Case No.: GD-09-012923

SECOND AMENDED CLASS ACTION COMPLAINT

Filed on behalf of: PLAINTIFF

Counsel of Record for this party:

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JURY TRIAL DEMANDED

NOTICE TO DEFEND

You have been sued in court. If you wish to defend against the claims set forth in the following pages, you must take action within twenty (20) days after this complaint and notice are served, by entering a written appearance personally or by attorney and filing in writing with the court your defenses or objections to the claims set forth against you. You are warned that if you fail to do so the case may proceed without you and a judgment may be entered against you by the court without further notice for any money claimed in the complaint and for any claim or relief requested by the Plaintiff. You may lose money or property or other rights important to you.

YOU SHOULD TAKE THIS PAPER TO YOUR LAWYER AT ONCE. IF YOU DO NOT HAVE OR KNOW A LAWYER OR CANNOT AFFORD ONE, THEN YOU SHOULD GO TO OR TELEPHONE THE OFFICE SET FORTH BELOW TO FIND OUT WHERE YOU CAN GET LEGAL HELP:

Lawyer Referral Service
Allegheny County Bar Association
920 City-County Building
414 Grant Street
Pittsburgh, PA 15219
412-261-5555

SECOND AMENDED CLASS ACTION COMPLAINT

NATURE OF THE ACTION

1. This class action is brought on behalf of patients, patient designees, representatives and attorneys ("Medical Records Requestors") who have been overcharged by Defendant Healthport d/b/a ChartOne, Inc. ("Healthport") for reproductions of medical records.

2. By law, a medical records reproduction companies ("MRRC") such as Defendant must provide medical records to Medical Records Requestors for a fee derived from the actual and reasonable cost of searching for, retrieving, reproducing and transmitting the records.

3. Contrary to this law, Defendant Healthport has charged the Representative and Class Plaintiff, as well as thousands of other Medical Records Requestors, fees that far exceed the actual and reasonable cost of searching for, retrieving, reproducing and transmitting the medical records. Indeed, Defendant has profited from the sale of Pennsylvania hospital patient medical records at the expense of these Medical Records Requestors. This class action is brought to compel Defendant to charge Medical Records Requestors only those fees that are permitted and to recover the money paid by Medical Records Requestors that was in excess of the actual and reasonable cost of searching for, retrieving, reproducing and transmitting the records.

THE PARTIES

4. Plaintiff David M. Landay ("Plaintiff") is a lawyer with an office located at 310 Grant Street, Suite 1420, Pittsburgh, Pennsylvania, 15219. In the course of representing his clients, Plaintiff has been repeatedly overcharged by Defendant in relation to medical records requests.

5. Defendant Healthport is a corporation or other entity with headquarters at 925 North Point Parkway, Suite 350, Alpharetta, Georgia 30005. This Defendant was formed in

2007 through the merger of SDS, a/k/a Smart Document Solutions ("SDS"), and Companion Technologies. In 2008, this Defendant also merged with ChartOne, Inc. ("ChartOne"). At all times relevant hereto, this Defendant was an MRRC that entered into exclusive agreements with Pennsylvania hospitals to provide medical records to Medical Records Requestors. At all times relevant hereto, this Defendant agreed to provide reproductions of medical records for a fee to the Representative and Class Plaintiff.

Patients And Their Designees, Representatives and Attorneys Are Legally Entitled To Obtain Medical Record Copies Based Upon The Reasonable And Actual Cost Of Reproduction

6. Under Pennsylvania and United States law, Pennsylvania hospitals are required to create, maintain, and preserve medical records.

7. The hospital records are recognized by law to be the property of the health care provider, not the patient.

8. Although patients are not provided legal dominion and control over their medical records, they, and their designees, representatives and attorneys are given the legal right to obtain reproductions of medical records for a modest fee based upon the reproduction provider's estimated actual and reasonable costs. Thus, Pennsylvania law limits the amount that Medical Records Requestors may be charged in connection with a request for medical records. Under the law, charges in connection with the provision of reproduced medical records must be cost-based.

9. Additionally, Pennsylvania law creates a "ceiling" on any such charges by establishing a maximum amount that may be charged for "search and retrieval" and a maximum "per page" fee based on the number of paper records reproduced. These statutory maximum amounts are adjusted annually beginning on January 1, 2000, by the Secretary of Health of the Commonwealth based on the most recent changes in the consumer price index reported annually by the Bureau of Labor Statistics of the United States Department of Labor.

10. Pennsylvania law, therefore, imposes a duty on MRRCs to establish procedures to estimate their actual costs for search, retrieval, reproduction and transmittal of medical records and then to charge Medical Records Requestors only that cost. Where the MRRC's estimated actual cost is lower than the statutory maximum amounts set forth in Pennsylvania law, the lower amount must be charged.

11. Pennsylvania law also limits the types, or categories, of fees that may be charged for the reproduction of medical records to the following three categories: A search and retrieval fee; a reproduction fee; and a postage, shipping or delivery fee. No other types or categories of fees may be charged under Pennsylvania law.

Healthport Operates As an MRRC To Provide Copies Of Medical Records To Patients and Patients' Attorneys

12. Defendant Healthport is an MRRC that has entered into exclusive medical records reproduction contracts with numerous Pennsylvania hospitals and hospital systems, including Allegheny General Hospital and the West Penn Allegheny Health System, Jefferson Regional Medical Center and J.C. Blair Memorial Hospital.

13. Under these contracts, Healthport is a designated agent of the hospital to be the sole and exclusive source from which Medical Records Requestors must obtain reproductions of medical records.

14. As part of these exclusive contracts with Pennsylvania hospitals, Healthport also provides reproductions of patient medical records for various other entities (e.g., physician practice groups, imaging centers, and clinics) that are affiliated with and/or owned by the various hospitals with which Healthport contracts ("affiliated entity").

15. Under these exclusive agreements, when a request for medical records comes in to the hospital or affiliated entity from a Medical Records Requestor, the hospital or affiliated entity notifies Healthport and makes the requested medical records available to the Healthport,

usually electronically. Healthport then contacts the Medical Records Requestor directly, informs them of the total number of pages of records to be "copied", and offers to provide these pages in exchange for payment of a specified fee. Once the specified fee is paid by the Medical Records Requestor, Healthport, using its exclusive access to the hospital's or affiliated entity's medical records, "copies" the records and forwards them directly to the Medical Records Requestor.

