IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

DAVID M. LANDAY,

Representative Plaintiff,

v.

Datavant, LLC formerly known as IOD Incorporated,

Defendant.

CIVIL DIVISION
CLASS ACTION

GD-09-012922

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

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Attorneys for Representative Plaintiff and the Putative Classes

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

DAVID M. LANDAY, Representative Plaintiff, v. CIOX HEALTH LLC formerly known as Health Port Technologies LLC, Defendant.	CIVIL DIVISION CLASS ACTION No. GD-09-012923 Coordinated With: GD-09-012919; GD-09-012922; and GD-09-014785

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

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

Plaintiff,

vs.

IOD INCORPORATED,

Defendant.

CIVIL DIVISION

Case No.:

GD-09-012922

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

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 IOD Incorporated ("IOD") for reproductions of medical records.

2. By law, a medical records reproduction company ("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 IOD 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 Requesters that was in excess of the actual and reasonable cost of searching for, retrieving, reproducing and transmitting the records.

THE PARTIES

4. Plaintiff Wayne M. Chiurazzi 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. Defendant IOD is a corporation or other entity with headquarters at 1030 Ontario Road, P.O. Box 19025, Green Bay, Wisconsin 54307. 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 Requesters. 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 Reproductions Based Upon The Estimated Actual and Reasonable Cost

6. Under Pennsylvania 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 a legal right to obtain reproductions of their 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.

IOD Operates As An MRRC To Provide Reproductions Of Medical Records To Medical Records Requestors

12. Defendant IOD is an MRRC that has entered into exclusive medical records reproduction contracts with numerous Pennsylvania hospitals and hospital systems, including Excela Health Westmoreland Regional Hospital.

13. Under these contracts, IOD 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, IOD 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 IOD 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 IOD and makes the requested medical records available to IOD, usually electronically. IOD then contacts the Medical Records Requester 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, IOD, 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, IOD 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 IOD. 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.

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

21. IOD 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. IOD 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 IOD 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 IOD 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 IOD

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 IOD 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 IOD 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 IOD 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 IOD's actual and reasonable reproduction costs.

25. With respect to search and retrieval fees, for requests received after January 1, 2009, Defendant IOD 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 IOD 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 IOD 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 IOD 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 IOD 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 IOD's actual and reasonable search and retrieval costs.

Representative Plaintiff Was Subjected To Defendant's Billing Practices

26. In or around March of 2009, Plaintiff sent Excela Health Westmoreland Regional Hospital an authorization from Patient "A" requesting a reproduction of Patient A's hospital medical records.

27. In response to this request, IOD sent Plaintiff an invoice for $42.42. This invoice is attached as Exhibit 1. Unbeknownst to Plaintiff, the invoice did not reflect charges based upon IOD's actual or estimated actual expenses for locating, retrieving, reproducing and transmitting the medical records. The medical records charges included a $19.80 fee for search and retrieval; a $1.33 per page fee for the reproduction of 16 pages of medical records; and a delivery or postage fee of $1.34.

28. Plaintiff having no other method of obtaining the medical records and believing the invoice comported with the law, Plaintiff paid IOD the requested $42.42. In exchange for this payment, IOD provided the requested reproduction of Patient A's hospital record.

CLASS ACTION ALLEGATIONS

29. 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 IOD 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).

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

Numerosity

30. 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 IOD. 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

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

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

e. Does IOD'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?

f. Does IOD'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?

g. Did a constructive trust arise due to IOD's knowing acquisition of monies in excess of its 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?

h. Was Defendant IOD unjustly enriched by its acceptance and retention of payments made by Medical Records Requesters 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?

Typicality

32. 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 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.

33. On information and belief, Plaintiff avers 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 the reproduction of Pennsylvania hospital and affiliated entity medical records.

34. On information and belief, Plaintiff avers that IOD 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 the reproduction of Pennsylvania hospital and affiliated entity medical records.

35. 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; and payment of medical records search and retrieval charges that exceeded Defendant's actual and/or estimated actual and reasonable expenses incurred.

Adequacy of Representation

36. Representative Plaintiff will assure the adequate representation of all members of the Class. Plaintiff's claims are typical of the Class's claims. Plaintiff has no conflict with Class Members in the maintenance of this action, and Plaintiff's interest in this action is antagonistic to Defendant's interests.

37. Plaintiff's interests are coincident with, and not antagonistic to, absent Class Members' interests because, by proving Plaintiff's individual claims Plaintiff will necessarily prove Defendant's liability as to the Class's claims.

38. Plaintiff is also cognizant of and determined to faithfully discharge its fiduciary duties to the absent Class Members as Class Representative. Plaintiff will vigorously pursue the Class's claims. Plaintiff is aware that it cannot settle this Class Action without prior Court approval. Representative Plaintiff has and/or can acquire the financial resources to litigate this Class Action.

39. 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

40. A class action provides 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.

41. The substantive claims of 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.

42. 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.

43. To Plaintiff's knowledge no other similar actions are pending against this Defendant in Pennsylvania.

44. This forum is appropriate for litigation of this Class Action because Plaintiff is located here and Defendant conducts business here.

45. 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.

46. 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.

47. 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

48. Plaintiff re-alleges and incorporates by reference each and every allegation in the preceding paragraphs.

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

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

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

52. By agreeing to provide and/or providing the requested medical records, Defendant IOD 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 the permissible fees that may be charged Medical Records Requestors in relation to these medical records requests and/or activities.

53. 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 IOD's actual and/or estimated actual and reasonable expenses, Defendant IOD 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.

54. Defendant IOD's conduct, as described at length above, constitutes a breach or breaches of contract and/or implied contract between Defendant IOD and Plaintiff, and the contracts and/or implied contracts between Defendant IOD 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.

55. As a result of Defendant IOD'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.

56. Defendant IOD's conduct was intentional, willful, wanton, reckless, and outrageous because Defendant IOD 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

57. Plaintiff re-alleges and incorporates by reference each and every allegation in the preceding paragraphs.

58. At all times material hereto, IOD was aware that it was billing, charging and/or collecting from Medical Records Requesters fees in excess of those authorized by law for the reproduction of Pennsylvania hospital and affiliated entity medical records. On information and belief, IOD 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.

59. Notwithstanding this knowledge, IOD charged and collected from the Representative and Class Plaintiff fees in excess of IOD'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. IOD thus accepted and appreciated an additional benefit over and above what is authorized by law.

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

COUNT III

Constructive Trust

61. Plaintiff re-alleges and incorporates by reference each and every allegation in the preceding paragraphs.

62. Plaintiff paid money to IOD on the condition that the money represented payment for the 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.

63. IOD 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.

64. IOD has wrongfully acquired and retained money obtained from Plaintiff.

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

COUNT IV

Unjust Enrichment – Quasi Contract

66. Plaintiff re-alleges and incorporates by reference each and every allegation in the preceding paragraphs.

67. Plaintiff has conferred benefits upon IOD 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 IOD's actual and/or estimated actual and reasonable costs incurred in these activities.

68. Defendant IOD has accepted and appreciates these conferred benefits in that IOD 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.

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

70. Accordingly, Plaintiff is entitled to judgment in the amount of money unjustly conferred on Defendant IOD.

COUNT V

Relief Pursuant To Declaratory Judgments Act

71. Plaintiff re-alleges and incorporates by reference each and every allegation in the preceding paragraphs.

72. An actual controversy has arisen between Plaintiff and all others similarly situated, on the one hand, and IOD 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.

73. Plaintiff contends that IOD'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. Plaintiff is informed and believes that IOD contends the contrary.

74. 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 IOD are continuing in that regard, and apparently will be continued into the indefinite future, Plaintiff and all others similarly situated have no adequate remedy at law to protect themselves from such ongoing practices other than through declaratory relief.

75. Plaintiff thus seeks 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. Plaintiff further seeks 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, Plaintiff demands judgment against Defendant IOD as follows:

1. Certifying this action as a Class Action with Plaintiff as the Representative 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. 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;

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

d. Awarding damages to Plaintiff 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;

e. 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;

f 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 PLAINTIFF

WAYNE M. CHIURAZZI LAW INC.
CLIENT EXPENSES
101 SMITHFIELD STREET
PITTSBURGH, PA 15222

3242

DATE 4-20-09

8-9/430
678

PAY TO THE ORDER OF IOD Incorporated $ 42.42

Forty two 42/100 DOLLARS

PNCBANK
PNC Bank, N.A. 001
Pittsburgh, PA

FOR [redacted]

⑈003242⑈ ⑆043000096⑆ 4013182223⑈

Mastercard, Visa, Discover & Checks accepted.