16. In exchange for this exclusive right to sell the hospital's or affiliated entity's reproduced medical records to Medical Records Requestors, Healthport may share the revenues from the sale of the records with the hospitals and/or affiliated entities, and may provide the hospitals and/or affiliated entities with a range of additional services at no charge or at greatly reduced charge. These services include, but are not limited to, free copies of medical records to satisfy non-billable medical records requests received by the hospital or affiliated entity; on site personnel and/or equipment to facilitate hospital or affiliated entity satisfaction of non-billable medical records requests; scanning of hospital or affiliated entity medical records to digital format for ease of storage and future retrieval and reproduction; and storage of medical records, either in paper or digital form.

Technological Advances Have Reduced The Costs Of Medical Record Location, Retrieval, Reproduction, and Transmittal

17. The use of computers, electronic records and the internet has led to substantial reduction of costs in the storage and reproduction of medical records for hospitals and their MRRC agents, including Healthport. Before the widespread use of computer technology in hospital medical record keeping and record reproduction, whenever a hospital or affiliated entity in Pennsylvania received a request from a Medical Records Requestor for a copy of a patient's medical records, the hospital's or affiliated entity's medical records department first needed to retrieve the patient's medical chart from an in-house or off-site storage location. The patient's medical chart was composed of numerous sheets of paper in different sizes, with information

sometimes recorded on the front and back, and often with information recorded on bifolds and trifolds. The top of each page was two-hole punched and the complete chart was held together by metal clips placed through these holes. Once the medical chart was obtained from storage, a person from the hospital or affiliated entity needed to take each sheet of paper out of these clips and photocopy by hand each and every page of the record. The medical records department then needed to reassemble the chart and send it back to storage; assemble the copies; place the copies in a mailing package, and send them via U.S. mail to the Medical Records Requestor. All of this, along with billing and bill collection, was done without the aid of computers, electronic records, or the internet.

18. Because of the implementation of technological advances, medical records in Pennsylvania, and throughout the United States, are increasingly created in electronic form on computers and/or converted into electronic form after creation, and thereafter stored in electronic form on computers. This trend toward computerized hospital records is the result of the belief among health care practitioners and policy makers that electronic medical records enhance patient safety, increase efficiencies in the delivery of health care, and improve the "bottom line" of hospitals and affiliated entities.

19. Electronic medical records also significantly reduce the time and expense involved in the storage, location, retrieval, reproduction, and transmittal of medical records to Medical Records Requestors. Once computerized, medical records can be retrieved instantly, printed instantly, or electronically transmitted across the globe instantly, all by pressing a few buttons on a computer keyboard.

20. While the actual cost of storing, locating, retrieving, reproducing and transmitting medical records has decreased dramatically, Defendant has failed to charge its actual, diminishing costs to patients and their designees, representatives and attorneys. In fact,

Defendant continues to charge Medical Records Requesters the maximum ceiling prices without any relationship to Defendant's actual costs of searching for, retrieving, reproducing and transmitting Pennsylvania hospital and affiliated entity medical records.

Healthport Fails To Establish And Follow A Procedure For Providing Medical Records Based Upon Its Actual And Reasonable Costs

21. Healthport is permitted to assess and charge Medical Records Requestors only for the estimated actual and reasonable expenses it incurs in connection with the reproduction of requested medical records.

22. Healthport does not follow a procedure designed to estimate and charge Medical Records Requestors, for the actual and reasonable expenses it incurs in connection with the search for and retrieval, reproduction and transmission of medical records.

23. Instead, when it reproduces medical records for Medical Records Requesters, Defendant Healthport automatically charges the maximum possible search and retrieval fee; and the maximum possible fee for making photocopies of paper records without regard to its actual search, retrieval, reproduction and transmittal processes and the actual costs associated therewith.

24. Thus, for requests received after January 1, 2009, Defendant Healthport consistently charged Plaintiff and all other similarly situated Medical Records Requestors $1.33 per page for pages 1-20; 99 cents per page for pages 21 through 60; and 33 cents per page for pages 61 and thereafter. For requests received from January 1, 2008 to December 31, 2008, Defendant Healthport consistently charged Plaintiff and all other similarly situated Medical Records Requestors $1.28 per page for pages 1-20; 95 cents per page for pages 21 through 60; and 32 cents per page for pages 61 and thereafter. For requests received from January 1, 2007 to December 31, 2007, Defendant Healthport consistently charged Plaintiff and all other similarly situated Medical Records Requestors $1.25 per page for pages 1-20; 93 cents per page for pages 21 through 60; and 31 cents per page for pages 61 and thereafter. For requests received from

January 1, 2006 to December 31, 2006, Defendant Healthport consistently charged Plaintiff and all other similarly situated Medical Records Requestors $1.23 per page for pages 1-20; 92 cents per page for pages 21 through 60; and 31 cents per page for pages 61 and thereafter. And for requests received from January 1, 2005 to December 31, 2005, Defendant Healthport consistently charged Plaintiff and all other similarly situated Medical Records Requestors $1.17 per page for pages 1-20; 88 cents per page for pages 21 through 60; and 30 cents per page for pages 61 and thereafter. Such charges are and have consistently been far in excess of Defendant Healthport's estimated actual and reasonable reproduction costs.

25. With respect to search and retrieval fees, for requests received after January 1, 2009, Defendant Healthport consistently charged Plaintiff and all other similarly situated patient attorneys, designees and representatives a search and retrieval fee of $19.80. For requests received from January 1, 2008 to December 31, 2008, Defendant Healthport consistently charged Plaintiff and all other similarly situated patient attorneys, designees and representatives a search and retrieval fee of $19.00. For requests received from January 1, 2007 to December 31, 2007, Defendant Healthport consistently charged Plaintiff and all other similarly situated patient attorneys, designees and representatives a search and retrieval fee of $18.54. For requests received from January 1, 2006 to December 31, 2006, Defendant Healthport consistently charged Plaintiff and all other similarly situated patient attorneys, designees and representatives a search and retrieval fee of $18.30. And for requests received from January 1, 2005 to December 31, 2005, Defendant Healthport consistently charged Plaintiff and all other similarly situated patient attorneys, designees and representatives a search and retrieval fee of $17.48. Such charges are and have consistently been far in excess of Defendant Healthport's estimated actual and reasonable search and/or retrieval costs.

26. In addition to the above-referenced reproduction and search and retrieval charges, Defendant Healthport has also consistently charged Plaintiff and all other similarly situated Medical Records Requestors a sales tax in relation to the search for and retrieval, reproduction and provision of Pennsylvania hospital and/or affiliated entity medical records.