Account Activity

Invoice #	Patient Name Facility Name	Reference Number	Date	Invoice Total	Balance Due
1-KP33582-0	[redacted] EXCELA REALTH WESTMORELAND REGIONAL HOSPITAL	NA	4/7/2009	42.42	42.42
			Total Balance Due		42.42

** The above charges are for copies of medical records ** Credit balances will be applied to invoices over 60 days **

Detach and return the bottom portion with payment — Retain top portion for your records

Statement Date: 4/8/2009
Customer Number: 412434077302
CHIURAZZI & MEGINE

Total Balance Due 42.42

☐ Please check here for change of address
See back for change of address form

Total Amount Enclosed

$

Include invoice number(s) on check and make payable to:

[redacted]
IOD INCORPORATED
PO BOX 19058
GREEN BAY WI 54307

end cash. Please allow 7 to 10 days for postal delivery

PENGAD 800-631-6989

EXHIBIT
1

EXHIBIT
4

1-4-10
10:00
Motion
Judge

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

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

Plaintiff,

v.

IOD INCORPORATED,

Defendant.

CIVIL DIVISION

Case No. GD-09-012922

IOD INCORPORATED'S PRELIMINARY OBJECTIONS, PROPOSED ORDER, AND BRIEF IN SUPPORT OF PRELIMINARY OBJECTIONS

Filed on Behalf of: Defendant IOD Incorporated.

Counsel of Record for this Party:

Don P. Foster, Esquire
Pa. I.D. No. 25809
Glenn A. Weiner, Esquire
Pa. I.D. No. 73530
Patrick J. Troy, Esquire
Pa. I.D. No. 89890

Klehr, Harrison, Harvey, Branzburg & Ellers LLP
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(Party represented by out-of-county counsel only)

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

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

Plaintiff,

vs.

IOD INCORPORATED,

Defendant.

CIVIL DIVISION

Case No. GD-09-012922

IOD INCORPORATED'S PRELIMINARY OBJECTIONS

Filed on Behalf of: Defendant IOD Incorporated.

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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,	CIVIL DIVISION
Plaintiff,	Case No. GD-09-012922
v.	**IOD INCORPORATED'S**
IOD INCORPORATED,	**PRELIMINARY OBJECTIONS**
Defendant.	

NOW, comes the Defendant, IOD Incorporated ("IOD"), pursuant to Pa. R. Civ. P. No. 1028, and requests that the court dismiss the complaint for legal insufficiency, failure to conform to law or rule of court and failure to exercise or exhaust a statutory remedy, in support whereof Defendant avers as follows:

I. DEMURRER TO COUNTS I AND V

1. Count I of the complaint seeks damages for breach of a contract. Plaintiff alleges that the rate requirements of the Medical Records Act, 42 Pa.C.S. § 6152 et. seq. ("the Act"), are implied terms of a contract between the parties whereby IOD produced medical records to the plaintiff upon written request. Count V seeks a Declaration that Plaintiff's construction of the Act is correct.

2. Plaintiff alleges that rates dictated by section 6152(a)(2)(i) of the Act, 42 Pa.C.S. § 6152(a)(2)(i), are merely a statutory maximum, or a permissible "ceiling" that a medical provider, or its agent, may charge when producing medical records to a patient or a patient's representative. The Plaintiff construes the Act as requiring that all bills for retrieving, copying

and producing medical records be cost-based if in fact the actual cost is less than the alleged statutory ceiling.

3. Plaintiff's construction of the Act is inconsistent with controlling decisional law in Pennsylvania interpreting the sections of the Act relied upon by the Plaintiff. The Superior Court has recently held that the rates set forth in section 6152(a)(2)(i) are mandatory rates that must be charged for the production of medical records. *See, Liss & Marion, P.C. v. Recordex Acquisition Corp.*, 937 A.2d 505 (Pa. Super. 2007), *pet. for allowance of appeal granted,* 598 Pa. 496, 957 A.2d 1175 (2008).

4. Plaintiff has alleged that at all times IOD charged the rates required by the Act. It has therefore alleged that IOD has at all times complied with the Act, as construed by the Superior Court. Accordingly, Plaintiff has alleged that IOD has complied with the law, and has not breached any express or implied term of any contract between the parties. It has therefore failed to state a cause of action and its complaint must be dismissed pursuant to Pa. R. Civ. P. No. 1028(a)(4).

5. Furthermore, Plaintiff improperly seeks to imply into the parties' alleged contract a statute which does not permit a private cause of action. Although the Superior Court has held that such implication of the terms of the Act is permissible, that issue is currently pending before the Supreme Court. IOD therefore raises this objection in order to preserve its right to move for dismissal of the complaint should the Supreme Court reverse the Superior Court on this issue.

II. FAILURE TO EXERCISE OR EXHAUST STATUTORY REMEDY

6. The Act is part of Pennsylvania's Evidence Code. In the event that a medical provider or facility fails to comply with the Act, a requestor's exclusive statutory remedy is to enforce the Act by motion to the Court, in the event that the records have been requested pursuant to subpoena issued in the context of a pending lawsuit, or by a miscellaneous action in

the event the records have been requested in a non-litigation context. The plaintiff here failed to exercise whichever of these remedies was available to it. Counts I and V of the Complaint must therefore be dismissed pursuant to Pa. R. Civ. P. No. 1028(7).

III. DEMURRER TO COUNTS II—IV: ADEQUATE LEGAL REMEDY

7. Count II seeks restitution of any amounts paid by plaintiff above the actual cost to IOD of producing the records requested by the plaintiff. Count III seeks the imposition of a constructive trust over those same amounts.

8. Restitution and Constructive Trust are remedies, not independent causes of action. They depend upon a viable claim of unjust enrichment or quasi-contract. Accordingly Counts II and III are legally insufficient and must be dismissed.

9. Count IV alleges that IOD has been unjustly enriched as a result of plaintiff's payment of the alleged statutory maximum rates, as opposed to a lower, cost-based amount, and seeks reimbursement of the overpayment. Unjust enrichment is not a legally sufficient cause of action when there is a contract between the parties. The plaintiffs have plead a contract, and the Superior Court has ruled that the relationship between a medical records requestor and supplier is a contractual relationship. Because a contract exists between the parties, the plaintiff may not sue for unjust enrichment. Count IV must be dismissed as legally insufficient under Pa. R. Civ. P. No. 1028(a)(4).

IV. FAILURE TO CONFORM TO LAW OR RULE OF COURT

10. Pa. R. Civ. P. No. 1019(i) requires a pleader to attach a copy of any writing that forms the basis for a claim or defense.

11. Paragraph 26 of the complaint alleges that the plaintiff sent a written request to a medical facility for copies of a client's medical records, which prompted the invoice attached as

Exhibit 1 to the complaint. That written request is part of the writings which contain the terms of any contract between the parties. The plaintiff has not attached that request to its complaint.

12. The complaint therefore fails to conform to a rule of court and must be dismissed.

V. DEMURRER TO COUNTS I—IV: VOLUNTARY PAYMENT

13. The Voluntary Payment Doctrine bars recovery of a payment not legally owed, but paid voluntarily. The plaintiff has not plead that it was operating under a mistake of fact when it voluntarily paid the invoice attached as exhibit 1 to the complaint. The plaintiff has plead instead that IOD billed the alleged maximum rates allowed by the Act. Those rates were publicly available to the plaintiff for comparison to the rates that were billed. The plaintiff has failed to allege that IOD did anything to mislead the plaintiff into thinking that it was not being billed the alleged statutory maximum.

14. If the plaintiff was operating under a mistaken interpretation of the law at the time it paid IOD's bill, or failed to take any step to determine whether it was being billed what it considered to be the legally mandated rate, then it is barred from recovery by the Voluntary Payment Doctrine.

VI. LEGAL INSUFFICIENCY OF DEMAND FOR PUNITIVE DAMAGES

15. Plaintiff's demand for relief includes a claim for punitive damages.

16. Punitive damages are not recoverable in a contract action; nor does the Act provide for an award for punitive damages inasmuch as it does not contemplate a private cause of action for damages. Plaintiff's demand for punitive damages must therefore be stricken.

VII. LEGAL INSUFFICIENCY OF REQUEST FOR ATTORNEYS FEES

17. 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 pled 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, defendant prays that the court dismiss the complaint with prejudice, and grant such other relief it deems appropriate under the circumstances.

KLEHR, HARRISON, HARVEY,
BRANZBURG & ELLERS LLP

Dated: September 29, 2009 By: 

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Patrick J. Troy, Esquire
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Attorneys for Defendant
IOD Incorporated

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

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

Plaintiff,

v.

IOD INCORPORATED,

Defendant.

CIVIL DIVISION

Case No. GD-09-012922

IOD INCORPORATED'S PROPOSED ORDER GRANTING PRELIMINARY OBJECTIONS

Filed on Behalf of: Defendant IOD Incorporated.

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,	:	CIVIL DIVISION Case No. GD-09-012922
Plaintiff,	:	
v.	:	
IOD, INCORPORATED	:	
Defendant.	:	

ORDER

NOW, this day of , 2009, upon consideration of Defendant IOD Incorporated's Preliminary Objections to Plaintiff's Complaint and Answer thereto, it is hereby ORDERED and DECREED that the Objections are SUSTAINED. The Complaint is dismissed with prejudice.

BY THE COURT:

_____
J.

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

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

Plaintiff,

vs.

IOD INCORPORATED,

Defendant.

CIVIL DIVISION

Case No. GD-09-012922

IOD INCORPORATED'S BRIEF IN SUPPORT OF PRELIMINARY OBJECTIONS

Filed on Behalf of: Defendant IOD Incorporated.

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,	CIVIL DIVISION
Plaintiff,	Case No. GD-09-012922
v.	
IOD INCORPORATED,	**BRIEF OF IOD INCORPORATED IN SUPPORT OF PRELIMINARY OBJECTIONS**
Defendant.	

Defendant IOD Incorporated ("IOD") submits this brief in support of its Preliminary Objections to the Complaint filed by plaintiff Chiurazzi & Mengine LLC ("C&M").

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. Plaintiff's complaint relies exclusively on an incorrect construction of Pennsylvania's Medical Records Act, 42 Pa.C.S. §§ 6151-6160 (the "Act"), which is contrary to controlling decisional law interpreting the Act. Accordingly, Count I of the Complaint, for breach of contract, and Count V, for declaratory relief, must be dismissed as legally insufficient under Pa. R. Civ. P. No. 1028 (a)(4). Plaintiff's claims for: restitution (Count II), the imposition of a constructive trust (Count III) and unjust enrichment (Count IV) must be dismissed under Pa. R. Civ. P. 1028(a)(2) and (4) inasmuch as the plaintiff has plead the existence of a contract, which bars equitable relief. Accordingly, the complaint must be dismissed in its entirety.

II. FACTUAL BACKGROUND

A. The Allegations of Chiurazzi & Mengine's Complaint

C&M is a law firm which from time-to-time requests medical records from health care providers on behalf of its clients. It alleges that it has been repeatedly overcharged by IOD in relation to those medical records requests. Compl. at ¶ 4. A true and correct copy of the Complaint is attached as Exhibit A. The complaint further alleges the existence of a putative class of plaintiffs comprised of patients, patient designees, representatives and attorneys who also were overcharged by IOD for reproductions of medical records. *Id.* at ¶ 3.[1]

According to C&M, "[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 ¶ 9. C&M contends that, as a result:

> Pennsylvania law, . . . imposes a duty on [medical records reproduction companies, like IOD] to establish procedures to estimate their actual costs for search, retrieval, reproduction and transmittal of medical records and then to charge [Requestors] 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 ¶ 10.

C&M alleges that IOD has 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

[1] Plaintiff has filed identical complaints in this court against the following medical records providers: the University of Pittsburgh Medical Center – Presbyterian Shadyside (GD-09-012919), HealthPort Technologies LLC (GD-09-012923), MRO Corporation (GD-09-012911), and Magee-Womens Hospital of the University of Pittsburgh Medical Center (GD-09-014785). On August 19, 2009, HealthPort removed the complaint to the United States District Court for the Western District of Pennsylvania pursuant to 28 U.S.C. §§ 1332(d) and 1441. The remaining complaints are in the process of being consolidated in this court.

the actual costs associated therewith." *Id.* at ¶¶ 22, 23. Specifically, C&M alleges that the invoice attached as Exhibit 1 to the complaint did not "reflect charges based upon IOD's actual or estimated actual expenses for locating, retrieving, reproducing and transmitting the medical records." *Id.* at ¶ 27. Instead the bill was for the statutory "ceilings" imposed by the Act. Accordingly, C&M "having no other method of obtaining medical records and believing the invoice comported with the law, paid IOD the requested $42.42. In exchange for this payment, IOD provided the requested reproduction of Patient A's hospital record." *Id.* at ¶ 28.

Count I of the complaint asserts a cause of action for breach of contract—alleging that it is implicit in each agreement to provide records that the production will be done in a manner consistent with the Act. *Id.* at ¶¶ 48-56. Count II seeks restitution for the fees IOD charged in excess of its actual and/or estimated costs "incurred in the search for and retrieval, reproduction, and transmittal" of medical records. *Id.* at ¶ 58. Count III seeks a constructive trust because "IOD has wrongfully acquired and retained money obtained from Plaintiff." *Id.* at ¶ 64. Count IV seeks a judgment for the amount of money unjustly conferred on IOD under a theory of unjust enrichment/quasi contract. *Id.* at ¶¶ 66-70. Finally, Count V seeks a declaration that C&M's instruction of the Act is correct. *Id.* at ¶74.

B. The Medical Records Act

The portions of the Act invoked by the plaintiff are found in Section 6152(a), 42 Pa.C.S. § 6152(a). It provides, in pertinent part, that:

> (1) When a subpoena duces tecum is served upon any healthcare provider...requiring the production of any medical charts or records...it shall be deemed a sufficient response to the subpoena...[to] notif[y] the attorney for the party causing service of this subpoena...of the healthcare 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 healthcare 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 $15.00 for searching for and retrieving the records; $1.00 per page for paper copies for the first 20 pages; $.75 per page for pages 21-60; and $.25 per page for page 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 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) and (2)(i). Section 6155 (b) of the Act, 42 Pa. C.S. § 6155(b), allows a patient or his designee, including his attorney, to access medical records without the use of a subpoena, and limits the amounts a health care provider or facility can charge to those amounts set forth in section 6152(a)(2)(i).

C. The *Liss & Marion* Decision

In *Liss & Marion, P.C. v. Recordex Acquisition Corp.*, 937 A.2d 505 (Pa. Super. 2007) ("*Liss & Marion*"), the Superior Court construed the very portions of the Act C&M invokes in its Complaint. [2] That construction is fatal to this lawsuit.

In *Liss & Marion*, the Superior Court affirmed an Order and Opinion of the Court of Common Pleas of Philadelphia County which had held that: (1) the Act was an implied term of each contract to purchase medical records; (2) the Act dictates two rates to bill for the cost of

[2] On September 24, 2008, the Pennsylvania Supreme Court granted Recordex's petition for allowance of appeal. *See Liss & Marion, P.C. v. Recordex Acquisition Corp.*, 598 Pa. 496, 957 A.2d 1175 (2008). Oral argument was heard on April 14, 2009. The Supreme Court has yet to rule. Thus, the Superior Court's decision in *Liss & Marion* controls here because "unless and until a Superior Court decision is overruled by the Supreme Court, the Superior Court decision constitutes the law of Pennsylvania with regard to the subject matter of the decision." *Rago v. State Farm Mut. Auto. Ins. Co.*, 355 Pa.Super. 207, 215, 513 A.2d 391, 395 (1986).

reproducing medical records: one rate for copies made from records stored on microfilm; and a second, lower rate for any paper copy made from records stored on any non-microfilm medium, including records stored in original paper form or records stored electronically; and (3) that Recordex had violated the terms of the Act by billing for copies stored in electronic media at the higher of the two rates—that is, at the microfilm rate as opposed to the rate set for "paper copies".[3] *Id.* at 508, n.5. A true and correct copy of the trial court's opinion is attached hereto as Exhibit B.

On appeal, the Superior Court affirmed, and held that "the billing limitations set forth in the Act were implicitly included in any agreement entered into by the parties." *Id.* at 512.[4] It also affirmed the trial court's construction of § 6152(a), holding that: "[t]he statute provides for only two rates, a rate for paper copies and a higher charge for copies from microfilm." *Id.* at 512-13. It found that, although the language of the Act does not specifically provide billing limitations for copies of medical records stored in any media other than microfilm, it does

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[3] It is important in understanding the gravamen of *Liss & Marion* that the lower court decision affirmed by the Superior Court interpreted the Act as referring to only one storage medium, microfilm, due to the reference to "copies from microfilm" (emphasis added). There is no reference in § 6152 (a)(2)(i) to copies "from" records stored "in" or "on" paper, only to "paper copies", which the Court construed as meaning the medium of production, not the medium of storage.