27. A sales tax on the reproduction of medical records is not permitted under Pennsylvania and U.S. law.

Representative Plaintiff Was Subjected To Defendant's Billing Practices

28. In or around September 2010, Plaintiff sent Allegheny General Hospital an authorization from Patient "A" requesting a reproduction of Patient A's hospital medical records.

29. In response to this request, Healthport sent Plaintiff an invoice for $36.85. This invoice is attached as Exhibit 1. Unbeknownst to Plaintiff, the invoice did not reflect charges based upon Healthport's actual or estimated actual expenses for locating, retrieving, reproducing and transmitting the medical records. The medical records charges included a $19.68 for search and retrieval; a $1.32 per page fee for the reproduction of 10 pages of medical records; a sales tax charge of $2.41 and a delivery or postage fee of $1.56.

30. Plaintiff, having no other method of obtaining the medical records and believing the invoice comported with law, Plaintiff paid Healthport the requested $36.85. In exchange for this payment, Healthport provided the requested reproduction of Patient A's hospital record.

CLASS ACTION ALLEGATIONS

31. This Class Action is filed pursuant to Pa.R.Civ.P. 1701 *et. seq.* by the Representative Plaintiff on behalf of a class defined as follows:

> All patients, patient designees, representatives and attorneys who requested medical records from a Pennsylvania hospital or affiliated entity that was processed and fulfilled by Healthport, ChartOne and/or SDS from July 1, 2005 until the date of final judgment in this case and who were charged and paid the

maximum search and retrieval and/or "per page" reproduction fees as set forth in 42 Pa.C.S. § 6152(a)(2)(i) and/or who were charged and paid a sales tax.

Pa.R.Civ.P. 1702, 1708 and 1709 Prerequisites

Numerosity

32. The proposed Class is so numerous that it is impracticable to bring all persons and entities that comprise it before the Court. The exact number of the members of the Class is unknown, but it is believed to include well over 1,000 persons and attorneys/law firms. The exact number and identity of these persons and attorneys/law firms can be determined from the records maintained by Healthport. In many instances, Class Members are either unaware that claims exist or have sustained individual damages too small to justify the costs of bringing suit separately. When aggregated, however, individual damages are large enough to justify this Class Action.

Commonality

33. The questions of law and fact common to the claims of each Class Member overwhelmingly predominate over any question of law or fact affecting only individual members of the Class. Questions of law and fact common to the Class include, but are not necessarily limited to, the following:

a. Do the laws of Pennsylvania provide that Healthport may only charge Medical Records Requestors a cost-based fee for the reproduction of Pennsylvania hospital and affiliated entity medical records?

b. Do the laws of Pennsylvania provide that Healthport may only charge patient attorneys, designees and representatives a cost-based fee for the search for and retrieval of Pennsylvania hospital and affiliated entity medical records?

c. Do the laws of Pennsylvania provide that Healthport may not charge Medical Records Requestors a sales tax for the search for and retrieval, reproduction and transmittal of Pennsylvania hospital and affiliated entity medical records?

d. What is the actual and/or estimated actual and reasonable cost incurred by Healthport in the reproduction of Pennsylvania hospital and affiliated entity medical records?

e. What is the actual and/or estimated actual and reasonable cost incurred by Healthport in the search for and retrieval of Pennsylvania hospital and affiliated entity medical records?

f. Does Healthport's failure to charge and collect fees based upon its actual and/or estimated actual and reasonable expenses for the search for, retrieval, reproduction, and transmittal of Pennsylvania hospital and affiliated entity medical records constitute a breach of contract, implied contract, and/or quasi-contract?

g. Does Healthport's charge of sales tax in relation to the search for, retrieval, reproduction, and transmittal of Pennsylvania hospital and affiliated entity medical records constitute a breach of contract, implied contract, and/or quasi-contract?

h. Does Healthport's failure to charge and collect fees based upon its actual and/or estimated actual and reasonable expenses for the search for, retrieval, reproduction, and transmittal of Pennsylvania hospital and affiliated entity medical records entitle Representative and Class Plaintiff to restitution?

i. Does Healthport's charge of sales tax in relation to the search for, retrieval, reproduction, and transmittal of Pennsylvania hospital and affiliated entity medical records entitle Representative and Class Plaintiff to restitution?

j. Did a constructive trust arise due to Healthport's knowing acquisition of monies in excess of its actual and/or estimated actual and reasonable cost for the search for and the retrieval, reproduction and transmittal of Pennsylvania hospital and affiliated entity medical records?

k. Did a constructive trust arise due to Healthport's knowing acquisition of sales tax in relation to the search for and retrieval, reproduction and transmittal of Pennsylvania hospital and affiliated entity medical records?

l. Was Defendant Healthport unjustly enriched by its acceptance and retention of payments made by Medical Records Requestors for the search for and retrieval, reproduction and transmittal of Pennsylvania hospital and affiliated entity medical records that exceeded Defendant's actual and/or estimated actual and reasonable costs incurred in these activities?

m. Was Defendant Healthport unjustly enriched by its acceptance and retention of payments made by Medical Records Requestors for sales tax in relation to the search for and retrieval, reproduction and transmittal of Pennsylvania hospital and affiliated entity medical records?

Typicality

34. The claims of Plaintiff are typical of the claims of the Class because at all times material to the allegations of this Class Action Complaint, Plaintiff requested medical records from Pennsylvania hospitals and affiliated entities and was charged similar fees and/or sales tax by Defendant. Plaintiff and the Class have sustained identical damages, and their claims arise

from an identical factual background and identical legal theories as set forth in this Class Action Complaint.

35. On information and belief, Plaintiff aver that Defendant has charged medical records reproduction fees identical to those charged to Plaintiff to hundreds, if not thousands of Medical Records Requestors that have requested reproductions of Pennsylvania hospital and affiliated entity medical records.

36. On information and belief, Plaintiff avers that Healthport charged medical records search and retrieval fees identical to those charged to Plaintiff to hundreds, if not thousands of patient attorneys, designees and representatives that have requested reproductions of Pennsylvania hospital and affiliated entity medical records.

37. On information and belief, Plaintiff aver that Healthport has charged sales taxes in connection with the provision of Pennsylvania and affiliated entity medical records reproductions identical to those charged to Plaintiff to hundreds, if not thousands of Medical Records Requestors.