[4] IOD disputes the Superior Court's holding that the Act is an implied term of every agreement to purchase medical records, thereby enabling a private cause of action. In granting allocatur, the Supreme Court specifically accepted review of the issue of whether "a private cause of action for breach of an implied contract arise[s] out of a violation of the Medical Records Act." IOD agrees with Recordex's position in that appeal that the Act does not permit a private cause of action because the Act is part of the Evidence Code and the Rules of Civil Procedure. Accordingly, the remedy of a records requester, such as C&M, in the event of non-compliance is limited to a motion for contempt if a subpoena has issued or a miscellaneous action to enforce compliance if there is a request without a subpoena. Based on this theory, C&M's complaint is defective under both Rule 1028(a)(4) and 1028(a)(7) because the plaintiff failed to exhaust the remedies prescribed by the statute. IOD submits that the Superior Court erred in holding that the plaintiffs could avoid the procedural limitations of the Act through the artifice of a theory of implied contract. This is one of the issues certified by the Supreme Court for appeal. However, for the present purposes, but reserving its right to raise this issue in this case should the Supreme Court reverse, IOD is constrained by *Liss & Marion* and must assume that a private cause of action under the Act exists by way of a cause of action for breach of an implied contract.

mandate 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.* at 513 (quoting 42 Pa.C.S. § 6152(a)(2)(i), emphasis in original). The court concluded that Recordex "had the duty to seek prior approval of any charges for the copying of medical records not specifically provided for in the Act." *Id.* Thus, it affirmed the trial court's finding that Recordex had breached the implied terms of its agreement to reproduce medical records by defaulting to the higher microfilm rate when billing for reproduction of electronically-stored records, as opposed to the lower paper copy fee, without presenting evidence that copies of records stored electronically justified any increase of the paper coping cost or seeking prior approval to do so. *Id.* at 513, n.13.

This construction of the Act is diametrically opposed to that offered by C&M to support its complaint. The complaint must therefore be dismissed.

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 a preliminary objection for 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. *Giffin v. Chronister*, 151 Pa. Commw. 286, 291, 616 A.2d 1070, 1073 (1992) (citations omitted). More specifically, a preliminary objection in the nature of a demurrer is deemed to admit all well-pled facts and all inferences reasonably deduced from those facts. *Id.* 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.*

B. Plaintiff's Breach of Contract Claim Is Legally Insufficient.

To maintain a cause of action for breach of contract, 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. 2006). Under the controlling authority of *Liss & Marion,* C&M's complaint fails to establish the breach of any duty owed to C&M by IOD. The Act does not require that IOD bill plaintiffs for medical records in the manner alleged by C&M. IOD has no duty to limit its charges to its actual costs for its search, retrieval, reproduction and transmittal of the records, but rather is required to charge the rates set by the Act. This is precisely what C&M alleges IOD did. IOD's preliminary objections to plaintiff's claim for breach of contract should therefore be sustained, and C&M's breach of contract claims dismissed.

1. *Liss & Marion* precludes C&M's claim that IOD has a duty to calculate and charge the actual cost for reproducing medical records.

C&M's complaint is replete with allegations that the Act imposes a duty on IOD "to establish procedures to estimate [its] actual costs for search, retrieval, reproduction and transmittal of medical records and then charge [plaintiffs] only that cost." *See, e.g.*, Comp. at ¶¶ 10, 21, 50, and 53.

In *Liss & Marion*, however, the Superior Court held the inverse: "The health care provider, by the terms of the Act, was under an obligation to limit its charges for copies of medical records to those mandated in the Act, or to seek prior approval of a *higher charge* from the party requesting the records." 937 A.2d at 513. (emphasis supplied). Accordingly, IOD's right to charge different amounts to reproduce records than those dictated in the Act, and in turn seek the requestor's approval to do so, is triggered only when IOD seeks to bill at a rate higher than the rates set in the Act. As discussed more fully below, C&M does not allege that IOD's

charges exceeded the two rates set by the Act. In fact, it alleges that IOD did charge those rates. Therefore, C&M cannot maintain a cause of action for breach of contract because no duty under the Act was breached.

2. C&M's complaint fails to state a legally enforceable claim because from the face of the complaint IOD has complied with the Act.

C&M claims that IOD "automatically" charged the plaintiffs the rates set by the Act. Compl. at ¶ 23. Paragraphs 24 and 25 of the Complaint contain a lengthy recitation of the actual per page copying charges (¶ 24) and the related search and retrieval fees (¶ 25) billed by IOD during the relevant time period.[5]

The rates alleged by C&M in these paragraphs to have been billed by IOD reflect the annual adjustments made by the Secretary of Health to the rates initially mandated in section 6152(a)(2)(i) of the Act.[6] All C&M has therefore alleged is that IOD charged exactly what the

[5] Apparently IOD's billing for records stored on microfilm is not at issue in this lawsuit because the allegations in paragraphs 24 and 25 are limited to billing for documents stored on a medium other than microfilm.

[6] *Compare* ¶¶ 24 and 25 *to* 38 Pa. Bull. 6660 (Dec. 6, 2008): ("effective January 1, 2009: 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: Amount charged per page for pages 1-20 not to exceed $1.33; Amount charged per page for pages 21-60 not to exceed $0.99; Amount charged per page for pages 60-end not to exceed $0.33 ... Search and retrieval of records not to exceed $19.08...."); 37 Pa. Bull. 6356 (Dec. 1, 2007) ("effective January 1, 2008, 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: Amount charged per page for pages 1-20 not to exceed $1.28; Amount charged per page for pages 21-60 not to exceed $0.95; Amount charged per page for pages 60-end not to exceed $0.32 ... Search and retrieval of records not to exceed $19.00...."); 36 Pa. Bull. 7685 (Dec. 16, 2006) ("effective January 1, 2007, 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: Amount charged per page for pages 1-20 not to exceed $1.25; Amount charged per page for pages 21-60 not to exceed $0.93; Amount charged per page for pages 60-end not to exceed $0.31 ... Search and retrieval of records not to exceed $18.54...."); 35 Pa. Bull. 6591 (Dec. 2, 2005) ("effective January 1, 2006, 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: Amount charged per page for pages 1-20 not to exceed $1.23; Amount charged per page for pages 21-60 not to exceed $0.92; Amount charged per page for pages 60-end not to exceed $0.31 ... Search and retrieval of records not to exceed $18.30...."); 34 Pa. Bull. 6474 (Dec. 3, 2004) ("effective January 1, 2005, 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: Amount charged per page for pages 1-20 not to exceed $1.17; Amount charged per page for pages 21-60 not to

Act, as construed by the Superior Court, says it should have charged. "The health care provider, by the terms of the Act, was under an obligation to limit its charges for copies of medical records to those mandated in the Act, or to seek prior approval of a higher charge from the party requesting the records." *Liss & Marion,* 937 A.2d at 513. (emphasis supplied). C&M's complaint only alleges conduct which was required by controlling Pennsylvania authority. Such conduct cannot be actionable. Accordingly, C&M's breach of contract claims must be dismissed.

C. Plaintiff's Claims for Unjust Enrichment, Restitution and a Constructive Trust Are Legally Insufficient

1. Unjust Enrichment

Count IV of the complaint alleges a claim based on unjust enrichment/quasi contract. Compl., at ¶¶ 66-70. This claim fails because *Liss & Marion* held that "the billing limitations set forth in the Act were implicitly included in any agreement entered into the parties." *Id.*, 937 A.2d. at 512. Based on the Superior Court's explicit recognition of the incorporation of the Act into any agreement to reproduce medical records, C&M's unjust enrichment claim is legally insufficient, and IOD's preliminary objection to Count IV should be sustained. Because C&M's unjust enrichment claim fails, so must its claims for restitution (Count II) and a constructive trust (Count III), as they are simply remedies that depend upon the legal sufficiency of an unjust enrichment claim. *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.*

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exceed $0.88; Amount charged per page for pages 60-end not to exceed $0.30 ... Search and retrieval of records not to exceed $17.48....") For ease of reference the cited portion of the Bulletin is attached as Exhibit C.

v. Fleming Steel Co., 787 A.2d 988, 991 (Pa. Super. 2001). The doctrine of quasi-contract, or unjust enrichment, is therefore inapplicable where a contract exists between the parties. *Id.*

2. Restitution.

As for C&M's claim for restitution, in *Wilson Area Sch. Dist. v. Skepton*, 586 Pa. 513, 520, 895 A.2d 1250, 1254 (2006), the Pennsylvania Supreme Court recognized that the "doctrine of unjust enrichment contemplates that '[a] person who has been unjustly enriched at the expense of another must make restitution to the other.'" (citations omitted). In other words, restitution is a remedy in the event a defendant has been unjustly enriched. That remedy is only available in the absence of an express contract. The Superior Court has held that in the context of a request for medical records controlled by the Act, a contract exists. Therefore, restitution is not a remedy available to C&M.

3. Constructive Trust

In the same vein, "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. 1994) (citation omitted). No trust is necessary here because C&M cannot be unjustly enriched due to the existence of a contract. Its remedy is legal damages in the event of a breach of that contract. Accordingly, IOD's preliminary objections to Count III of the complaint should be sustained.

D. <u>Plaintiff's Complaint Fails To Conform to Rule of Court</u>

Pennsylvania Rule of Civil Procedure No. 1028(a)(2) allows for a preliminary objection for failure of a pleading to conform to law or rule of court. C&M's complaint fails to conform to Pa. R. Civ. P. No. 1019(i).

The complaint suggests that the "contract" at issue is the invoice attached as Exhibit 1. *See* Compl. at ¶¶ 26-28. However, Paragraph 26 alleges that C&M made a written request for records to which IOD responded by way of the invoice. *Id.* The invoice and plaintiff's payment are attached as Exhibit 1 to the Complaint, the request is not. Plaintiff's records request to IOD is, however, an integral part of the contract. Without the request, one is left to wonder what IOD was responding to, and just where in the interaction between the parties a contract was joined by an acceptance of an offer. This is particularly important in the context of the Act, which allows parties to agree to rates other than those set forth in the Act.

Accordingly, Plaintiff's breach of contract claim violates Rule 1019(i), and IOD's preliminary objections under Rule 1028(a)(2) should be sustained.

E. Counts I--IV of The Complaint Are Barred By The Voluntary Payment Doctrine

In paragraphs 24 and 25 of the Complaint, plaintiff alleges that for the calendar years 2005 through 2009, IOD "consistently" charged Medical Records Requestors the rates set forth in the paragraphs for the searching, retrieval, copying and transmittal of medical records. Attached as Exhibit C are excerpts from the Pennsylvania Bulletin which show the statutory rate set by the Secretary of Health for the period of time encapsulated by the allegations of paragraphs 24 and 25.[7]

The plaintiff has therefore alleged that for every invoice from June 15, 2005 to the present, IOD has charged the rates required by the Act, that it did not hide or misrepresent that it was charging these "maximum" rates (because the statutory rate and the invoiced rate are both available to the requestor for comparison), and that the plaintiff voluntarily paid the invoice

[7] Pursuant to 45 Pa.C.S. § 506, "[t]he contents of the code, of the permanent record thereto, *and of the bulletin, shall be judicially noticed.*" (emphasis added).

despite knowing, according to the complaint, that the statute required cost-based billing as opposed to automatic "maximum" rate billing. These allegations implicate the voluntary payment doctrine ("the Doctrine"), and require dismissal of the complaint.

The principle of voluntary payment precludes a claim for breach of contract when a bill has been paid voluntarily. *Sebastionelli v. Prudential Ins. Co. of Am.*, 337 Pa. 466, 470, 12 A.2d 113, 115 (1940); *see also*, *Kline v. Morrison*, 353 Pa. 79, 84, 44 A.2d 267, 269 (1945) ("It is well settled that money, not legally due, but paid voluntarily cannot be recovered back"). The Doctrine has been held in other jurisdictions to preclude claims of breach of contract for overpricing of medical records. *See Boykin v. Smart Corp.*, 669 So. 2d 939, 941 (Ala. Civ. App. 1995); *U-Haul Co. v. Johnson*, 893 So. 2d 307, 312 (Ala. 2004) (decertifying a class for failure to consider voluntary payment defense); *Morales v. CopyRight, Inc.*, 813 N.Y.S.2d 731, 732 (N.Y. App. Div. 2006) (dismissing class action complaint alleging overbilling of medical record reproduction costs on basis of voluntary payment defense); *Cotton v. Med-Cor Health Info. Solutions, Inc.*, 472 S.E.2d 92, 94 (Ga. Ct. App. 1996).

The plaintiff seeks to avoid the obvious question of why would an attorney who, even more than the layperson, is presumed to know the law, voluntarily pay an excessive bill, particularly when working in a fiduciary capacity and under a fee agreement that could well call for the client ultimately to pay the excessive bill, by alleging that when it paid IOD's invoices it "believ[ed] the invoice(s) comported with the law" Compl. at ¶ 28. C&M thereby presumably seeks to avail itself of the safe harbor of the Doctrine that when one has been fraudulently induced into a mistaken assumption of material fact, then the Doctrine will not bar a claim for breach of contract after a bill has been paid. *See, e.g., Acme Markets, Inc. v. Valley View Shopping Center, Inc.*, 493 A.2d 736, 737 (Pa. Super. 1985).

However, even the most generous reading of the complaint does not avoid the application of the Doctrine in this case. There is no allegation of fraud--indeed, the allegation is precisely the opposite: IOD clearly, and without any pretense, billed the rates set by the statute, as modified thereafter by the Secretary of Health, for producing medical records stored on microfiche, and the rates set by the statute for producing records stored on all other media, whether electronic or paper.

From the face of the complaint, it is clear that when the plaintiff paid its bill, it interpreted the statute in precisely the same manner as has the Superior Court in *Liss & Marion*, and in the same way IOD interpreted the Act when it submitted the bill. Even if the plaintiff's current construction of the statute is correct, and *Liss & Marion* says that it is not, that does not vitiate the effect of the Voluntary Payment Doctrine as mistakes of law do not permit ex post facto recovery of voluntarily paid bills. *Acme Markets,* 493 A.2d at 737 ("[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"). At best, it would entitle the plaintiff only to injunctive relief to compel compliance with its construction of the statute in the future.

For these reasons, IOD prays that the court dismiss Counts I through IV of the Complaint.

F. Plaintiff's Claim For Punitive Damages Should Be Stricken

In its Demand For Relief plaintiff seeks an award of punitive damages on all causes of action save Count V--the count seeking declaratory relief. This prayer should be stricken under Pa.R.Civ.P. Nos. 1028(a)(2), (3) and (4).

Plaintiff's cause of action sounds in contract. Its claim of breach arises out of what it alleges is IOD's failure to comply with the Act. Neither Pennsylvania common law of damages nor the statute implied into the contract allow for an award of punitive damages.

The general rule in Pennsylvania is that punitive damages are not recoverable in a contract case unless the action complained of independently would be a tort. *Restatement (second) Contracts* § 355. Unless the statute relied upon in a cause of action expressly provides for punitive damages, they are not recoverable. *Robson v. EMC Ins. Cos.*, 785 A.2d 507, 510 (Pa. Super. 2001).

Plaintiff has not alleged any conduct of IOD that is tortious. Although it alleges that IOD's breach was "intentional, willful, wanton, reckless, and outrageous" -- all boilerplate allegations in tort cases seeking punitive damages--it fails to allege any underlying conduct that is itself tortious. It has long been established that a party to a contract has a right to breach that contract, intentionally and for reasons of personal benefit, and only be liable for the damages that flow from that breach. *See, e.g.*, *Thyssen, Inc. v. SS Fortune Star*, 777 F.2d 57, 63 (2d Cir. 1985) ("Breaches of contract that are in fact efficient and wealth enhancing should be encouraged...."); *O.W. Holmes, The Path of the Law, Collected Legal Papers* 175 (1920) ("The duty to keep a contract at common law means a prediction that you must pay damages if you do not keep it--and nothing else").

Nor is there anything in the statute to suggest that the Legislature contemplated an award of punitive damages in the event that the rates set forth in the Act were ever implied into an agreement to reproduce medical records. Indeed, the fact that the Legislature did not see fit to create a private cause of action in the first instance is proof positive that it did not intend that punitive damages would ever be awarded for violation of the Act.

The prayer for punitive damages should therefore be stricken.

G. Plaintiff is Not Entitled to Attorneys Fees

Plaintiff's complaint also demands an award of 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 by the parties or some other established exception. *See Merlino v. Delaware County*, 556 Pa. 422, 425, 728 A.2d 949, 951 (1999). *See also* 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 attorneys' fees exists. Accordingly, Plaintiff's demand for attorneys' fees should be stricken from the Complaint.

IV. CONCLUSION

For the foregoing reasons, the defendants pray that the Court grant its preliminary objection and dismiss the complaint with prejudice.

KLEHR, HARRISON, HARVEY,
BRANZBURG & ELLERS LLP

Dated: September 29, 2009

By: _____

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CERTIFICATE OF SERVICE

I, Patrick J. Troy, hereby certify that a true and correct copy of the foregoing Preliminary Objections, Brief of IOD Incorporated in Support of Its Preliminary Objections, and Exhibits thereto were served via first class mail this 29th day of September, 2009 upon the following individuals:

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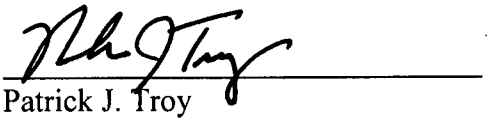

Patrick J. Troy

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

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

Plaintiff,

vs.

IOD INCORPORATED,

Defendant.

CIVIL DIVISION

Case No.:

GD-09-012922

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

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 IOD Incorporated ("IOD") for reproductions of medical records.

2. By law, a medical records reproduction company ("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 IOD 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 Requesters that was in excess of the actual and reasonable cost of searching for, retrieving, reproducing and transmitting the records.

THE PARTIES

4. Plaintiff Wayne M. Chiurazzi 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. Defendant IOD is a corporation or other entity with headquarters at 1030 Ontario Road, P.O. Box 19025, Green Bay, Wisconsin 54307. 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 Requesters. 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 Reproductions Based Upon The Estimated Actual and Reasonable Cost

6. Under Pennsylvania 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 a legal right to obtain reproductions of their 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.