38. As a result of Defendant's conduct, Plaintiff and all other similarly situated patients, patient designees, representatives, and attorneys have sustained damages and losses, including, but not limited to, payment of medical record reproduction charges that exceeded Defendant's actual and/or estimated actual and reasonable expenses incurred; payment of medical records search and retrieval charges that exceeded Defendant's actual and/or estimated actual and reasonable expenses incurred; and payment of sales tax charges.

Adequacy of Representation

39. Representative Plaintiff will assure the adequate representation of all members of the Class. Their claims are typical of the Class's claims. They have no conflict with Class

Members in the maintenance of this action, and their interest in this action is antagonistic to Defendant's interests.

40. Plaintiff's interests are coincident with, and not antagonistic to, absent Class Members' interest because, by proving their individual claims they will necessarily prove Defendant's liability as to the Class's claims.

41. The Plaintiff is also cognizant of and determined to faithfully discharge his fiduciary duties to the absent Class Members as Class Representatives. He will vigorously pursue the Class's claims. His is aware that he cannot settle this Class Action without prior Court approval. Representative Plaintiff has and/or can acquire the financial resources to litigate this Class Action.

42. Undersigned counsel are experienced in litigating Class Actions and have handled many such actions in the state and federal courts for and on behalf of other consumers. Counsel is handling this Class Action on a contingent fee basis and will receive compensation for professional services rendered in this Class Action only as awarded by this Court.

A Class Action Provides A Fair And Efficient Method Of Litigation

43. A class action provides for a fair and efficient method of adjudicating this controversy. The common questions of law and fact outlined above predominate over any question(s) affecting individual Class Members only.

44. The substantive claims of the Representative Plaintiff and the Class Members will require evidentiary proof of the same kind and application of the same law since Defendant has treated all Class Members in a similar and/or identical manner.

45. The prosecution of separate actions by or against Class Members would create the risk of inconsistent or varying adjudications with respect to individual Class Members and

would, as a practical matter, impair or impede the ability of Class Members to protect their interests.

46. To Plaintiff's knowledge no other similar actions are pending against this Defendant in Pennsylvania.

47. This forum is appropriate for litigation of this Class Action because the Plaintiff is located here and Defendant conducts business here.

48. A class action is superior to other available methods for the fair and efficient adjudication of this controversy. The expense and burden of individual litigation effectively makes it impossible for individual Class Members to seek redress for the wrongs complained of herein.

49. There are no known unusual legal or factual issues that would cause management problems not normally and routinely handled in class actions, and because damages may be calculated with mathematical precision, the cost of administering the Class Fund will be minimized. Because Class Members may be unaware that their rights have been violated or, if aware, would be unable to litigate their claims on an individual basis because of their relatively small damages, a class action is the only practical proceeding available.

50. Defendant has acted or refused to act on grounds generally applicable to the Class, thereby making final equitable or declaratory relief appropriate with respect to the Class.

COUNT I
Breach of Contract/Implied Contract

51. Plaintiff re-alleges and incorporates by reference each and every allegation in the preceding paragraphs.

52. A contract arises between the Medical Records Requestor and Defendant Healthport every time Defendant Healthport agrees to provide and/or provides a Medical Records Requestor with medical records from a Pennsylvania hospital or affiliated entity in

exchange for the Medial Records Requestor's agreement to pay and/or payment of the fees specified by Defendant Healthport.

53. Implicit in each such contract is Defendant Healthport's agreement to provide the reproduced medical records to the Medical Records Requestor in a manner consistent with Pennsylvania law.

54. Also implicit in each such contract and/or Pennsylvania law is Defendant Healthport's covenantal duty of good faith and fair dealing.

55. By agreeing to provide and/or providing the requested medical records, Defendant Healthport implicitly agreed to comply with Pennsylvania law, and to act in full compliance therewith in relation to Defendant's billing for the search for, and the retrieval, reproduction and transmittal of Pennsylvania hospital and affiliated entity medical records; and/or in relation to permissible fees that may be charged Medical Records Requestors in relation to the these medical records requests and/or activities.

56. By failing to charge Plaintiff and all other similarly situated Medical Records Requestors a fee for the search for and the retrieval, reproduction and transmittal of Pennsylvania hospital and affiliated entity medical records that is based on Defendant Healthport's actual and/or estimated actual and reasonable expenses, Defendant Healthport failed and continues to fail to comply with applicable Pennsylvania law, and therefore breached and continues to breach its contractual obligations to Plaintiff and all other similarly situated Medical Records Requestors.

57. By charging Plaintiff and all other similarly situated Medical Records Requestors sales tax in connection with the provision of Pennsylvania hospital and affiliated entity medical records reproductions, Defendant Healthport failed and continues to fail to comply with

applicable Pennsylvania law, and therefore breached and continues to breach its contractual obligations to Plaintiff and all other similarly situated Medical Records Requestors.

58. Defendant Healthport's conduct, as described at length above, constitutes a breach or breaches of contract and/or implied contract between Defendant Healthport and Plaintiff, and the contracts and/or implied contracts between Defendant Healthport and each and every Class Member, as well as the covenant of good faith and fair dealing implied in and/or applicable to each such contract.

59. As a result of Defendant Healthport's breaches of contract and/or implied contract and its breaches of the covenant of good faith and fair dealing, Plaintiff and all other similarly situated Medical Records Requestors were caused to suffer damages and losses as set forth in this Class Action Complaint.

60. Defendant Healthport's conduct was intentional, willful, wanton, reckless, and outrageous because Defendant Healthport had actual knowledge of Pennsylvania law governing charges for the search for and the retrieval, reproduction and transmittal of Pennsylvania hospital and affiliated entity medical records to Medical Records Requestors, but nevertheless persisted in refusing to follow these laws out of a desire to maximize its own economic gains and/or its own convenience.