IOD Operates As An MRRC To Provide Reproductions Of Medical Records To Medical Records Requestors

12. Defendant IOD is an MRRC that has entered into exclusive medical records reproduction contracts with numerous Pennsylvania hospitals and hospital systems, including Excela Health Westmoreland Regional Hospital.

13. Under these contracts, IOD 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, IOD 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 IOD 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 IOD and makes the requested medical records available to IOD, usually electronically. IOD then contacts the Medical Records Requester 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, IOD, 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, IOD 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 IOD. 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.

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

21. IOD 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. IOD 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 IOD 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 IOD 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 IOD

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 IOD 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 IOD 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 IOD 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 IOD's actual and reasonable reproduction costs.

25. With respect to search and retrieval fees, for requests received after January 1, 2009, Defendant IOD 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 IOD 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 IOD 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 IOD 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 IOD 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 IOD's actual and reasonable search and retrieval costs.

Representative Plaintiff Was Subjected To Defendant's Billing Practices

26. In or around March of 2009, Plaintiff sent Excela Health Westmoreland Regional Hospital an authorization from Patient "A" requesting a reproduction of Patient A's hospital medical records.

27. In response to this request, IOD sent Plaintiff an invoice for $42.42. This invoice is attached as Exhibit 1. Unbeknownst to Plaintiff, the invoice did not reflect charges based upon IOD's actual or estimated actual expenses for locating, retrieving, reproducing and transmitting the medical records. The medical records charges included a $19.80 fee for search and retrieval; a $1.33 per page fee for the reproduction of 16 pages of medical records; and a delivery or postage fee of $1.34.

28. Plaintiff having no other method of obtaining the medical records and believing the invoice comported with the law, Plaintiff paid IOD the requested $42.42. In exchange for this payment, IOD provided the requested reproduction of Patient A's hospital record.

CLASS ACTION ALLEGATIONS

29. 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 IOD 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).

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

Numerosity

30. 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 IOD. 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

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

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

e. Does IOD'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?

f. Does IOD'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?

g. Did a constructive trust arise due to IOD's knowing acquisition of monies in excess of its 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?

h. Was Defendant IOD unjustly enriched by its acceptance and retention of payments made by Medical Records Requesters 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?

Typicality

32. 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 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.

33. On information and belief, Plaintiff avers 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 the reproduction of Pennsylvania hospital and affiliated entity medical records.

34. On information and belief, Plaintiff avers that IOD 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 the reproduction of Pennsylvania hospital and affiliated entity medical records.

35. 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; and payment of medical records search and retrieval charges that exceeded Defendant's actual and/or estimated actual and reasonable expenses incurred.

Adequacy of Representation

36. Representative Plaintiff will assure the adequate representation of all members of the Class. Plaintiff's claims are typical of the Class's claims. Plaintiff has no conflict with Class Members in the maintenance of this action, and Plaintiff's interest in this action is antagonistic to Defendant's interests.

37. Plaintiff's interests are coincident with, and not antagonistic to, absent Class Members' interests because, by proving Plaintiff's individual claims Plaintiff will necessarily prove Defendant's liability as to the Class's claims.

38. Plaintiff is also cognizant of and determined to faithfully discharge its fiduciary duties to the absent Class Members as Class Representative. Plaintiff will vigorously pursue the Class's claims. Plaintiff is aware that it cannot settle this Class Action without prior Court approval. Representative Plaintiff has and/or can acquire the financial resources to litigate this Class Action.

39. 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

40. A class action provides 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.

41. The substantive claims of 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.

42. 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.

43. To Plaintiff's knowledge no other similar actions are pending against this Defendant in Pennsylvania.

44. This forum is appropriate for litigation of this Class Action because Plaintiff is located here and Defendant conducts business here.

45. 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.

46. 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.

47. 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

48. Plaintiff re-alleges and incorporates by reference each and every allegation in the preceding paragraphs.

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

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

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

52. By agreeing to provide and/or providing the requested medical records, Defendant IOD 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 the permissible fees that may be charged Medical Records Requestors in relation to these medical records requests and/or activities.

53. 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 IOD's actual and/or estimated actual and reasonable expenses, Defendant IOD 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.

54. Defendant IOD's conduct, as described at length above, constitutes a breach or breaches of contract and/or implied contract between Defendant IOD and Plaintiff, and the contracts and/or implied contracts between Defendant IOD 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.

55. As a result of Defendant IOD'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.

56. Defendant IOD's conduct was intentional, willful, wanton, reckless, and outrageous because Defendant IOD 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

57. Plaintiff re-alleges and incorporates by reference each and every allegation in the preceding paragraphs.

58. At all times material hereto, IOD was aware that it was billing, charging and/or collecting from Medical Records Requesters fees in excess of those authorized by law for the reproduction of Pennsylvania hospital and affiliated entity medical records. On information and belief, IOD 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.

59. Notwithstanding this knowledge, IOD charged and collected from the Representative and Class Plaintiff fees in excess of IOD'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. IOD thus accepted and appreciated an additional benefit over and above what is authorized by law.

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

COUNT III

Constructive Trust

61. Plaintiff re-alleges and incorporates by reference each and every allegation in the preceding paragraphs.

62. Plaintiff paid money to IOD on the condition that the money represented payment for the 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.

63. IOD 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.

64. IOD has wrongfully acquired and retained money obtained from Plaintiff.

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

COUNT IV

Unjust Enrichment – Quasi Contract

66. Plaintiff re-alleges and incorporates by reference each and every allegation in the preceding paragraphs.

67. Plaintiff has conferred benefits upon IOD 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 IOD's actual and/or estimated actual and reasonable costs incurred in these activities.

68. Defendant IOD has accepted and appreciates these conferred benefits in that IOD 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.

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

70. Accordingly, Plaintiff is entitled to judgment in the amount of money unjustly conferred on Defendant IOD.

COUNT V

Relief Pursuant To Declaratory Judgments Act

71. Plaintiff re-alleges and incorporates by reference each and every allegation in the preceding paragraphs.

72. An actual controversy has arisen between Plaintiff and all others similarly situated, on the one hand, and IOD 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.

73. Plaintiff contends that IOD'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. Plaintiff is informed and believes that IOD contends the contrary.

74. 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 IOD are continuing in that regard, and apparently will be continued into the indefinite future, Plaintiff and all others similarly situated have no adequate remedy at law to protect themselves from such ongoing practices other than through declaratory relief.

75. Plaintiff thus seeks 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. Plaintiff further seeks 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, Plaintiff demands judgment against Defendant IOD as follows:

1. Certifying this action as a Class Action with Plaintiff as the Representative 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. 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;

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

d. Awarding damages to Plaintiff 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;

e. 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;

f 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: _____
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Pa. I.D. No. 51281
David Paul, Esquire
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PIETZ LAW OFFICE, LLC

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ATTORNEYS FOR PLAINTIFF

WAYNE M. CHIURAZZI LAW INC.
CLIENT EXPENSES
101 SMITHFIELD STREET
PITTSBURGH, PA 15222

3242

DATE 4-20-09

PAY TO THE ORDER OF IOD Incorporated $ 42.42

Forty-two & 42/100 DOLLARS

PNCBANK
PNC Bank, N.A. 001
Pittsburgh, PA

FOR [redacted]

⑈003242⑈ ⑆043000096⑆ 4013182223⑈

Mastercard, Visa, Discover & Checks accepted.

Account Activity

Invoice #	Patient Name / Facility Name	Reference Number	Date	Invoice Total	Balance Due
1-KP33582-0	[redacted] EXCELA HEALTH WESTMORELAND REGIONAL HOSPITAL	NA	4/7/2009	42.42	42.42
			Total Balance Due		42.42

** The above charges are for copies of medical records ** Credit balances will be applied to invoices over 60 days **

Detach and return the bottom portion with payment — Retain top portion for your records

Statement Date: 4/8/2009
Customer Number: 412434077302
CHIURAZZI & MEGINE

Total Balance Due 42.42

☐ Please check here for change of address
See back for change of address form

Total Amount Enclosed
$

Include invoice number(s) on check and make payable to:

[redacted] IOD INCORPORATED
PO BOX 19058
GREEN BAY WI 54307

send cash. Please allow 7 to 10 days for postal delivery

EXHIBIT
1

PENGAD 800-631-6989

2,120

IN THE COURT OF COMMON PLEAS
OF PHILADELPHIA COUNTY

CIVIL TRIAL DIVISION

LISS & MARION, P.C.	:	FEBRUARY TERM, 2003
vs.	:	
RECORDEX ACQUISITION CORP., ET AL.	:	NO. 1117

OPINION

This is an appeal from the judgment following trial of a class action lawsuit. Plaintiff sued defendants for violation of the medical records Act 42 Pa. C.S. § 6151, et. seq. claiming that defendants billed parties in excess of the permissible charges under the Act for an extended period of time.

On July 9, 2004, following discovery and a full Certification Hearing the Court granted Plaintiff's Motion for Class Certification. The Court certified a class which consisted of "All individuals and entities who, with respect to a request or subpoena from medical records for charts of health care provider or employees 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 defendants had contracts with numerous Philadelphia Hospitals to provide copies of medical records on behalf of the hospitals to parties requesting same including

personal injury plaintiffs and attorneys representing those plaintiffs. The Act delineates permissible charges by any health care facility for "paper copies" and for "copies from microfilm." Defendants concede that at all relevant times it charged the maximum rates permissible for copies from microfilm rather than the lower permissible maximum charges for paper copies for all records electronically retrieved.

Accordingly, the issue presented at trial is whether records electronically retrieved are more like paper copies or more like microfilm copies and whether the act allows the higher charge for electronically retrieved records. The Order certifying the class for trial purposes was issued together with a Memorandum Opinion a copy of which is attached hereto and made part hereof and addresses all appellate issues concerning certification.

Defendants appeals claiming that the Courts grant of plaintiff's Motion for Summary Judgment as to liability was improper. Defendants also claim error in granting plaintiff's motion to mold the verdict by adding interest in the amount of $14,828.46. The calculation of interest is a ministerial act founded in statute and is to be added by the Court following verdict. After review of plaintiff's Motion and defendants' responses thereto and performing the ministerial mathematical calculation the Court determines there was no error in molding the verdict. Following trial, the Court entered a Verdict in the amount of $479,472.59 together with interest as provided by law on November 21, 2005. Finally defendants claim error in the denial of defendants' motion for leave to file a second amended new matter. The pleading aspects of this case began with the filing of an original complaint on February 10, 2003 and pleading practice proceeded until March 28, 2003 when plaintiff's second amended complaint was filed. By Order dated November 14, 2003 four counts of plaintiff's second amended complaint were dismissed

pursuant to defendants' preliminary objection. Defendants filed an answer with new matter including the affirmative defense of statute of limitations to plaintiff's second amended complaint on December 5, 2003. On December 12, 2003 plaintiff filed preliminary objections to defendants' new matter and on January 2, 2004 instead of substantively responding, defendants responded to plaintiff's preliminary objections by filing an amended new matter. The amended new matter filed on January 2, 2004 did not include any statute of limitations affirmative defense. During trial defendants argued that damages should be limited by a statute of limitations even though not plead. By formal motion defendant claimed "that affirmative a defense was inadvertently omitted from the amended new matter filed by defendants." The defense of statute of limitations is an affirmative defense which must be pled "in a responsive pleading under the heading 'new matter'."[1] An affirmative defense is waived if not pled as new matter.[2]

When a pleading has been amended, matters contained in the original pleading are no longer operative[3]. In Vetenshtein v. City of Philadelphia, 755 A.2d 62 (Pa. Commwlth. 2000) the Commonwealth Court held claims which had been initially properly pled had been waived when deleted from a second amended complaint citing Slekton and Standard Pennsylvania Practice. In this case Plaintiff litigated the case for years on the understanding that there was no affirmative defense of the statute of limitations. It was only until trial had commenced that any attempt to reinstitute this affirmative defense was even raised. Plaintiff would be severely prejudice by this late

[1] Pa. Rules of Civil Procedure 1030.
[2] Pa. Rules of Civil Procedure 1032a. See also Iorfida v. Mary Roberts Realty Co., Inc., 539 A.2d 383 (Pa. Super. Ct. 1988).
[3] See Slekton v. Lower Merion Township, 178 A 387 (Pa. 1935).

addition. Accordingly the denial of defendants' motion to amend the new matter during trial to plead an affirmative defense was properly denied.

By motion filed January 9, 2006 plaintiff sought approval for attorney's fees and a class representative incentive award. By Order dated March 2, 2006, Class counsel was awarded attorney's fees and reimbursement of litigation expenses in the amount of $61,052.23. The class representative Liss & Marion, PC was awarded $5,000.00. These costs were specifically identified in Exhibit C to plaintiff's Motion. The fee awarded was in accord with the extensive litigation activity summarized in the motion for this class action litigation which had been ably, diligently, and persistently defended for nearly three years. Corporate defendants unsuccessfully contested virtually every aspect of certification including jurisdiction and the substance of the allegations. Summary Judgment motions were extensively briefed and argued before the Court. Trial took place on October 20, 2005 and November 3, 2005. Pennsylvania Rules of Civil Procedure 1716 sets forth several factors to consider when awarded attorney's fees:

1. The time and effort reasonably expended by the attorney in the litigation.

2. The quality of the services rendered.

3. The results achieved and benefits conferred upon the class for the magnitude, complexity and uniqueness of the litigation, and

4. Whether the receipt of the fee was contingent on success.

As set forth in their motion, class counsel Alan M. Feldman and Thomas Moore Marrone devoted in excess of 300 attorney hours in the success pursuit of this litigation. The quality of services rendered by them attested to their professionalism and skill

eventually resulted in Summary Judgment as to liability and proof of hotly contested damages.

The benefits conferred on the Class are not limited to financial compensation. As a direct result of this lawsuit defendants have changed their billing practices. Although the case essentially turned on an interpretation of an ambiguous statute which failed to allow for advances in technology, the tenacity with which the defense fought every aspect of liability and damages rendered the case one of significant magnitude, complexity and uniqueness. Accordingly the attorney fee awarded was proper. Also proper was the limited award of $5,000.00 as an incentive to the class representative.

The Court properly granted plaintiff''s motion for summary judgment or liability and denied defendants motion for summary judgment. It is uncontested that the defendant routinely charged microfilm or microfiche rates for producing copies derived from non-mircofilm and non-mircofiche media. The Medical Records Act 42 Pa. C. S. § 6152 does not authorize such charges. Accordingly, the only legal issue in the case beyond the ministerial calculation of overcharges was the question of whether defendant's billing practices were unlawful. The facts were not in dispute.

Defendant Recordex represented and acted as agent for many hospitals including Abington Memorial Hospital and St. Christopher's Hospital. They provided copies of patient records. The Pennsylvania legislature in enacting the MRA expressly determined as a matter of public policy and as a specified monetary amount the right of record copy services to set rates and legislatively determined appropriate billing practices. The Act specifically provides that a health care provider which chooses to proceed under the Act and provide copies of charts and records may only charge the following: "The payment

shall not exceed $15.00 for searching for and retrieving the records, $1.00 per page for paper copies for the first twenty pages, $0.75 per page for pages 21 through 60 and $0.25 per page for pages 61 thereafter. One Dollar and fifty cents per page for copies from microfilm; plus actual costs of postage, shipping or delivery. No other charges for the retrieval, coping 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 copies of the medical records."[4]

The defendant admits to billing electronically retrieved copies at the higher microfilm rate and inaccurately listed on each bill that the charge was for "fiche/image copy charged". This uniform policy was confirmed by defendants' designee Bonnie Heim at deposition:

"Question: But to clarify, the question I asked and the answer you gave in response to the, if copies are produced from an electronic format, it has been the policy of Recordex and is the policy of Recordex to charge the microfilm rate for copies; is that right?

Answer: Yes."

The distinction between microfilm and electronic copying was further confirmed in that same deposition:

"Q: Is microfilm a different technology from the scanning of documents onto a disk?

A: Yes.

[4] 42 Pa. C. S. A. § 6152(2)(i). The Secretary of Health of the Commonwealth is authorized to adjust these figures and adjustments were made in January 2002 and January 2003. The actual amounts authorized by statute is a question for the damages phase of trial and does not impact the decision to grant summary judgment as to liability.

Q: Would you agree that the copying of records that have been scanned onto a disk has nothing to do with microfilm?

A: It has nothing to do with microfilm itself. It's a non-paper medium."

Accordingly the issue on summary judgment is the legal question of whether the defendants' violated the MRA when they billed the microfilm rate for copies made from non-microfilm media. The plain reading the language of the statute states: "No other charges for 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 coping of the medical records."[5]

The statute provides for only two rates, a rate for paper copies and a higher charge for copies from microfilm. The legislature clearly intended that the extra cost of turning microfilm copies into paper warranted a higher per page charge. No testimony whatsoever was offered that creating paper copies from electronic medium as opposed to copying paper copies from other paper copies required any increased costs. Indeed it is counter-intuitive to think that any costs are increased. The costs of producing a paper copy of medical records from electronically stored medical records is cheaper than the cost of producing a copy from even paper medical records because there is no need to disassemble records, feed records into a copier, and reassemble both the original and the copy. When producing paper records from an electronic format one needs only to print them.