DEMAND FOR RELIEF

WHEREFORE, Plaintiff demands judgment against Defendant Healthport as follows:

1. Certifying this action as a Class Action with Plaintiff as the Representatives of the Class;

2. Declaring that the conduct of Defendant was in breach of contract and unlawful;

Awarding damages according to proof at trial;

5. Awarding costs and attorneys' fees to the extent permitted by law; and

6. Awarding such other and further relief as the Court deems necessary and proper.

JURY TRIAL DEMANDED

BERGER & LAGNESE

by: _____

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FEINSTEIN DOYLE PAYNE & KRAVEC, LLC

by: _____

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ATTORNEYS FOR PLAINTIFF

HealthPort
P.O. Box 409740
Atlanta, Georgia 30384-9740
Fed Tax ID 58 - 2659941
(770) 754 - 6000

HealthPort INVOICE

Invoice #: 0081866406
Date: 10/7/2010
Customer #: 466363

Ship to:	Bill to:	Records from:
ARLENE ROOS DAVID LANDAY THE GRANT BLDG STE 1420 310 GRANT ST PITTSBURGH, PA 15219-2201	ARLENE ROOS DAVID LANDAY THE GRANT BLDG STE 1420 310 GRANT ST PITTSBURGH, PA 15219-2201	ALLEGHENY GENERAL HOSPITAL 320 EAST NORTH AVENUE PITTSBURGH, PA 15212-4772

ENTERED

Requested By: DAVID LANDAY
Patient Name:
DOB:

Description	Quantity	Unit Price	Amount
Basic Fee			19.68
Retrieval Fee			0.00
Per Page Copy (Paper) 1	10	1.32	13.20
Shipping/Handling			1.56
Subtotal			34.44
Sales Tax			2.41
Invoice Total			36.85
Balance Due			36.85

EXHIBIT 1
PENGAD 800-631-6989

Pay your invoice online at www.HealthPortPay.com

Terms: Net 30 days

Please remit this amount : $ 36.85 (USD)

HealthPort
P.O. Box 409740
Atlanta, Georgia 30384-9740

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the within **SECOND AMENDED CLASS ACTION COMPLAINT** was served upon all counsel of record, via Email and by First Class Mail, postage pre-paid, this **24th** day of **February, 2020** as follows:

Amy L. Groff, Esquire
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17 North Second Street, 18th Floor
Harrisburg, PA 17101

Anna Shabalov, Esquire
K&L Gates LLP
210 Sixth Avenue
Pittsburgh, PA 15222

Paul A. Lagnese, Esquire
David M. Paul, Esquire
Counsel for Plaintiff

EXHIBIT
19

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

DAVID M. LANDAY, Plaintiff, v. HEALTHPORT, Defendant.	CIVIL DIVISION No. GD-09-012923 (coordinated with GD-09-012911; GD-09-012919; GD-09-012922; GD-09-014785; and GD-11-011194) **DEFENDANT'S ANSWER AND NEW MATTER TO PLAINTIFF'S SECOND AMENDED CLASS ACTION COMPLAINT**

NOTICE TO PLEAD

To: Plaintiff

You are hereby notified to file a written response to the within Answer and New Matter within twenty (20) days from service hereof or a default judgment may be entered against you.

/s/ Anna Shabalov
Anna Shabalov
K&L Gates LLP
Counsel for Defendant

Submitted On Behalf of Defendant CIOX Health, LLC, formerly named Defendant HealthPort Technologies, LLC

COUNSEL OF RECORD FOR THIS PARTY:

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IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

DAVID M. LANDAY,	)	CIVIL DIVISION
	)	
Plaintiff,	)	No. GD-09-012923
	)	
v.	)	
	)	
HEALTHPORT,	)	
	)	
Defendant.	)	
	)	
	)	

DEFENDANT'S ANSWER AND NEW MATTER TO PLAINTIFF'S SECOND AMENDED CLASS ACTION COMPLAINT

CIOX Health, LLC, formerly known as HealthPort Technologies, LLC ("HealthPort"),[1] hereby submits this Answer and New Matter to Plaintiff David M. Landay's ("Plaintiff's") Second Amended Class Action Complaint ("Second Amended Complaint"), and states as follows:

RESPONSE TO INTRODUCTION

1. The allegations set forth in paragraph 1 state conclusions of law to which no response is required. To the extent a response is required, these allegations are denied.

2. To the extent that paragraph 2 purports to interpret Pennsylvania's Medical Records Act, 42 Pa.C.S. § 6152 *et seq.* (the "MRA"), it states a legal conclusion to which no response is required. If a response is required, it is noted that the provisions of the MRA speak for themselves, and any allegations contrary to the language and meaning of the MRA are denied.

3. The allegations set forth in paragraph 3 state conclusions of law to which no response is required. To the extent a response is required, these allegations are denied. By way

[1] HealthPort Technologies, LLC has changed its name to CIOX Health, LLC, effective March 1, 2016.

of further response, HealthPort acted in conformity with the MRA at all times.

RESPONSE TO THE PARTIES

4. The allegations contained in paragraph 4 are admitted in part and denied in part. It is admitted only that Plaintiff is a lawyer with an office located at 310 Grant Street, Suite 1420, Pittsburgh, Pennsylvania 15219. The remainder of the paragraph, including that HealthPort has ever overcharged Plaintiff in relation to Plaintiff's medical record requests, is denied.

5. The allegations contained in paragraph 5 are denied as stated. It is admitted only that (i) HealthPort (now renamed CIOX Health, LLC) is a limited liability company organized under the laws of Georgia, (ii) it conducts business at 925 Northpoint Parkway, Suite 350, Alpharetta, Georgia 30005, and (iii) it is a medical records reproduction company that provided the representative plaintiff with copies of certain requested medical records for a fee approved by the representative plaintiff. By way of further response, see footnote 1, above.

RESPONSE TO FACTUAL ALLEGATIONS

6. The allegations set forth in paragraph 6 state conclusions of law to which no response is required. To the extent a response is required, these allegations are denied.

7. The allegations set forth in paragraph 7 state conclusions of law to which no response is required. To the extent a response is required, these allegations are denied.

8. To the extent that paragraph 8 purports to interpret the MRA, it states a legal conclusion to which no response is required. If a response is required, it is noted that the provisions of the MRA speak for themselves, and any allegations contrary to the language and meaning of the MRA are denied.

9. To the extent that paragraph 9 purports to interpret the MRA, it states a legal conclusion to which no response is required. If a response is required, it is noted that the

provisions of the MRA speak for themselves, and any allegations contrary to the language and meaning of the MRA are denied.

10. To the extent that paragraph 10 purports to interpret the MRA, it states a legal conclusion to which no response is required. If a response is required, it is noted that the provisions of the MRA speak for themselves, and any allegations contrary to the language and meaning of the MRA are denied.

11. To the extent that paragraph 11 purports to interpret the MRA, it states a legal conclusion to which no response is required. If a response is required, it is noted that the provisions of the MRA speak for themselves, and any allegations contrary to the language and meaning of the MRA are denied.

12. The allegations contained in paragraph 12 are denied as stated. It is admitted only that HealthPort entered into agreements with certain hospitals and hospital systems in Pennsylvania, including Allegheny General Hospital and the West Penn Allegheny Health System, Jefferson Regional Medical Center and J.C. Blair Memorial Hospital, to provide medical records to requestors.

13. The allegations contained in paragraph 13 are denied as stated. The allegations of paragraph 13 characterize the agreements HealthPort entered into with hospitals relating to medical records, and the allegations are denied because the agreements are written documents that speak for themselves.

14. The allegations contained in paragraph 14 are denied as stated. The allegations of paragraph 14 characterize the agreements HealthPort entered into with hospitals relating to medical records, and the allegations are denied because the agreements are written documents that speak for themselves.

15. The allegations contained in paragraph 15 are admitted in part and denied in part. It is admitted only that HealthPort contacted requestors directly, informed them of the total number of pages of records to be "copied," and offered to provide these pages in exchange for payment of a specified fee. The remaining allegations of paragraph 15 characterize the agreements HealthPort entered into with hospitals relating to medical records, and the allegations are denied because the agreements are written documents that speak for themselves.

16. The allegations contained in paragraph 16 are admitted in part and denied in part. The allegations of paragraph 16 characterize the agreements HealthPort entered into with hospitals relating to medical records, and the allegations are denied because the agreements are written documents that speak for themselves. To the extent a response is required, it is denied that HealthPort shared any revenue with hospitals and/or affiliated entities related to medical records requests. By way of further response, HealthPort did, in certain instances depending on the provisions contained in its contract with the health care provider, provide services to the hospital, for consideration, and, in instances where the hospital rendered services, share revenues with the hospital. It is specifically denied that HealthPort "sold" the medical records of the health care facility as alleged in paragraph 16.

17. The allegations contained in paragraph 17 are denied.

18. The allegations contained in paragraph 18 are admitted in part and denied in part. It is admitted only that medical records are sometimes created and/or stored in electronic form on computers. After a reasonable investigation, there is insufficient knowledge or information to form a belief as to the truth of the remaining allegations in paragraph 18, and therefore, these allegations are denied.

19. The allegations contained in paragraph 19 are denied. Plaintiff has not fairly summarized the process for complying with requests for copies of electronic medical records.

20. The allegations set forth in paragraph 20 state conclusions of law to which no response is required. To the extent a response is required, these allegations are denied. By way of further response, HealthPort acted in conformity with the MRA at all times despite the fact that it was not a "health care provider" or "facility" under the MRA.

21. To the extent that paragraph 21 purports to interpret the MRA, it states a legal conclusion to which no response is required. If a response is required, it is noted that the provisions of the MRA speak for themselves, and any allegations contrary to the language and meaning of the MRA are denied.

22. To the extent that paragraph 22 purports to interpret the MRA, it states a legal conclusion to which no response is required. If a response is required, it is noted that the provisions of the MRA speak for themselves, and any allegations contrary to the language and meaning of the MRA are denied. By way of further response, HealthPort acted in conformity with the MRA at all times despite the fact that it was not a "health care provider" or "facility" under the MRA.

23. To the extent that paragraph 23 purports to interpret the MRA, it states a legal conclusion to which no response is required. If a response is required, it is noted that the provisions of the MRA speak for themselves, and any allegations contrary to the language and meaning of the MRA are denied. By way of further response, HealthPort acted in conformity with the MRA at all times despite the fact that it was not a "health care provider" or "facility" under the MRA.

24. The allegations set forth in paragraph 24 state conclusions of law to which no

response is required. To the extent a response is required, the phrase "similarly situated" is vague and ambiguous, and the allegations incorporating that phrase are therefore denied. By way of further response, HealthPort acted in conformity with the MRA at all times despite the fact that it was not a "health care provider" or "facility" under the MRA.

25. The allegations set forth in paragraph 25 state conclusions of law to which no response is required. To the extent a response is required, the phrase "similarly situated" is vague and ambiguous, and the allegations incorporating that phrase are therefore denied. By way of further response, HealthPort acted in conformity with the MRA at all times despite the fact that it was not a "health care provider" or "facility" under the MRA.

26. The allegations contained in paragraph 26 are denied as stated. HealthPort did not charge sales tax. To the contrary, HealthPort collected and remitted sales tax as required by Pennsylvania law.

27. The allegations set forth in paragraph 27 state conclusions of law to which no response is required. To the extent a response is required, HealthPort denies these allegations.

28. HealthPort admits the allegations set forth in paragraph 28.

29. The allegations contained in paragraph 29 are admitted in part and denied in part. It is admitted that HealthPort issued the invoice attached as Exhibit 1 to the Second Amended Complaint. To the extent the allegations in paragraph 29 attempt to characterize the invoice, the allegations are denied because the invoice is a written document that speaks for itself. The remaining allegations in paragraph 29 state conclusions of law to which no response is required. If a response is required, the remaining allegations are denied.

30. The allegations contained in paragraph 30 are denied as stated. Plaintiff had the choice of obtaining copies of the medical records from HealthPort at the rates and fees specified

in the invoice attached as Exhibit 1 to the Second Amended Complaint or, alternatively, inspecting and copying any requested medical records at the medical center's place of business. In exchange for the payment of the fees specified in the invoice, HealthPort provided the requested records to Plaintiff.

RESPONSE TO CLASS ACTION ALLEGATIONS

31. The allegations set forth in paragraph 31 state conclusions of law to which no response is required. To the extent a response is required, it is denied that the claims set forth in the Second Amended Complaint are proper for class certification, as, to the contrary, Plaintiff cannot satisfy the requirements to certify a class.

32. The allegations set forth in paragraph 32 state conclusions of law to which no response is required. To the extent a response is required, after a reasonable investigation, there is insufficient knowledge or information to form a belief as to the truth of the allegations contained in paragraph 32 and, therefore, the allegations are denied. By way of further response, HealthPort lacks knowledge or information about whether the claimants in the putative class are aware of their potential claims or the amount of individual damages they allegedly sustained, and, therefore, such allegations are denied.

33. The allegations set forth in paragraph 33, including subparts (a) through (m), state conclusions of law to which no response is required. To the extent a response is required, it is denied that the claims set forth in the Second Amended Complaint are proper for class certification, as, to the contrary, Plaintiff cannot satisfy the requirements to certify a class.

34. The allegations set forth in paragraph 34 state conclusions of law to which no response is required. To the extent a response is required, it is denied that HealthPort charged excessive fees as defined by the MRA. Additionally, Plaintiff repeatedly approved and

voluntarily paid any invoices submitted by HealthPort. Furthermore, the factual background of each individual request alleged by a putative plaintiff will necessarily differ. As a result, it is denied that the claims set forth in the Second Amended Complaint are proper for class certification, as, to the contrary, Plaintiff cannot satisfy the requirements to certify a class.

35. The allegations set forth in paragraph 35 state conclusions of law to which no response is required. To the extent a response is required, after a reasonable investigation, there is insufficient knowledge or information to form a belief as to the truth of the allegations contained in paragraph 35 and, therefore, the allegations are denied. By way of further response, it is specifically denied that the claims set forth in the Second Amended Complaint are proper for class certification, as, to the contrary, Plaintiff cannot satisfy the requirements to certify a class.

36. The allegations set forth in paragraph 36 state conclusions of law to which no response is required. To the extent a response is required, after a reasonable investigation, there is insufficient knowledge or information to form a belief as to the truth of the allegations contained in paragraph 36 and, therefore, the allegations are denied. By way of further response, it is specifically denied that the claims set forth in the Second Amended Complaint are proper for class certification, as, to the contrary, Plaintiff cannot satisfy the requirements to certify a class.

37. The allegations set forth in paragraph 37 state conclusions of law to which no response is required. To the extent a response is required, after a reasonable investigation, there is insufficient knowledge or information to form a belief as to the truth of the allegations contained in paragraph 37 and, therefore, the allegations are denied. By way of further response, it is specifically denied that the claims set forth in the Second Amended Complaint are proper for class certification, as, to the contrary, Plaintiff cannot satisfy the requirements to certify a class.

38. The allegations set forth in paragraph 38 state conclusions of law to which no response is required. To the extent a response is required, the allegations contained in paragraph 38 are denied. By way of further response, it is specifically denied that the claims set forth in the Second Amended Complaint are proper for class certification, as, to the contrary, Plaintiff cannot satisfy the requirements to certify a class.

39. The allegations set forth in paragraph 39 state conclusions of law to which no response is required. To the extent a response is required, after a reasonable investigation, there is insufficient knowledge or information to form a belief as to the truth of the allegations contained in paragraph 39 and, therefore, the allegations are denied. By way of further response, it is specifically denied that the claims set forth in the Second Amended Complaint are proper for class certification, as, to the contrary, Plaintiff cannot satisfy the requirements to certify a class.

40. The allegations set forth in paragraph 40 state conclusions of law to which no response is required. To the extent a response is required, after a reasonable investigation, there is insufficient knowledge or information to form a belief as to the truth of the allegations contained in paragraph 40 and, therefore, the allegations are denied. By way of further response, it is specifically denied that the claims set forth in the Second Amended Complaint are proper for class certification, as, to the contrary, Plaintiff cannot satisfy the requirements to certify a class.

41. The allegations set forth in paragraph 41 state conclusions of law to which no response is required. To the extent a response is required, after a reasonable investigation, there is insufficient knowledge or information to form a belief as to the truth of the allegations contained in paragraph 41 and, therefore, the allegations are denied. By way of further response, it is specifically denied that the claims set forth in the Second Amended Complaint are proper for class certification, as, to the contrary, Plaintiff cannot satisfy the requirements to certify a class.

42. The allegations set forth in paragraph 42 state conclusions of law to which no response is required. To the extent a response is required, after a reasonable investigation, there is insufficient knowledge or information to form a belief as to the truth of the allegations contained in paragraph 42 and, therefore, the allegations are denied. By way of further response, it is specifically denied that the claims set forth in the Second Amended Complaint are proper for class certification, as, to the contrary, Plaintiff cannot satisfy the requirements to certify a class.

43. The allegations set forth in paragraph 43 state conclusions of law to which no response is required. To the extent a response is required, after a reasonable investigation, there is insufficient knowledge or information to form a belief as to the truth of the allegations contained in paragraph 43 and, therefore, the allegations are denied. By way of further response, it is specifically denied that the claims set forth in the Second Amended Complaint are proper for class certification, as, to the contrary, Plaintiff cannot satisfy the requirements to certify a class.

44. The allegations set forth in paragraph 44 state conclusions of law to which no response is required. To the extent a response is required, after a reasonable investigation, there is insufficient knowledge or information to form a belief as to the truth of the allegations contained in paragraph 44 and, therefore, the allegations are denied. By way of further response, it is specifically denied that the claims set forth in the Second Amended Complaint are proper for class certification, as, to the contrary, Plaintiff cannot satisfy the requirements to certify a class.

45. The allegations set forth in paragraph 45 state conclusions of law to which no response is required. To the extent a response is required, after a reasonable investigation, there is insufficient knowledge or information to form a belief as to the truth of the allegations contained in paragraph 45 and, therefore, the allegations are denied. By way of further response,

it is specifically denied that the claims set forth in the Second Amended Complaint are proper for class certification, as, to the contrary, Plaintiff cannot satisfy the requirements to certify a class.

46. The allegations set forth in paragraph 46 state conclusions of law to which no response is required. To the extent a response is required, after a reasonable investigation, there is insufficient knowledge or information to form a belief as to the truth of the allegations contained in paragraph 46 and, therefore, the allegations are denied. By way of further response, it is specifically denied that the claims set forth in the Second Amended Complaint are proper for class certification, as, to the contrary, Plaintiff cannot satisfy the requirements to certify a class.

47. The allegations set forth in paragraph 47 state conclusions of law to which no response is required. To the extent a response is required, it is admitted only that Plaintiff is located here and HealthPort conducted some business in Pennsylvania. After a reasonable investigation, there is insufficient knowledge or information to form a belief as to the truth of the remaining allegations contained in paragraph 47 and, therefore, the allegations are denied. By way of further response, it is specifically denied that the claims set forth in the Second Amended Complaint are proper for class certification, as, to the contrary, Plaintiff cannot satisfy the requirements to certify a class.

48. The allegations set forth in paragraph 48 state conclusions of law to which no response is required. To the extent a response is required, after a reasonable investigation, there is insufficient knowledge or information to form a belief as to the truth of the allegations contained in paragraph 48 and, therefore, the allegations are denied. By way of further response, it is specifically denied that the claims set forth in the Second Amended Complaint are proper for class certification, as, to the contrary, Plaintiff cannot satisfy the requirements to certify a class.

49. The allegations set forth in paragraph 49 state conclusions of law to which no response is required. To the extent a response is required, the allegations contained in paragraph 49 are denied. By way of further response, it is specifically denied that the claims set forth in the Second Amended Complaint are proper for class certification, as, to the contrary, Plaintiff cannot satisfy the requirements to certify a class.

50. The allegations set forth in paragraph 50 state conclusions of law to which no response is required. To the extent a response is required, after a reasonable investigation, there is insufficient knowledge or information to form a belief as to the truth of the allegations contained in paragraph 50 and, therefore, the allegations are denied. By way of further response, it is specifically denied that the claims set forth in the Second Amended Complaint are proper for class certification, as, to the contrary, Plaintiff cannot satisfy the requirements to certify a class.

RESPONSE TO COUNT I
Breach of Contract/Implied Contract

51. This is an incorporation-by-reference paragraph to which no response is required. To the extent a response is required, the answers to paragraphs 1 through 50 of the Second Amended Complaint are incorporated by reference and realleged, as if fully set forth herein.

52. The allegations set forth in paragraph 52 state conclusions of law to which no response is required. To the extent a response is required, these allegations are denied.

53. The allegations set forth in paragraph 53 state conclusions of law to which no response is required. To the extent a response is required, these allegations are denied.

54. The allegations set forth in paragraph 54 state conclusions of law to which no response is required. To the extent a response is required, these allegations are denied.

55. The allegations set forth in paragraph 55 state conclusions of law to which no response is required. To the extent a response is required, these allegations are denied.

56. The allegations set forth in paragraph 56 state conclusions of law to which no response is required. To the extent a response is required, these allegations are denied.

57. The allegations set forth in paragraph 57 state conclusions of law to which no response is required. To the extent a response is required, these allegations are denied.

58. The allegations set forth in paragraph 58 state conclusions of law to which no response is required. To the extent a response is required, these allegations are denied.

59. The allegations set forth in paragraph 59 state conclusions of law to which no response is required. To the extent a response is required, these allegations are denied.

60. The allegations set forth in paragraph 60 state conclusions of law to which no response is required. To the extent a response is required, these allegations are denied.

RESPONSE TO DEMAND FOR RELIEF

WHEREFORE, any and all liability is denied, and it is denied that Plaintiff is entitled to any relief.

NEW MATTER

1. The responses to the allegations in the Second Amended Complaint, as stated above, are hereby repeated and incorporated by reference.

2. Each averment not specifically admitted in this Answer is denied.

3. Plaintiff's Second Amended Complaint fails to state a claim upon which relief may be granted.

4. Plaintiff's Second Amended Complaint fails because HealthPort was not and is not a "health care provider" or "facility" subject to the alleged requirements of the MRA.

5. Plaintiff's claims are barred in whole or in part because HealthPort's charges were reasonable and justified by the decisional law of the Commonwealth of Pennsylvania interpreting the applicable provisions of the MRA.

6. Plaintiff's claims are barred in whole or in part because HealthPort did not overcharge Plaintiff (or any patient, patient designee or patient representative) for the reproduction of medical records under the MRA.

7. Plaintiff's claims are barred in whole or in part because HealthPort complied with any duty it had under the MRA by obtaining "prior approval" from the Plaintiff for the fees that it charged pursuant to § 6152(a)(2)(i).

8. Plaintiff had knowledge (and/or means of knowledge) of all relevant facts, including facts relating to the fees, and he voluntarily paid them.

9. Plaintiff's claims are barred by the voluntary payment doctrine.

10. Plaintiff's claims are barred by the doctrine of accord and satisfaction.

11. Plaintiff's claims are barred under the doctrines of estoppel, waiver, truth, consent, failure of consideration, and res judicata.

12. All equitable defenses, including, but not limited to, the defense of "unclean hands," are asserted.

13. Plaintiff has not diligently pursued his claims, to the prejudice of the defense.

14. Plaintiff's claims are barred in whole or in part by the statute of limitations, laches, and other limitations defenses.

15. Plaintiff's claim to damages is unfounded, is otherwise speculative, and is not proximately caused by HealthPort's conduct.

16. Plaintiff's Second Amended Complaint fails to identify a class capable of certification pursuant to the requirements in Pa. R. Civ. P. 1701 *et seq.*

17. Plaintiff failed to exhaust his administrative or other available remedies.

18. Plaintiff lacks standing to pursue his claims as alleged.

19. Plaintiff is not entitled to attorneys' fees or litigation costs.

20. Plaintiff is not entitled to an award of punitive damages.

21. All applicable affirmative defenses, including, but not limited to, those defenses under Pennsylvania Rule of Civil Procedure 1030, are hereby asserted.

22. Any additional defenses raised by any of the other defendants in the cases coordinated with this one are hereby incorporated by reference.

23. The right to amend the New Matter to raise additional defenses and/or counterclaims which may be disclosed during the investigation of this case or through the discovery process is reserved.

WHEREFORE, any and all liability is denied, and judgment should be entered in HealthPort's favor and against Plaintiff with cost of suit sustained.

Dated: March 16, 2020

Respectfully Submitted:

/s/ Anna Shabalov
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Counsel for Defendant

ATTORNEY VERIFICATION

I, Anna Shabalov, hereby certify that I am counsel for defendant CIOX Health, LLC ("CIOX") and am authorized to make this Verification on behalf of CIOX.

I hereby declare that I reviewed Defendant's Answer and New Matter, but do not have personal knowledge with respect to all of the information contained therein. Based on these qualifications, I verify that the facts contained herein are true and correct to the best of my knowledge, information and belief. This statement and verification is made subject to the penalties of 18 Pa. C.S.A. § 4904 relating to unsworn fabrication to authorities, which provides that if I make knowingly false averments, I may be subject to criminal penalties.

I intend to supplement this Answer and New Matter with a signed verification on behalf of CIOX at a later date.

Dated: March 16, 2020

/s/ Anna Shabalov
Anna Shabalov

CERTIFICATE OF SERVICE

I hereby certify that on March 16, 2020, I served a copy of the foregoing Defendant's Answer and New Matter to Plaintiff's First Amended Class Action Complaint by U.S. Mail, postage prepaid, on the following counsel of record:

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/s/ Anna Shabalov
Anna Shabalov

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been served upon counsel of record by Electronic Mail this 8th Day of June 2026 addressed as follows:

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s/
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