The Act envisions a cost for paper copies and an additional cost if that paper copy had to be created from microfilm storage. Where the legislative language is clear, there

[5] Defendants' contention that acquiescence in the charges indicated "prior approval" and is an obtuse, grotesque reading the legislature's requirement of prior approval, especially in light of the misleading statement on the bill identifying the copies as "fiche/image copy charged."

is no need to investigate legislative intent. There is need to investigate legislative history,[6] and there is no need for interpretation. Indeed where the legislative language is clear it is impermissible pursuant to the legislative interpretation act for the court to go beyond the clear language of the statute. "When the words of a statute are clear and free from all ambiguity, the letter is not to be disregarded under the pretext of pursuing its spirit." 1 Pa. C. S. § 1921(b).[7] The statute provides a specific rate for "paper copies." An exception is allowed for a higher rate only when those paper copies need to be created "from microfilm."

Recordex's argument that the payment for the records constitutes a waiver of the right to seek recovery after learning of excess charge is unsupported by Pennsylvania Law. No copy was made from microfiche or microfilm. Nonetheless the charge authorized by the legislature only for such copies derived there from was billed. The legislature has the absolute authority to legislate economic issues including interest rates and charges for services. Having done so, defendant has violated this act by charging a higher than authorized fee and Summary Judgment was properly granted.

For the reasons set forth above, the verdict should be affirmed.

BY THE COURT

11/27/06
DATE

MARK I. BERNSTEIN, J.

[6] Of which there is precious little or none.
[7] Cherry v. Pennsylvania Higher Education Assistance Agency, 537 Pa. 186, 642 A.2d 463 (1994).

NOTICES

DEPARTMENT OF HEALTH

Amendments to Charges for Medical Records

[38 Pa.B. 6660]
[Saturday, December 6, 2008]

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--1041.4 and 2501--2506) and the regulations promulgated thereunder; (b) 75 Pa.C.S. Chapter 17 (relating to financial responsibility) 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, 2007, through October 31, 2008, the consumer price index was 4.2%.

Accordingly, the Secretary provides notice that, effective January 1, 2009, 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	$ 1.33
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	$ 1.96
Flat fee for production of records to support any claim under Social Security	$25.09
Flat fee for supplying records requested by a district attorney	$19.08
* Search and retrieval of records	$19.08

* *Note*: Federal regulations enacted under the Health Insurance Portability and Accountability Act at 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 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, www.hhs.gov/ocr/hipaa.

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 of Health is not authorized to enforce these charges.

Questions or inquiries concerning this notice should be sent to James T. Steele, Jr., Deputy Chief Counsel, Room 825, Health and Welfare Building, Harrisburg, PA 17120 or for speech and or hearing impaired persons the Pennsylvania AT&T Relay Service at (800) 654-5984 (TT) or V/TT (717) 783-6514.

A. EVERETTE JAMES,
Acting Secretary

[Pa.B. Doc. No. 08-2204. Filed for public inspection December 5, 2008, 9:00 a.m.]

NOTICES

DEPARTMENT OF HEALTH

Amendments to Charges for Medical Records

[37 Pa.B. 6356]
[Saturday, December 1, 2007]

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--104.4 and 2501--2506) and the regulations promulgated thereunder; (b) 75 Pa.C.S. Chapter 17 (relating to financial responsibility) 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, 2006, through October 31, 2007, the consumer price index was 2.5%.

Accordingly, the Secretary provides notice that, effective January 1, 2008, 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	$ 1.28
Amount charged per page for pages 21--60	$ .95
Amount charged per page for pages 61--end	$ .32
Amount charged per page for microfilm copies	$ 1.88
Flat fee for production of records to support any claim under Social Security	$24.08
Flat fee for supplying records requested by a district attorney	$19.00
* Search and retrieval of records	$19.00

*NOTE: Federal regulations enacted under the Health Insurance Portability and Accountability Act (HIPAA) at 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 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, www.hhs.gov/ocr/hipaa.

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 of Health is not authorized to enforce these charges.

Questions or inquiries concerning this notice should be sent to James T. Steele, Jr., Deputy Chief Counsel, Room 825, Health and Welfare Building, Harrisburg, PA 17120 or for speech and or hearing impaired persons, the Pennsylvania AT&T Relay Services at (800) 654-5984 (TT) or V/TT (717) 783-6514.

CALVIN B. JOHNSON, M. D., M.P.H.,
Secretary

[Pa.B. Doc. No. 07-2155. Filed for public inspection November 30, 2007, 9:00 a.m.]

NOTICES

DEPARTMENT OF HEALTH

Amendments to Charges for Medical Records

[36 Pa.B. 7685]
[Saturday, December 16, 2006]

Because of an inadvertent typographical error in the notice published at 36 Pa.B. 7345 (December 2, 2006), the Department of Health (Department) is reprinting the document in its entirety to ensure accuracy of the information contained in this document.

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 et seq.) and the regulations promulgated thereunder; (b) 75 Pa.C.S. Chapter 17 (relating to financial responsibility) 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, 2005, through October 31, 2006, the consumer price index was 1.3%.

Accordingly, the Secretary provides notice that, effective January 1, 2007, 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	$ 1.25
Amount charged per page for pages 21--60	$ .93
Amount charged per page for pages 61--end	$ .31
Amount charged per page for microfilm copies	$ 1.83
Flat fee for production of records to support any claim under Social Security	$23.49
Flat fee for supplying records requested by a district attorney	$18.54
* Search and retrieval of records	$18.54

*NOTE: Federal regulations enacted under the Health Insurance Portability and Accountability Act (HIPAA) at 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 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, www.hhs.gov/ocr/hipaa.

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, Room 825, Health and Welfare Building, Harrisburg, PA 17120 or for speech and or hearing impaired persons, the Pennsylvania AT&T Relay Services at (800) 654-5984 (TT) or V/TT (717) 783-6514.

CALVIN B. JOHNSON, M. D., M.P.H.,
Secretary

[Pa.B. Doc. No. 06-2465. Filed for public inspection December 15, 2006, 9:00 a.m.]

NOTICES

DEPARTMENT OF HEALTH

Amendments to Charges for Medical Records

[35 Pa.B. 6591]

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 charts 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 et seq.) and the regulations promulgated thereunder; (b) 75 Pa.C.S. Chapter 17 (relating to financial responsibility) 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 September 30, 2004, through September 30, 2005, the consumer price index was 4.7%.

Accordingly, the Secretary provides notice that, effective January 1, 2006, the following payments 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	$ 1.23
Amount charged per page for pages 21--60	$ .92
Amount charged per page for pages 61--end	$ .31
Amount charged per page for microfilm copies	$ 1.81
Flat fee for production of records to support any claim under Social Security Act or claims under other Federal or State financial needs based programs	$23.19
Flat fee for supplying records requested by a District Attorney	$18.30
*Search and retrieval of records	$18.30

*NOTE: Federal regulations enacted under the Health Insurance Portability and Accountability Act (HIPAA) at 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 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, www.hhs.gov/ocr/hipaa.

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 of Health is not authorized to enforce these charges.

Questions or inquiries concerning this notice should be sent to James T. Steele, Jr., Deputy Chief Counsel, Room 825, Health and Welfare Building, Harrisburg, PA 17120 or for speech and/or hearing impaired persons, the Pennsylvania AT&T Relay Services at (800) 654-5984 (TT) or V/TT (717) 783-6514.

CALVIN B. JOHNSON, M.D., M.P.H.,
Secretary

[Pa.B. Doc. No. 05-2221. Filed for public inspection December 2, 2005, 9:00 a.m.]

NOTICES

DEPARTMENT OF HEALTH

Amendments to Charges for Medical Records

[34 Pa.B. 6474]

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 charts or records either: a) for the purpose of supporting any claim or appeal under the Social Security Act or any Federal orState 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 et seq.) and the regulations promulgated thereunder, b) 75 Pa.C.S. Chapter 17 (relating to financial responsibility) 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, 2003, through October 31, 2004, the consumer price index was 3.2%.

Accordingly, the Secretary provides notice that, effective January 1, 2005, the following payments 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	$ 1.17
Amount charged per page for pages 21--60	$ .88
Amount charged per page for pages 61--end	$ .30
Amount charged per page for microfilm copies	$ 1.73
Flat fee for production of records to support any claim under Social Security Act or claims under other Federal or State financial needs based programs	$22.15
Flat fee for supplying records requested by a District Attorney	$17.48
*Search and retrieval of records	$17.48

*NOTE: Federal regulations enacted under the Health Insurance Portability and Accountability Act (HIPAA) at 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 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 United States Department of Health and Human Services at: 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 or www.hhs.gov/ocr/hipaa.

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 of Health is not authorized to enforce these charges.

Questions or inquiries concerning this notice should be sent to: James T. Steele, Jr., Deputy Chief Counsel, Room 825, Health and Welfare Building, P. O. Box 90, Harrisburg, PA 17108, or for speech and/or hearing impaired persons, the Pennsylvania AT&T Relay Services at (800) 654-5984 (TT) or V/TT (717) 783-6514.

CALVIN B. JOHNSON, M.D., M.P.H.,
Secretary

[Pa.B. Doc. No. 04-2153. Filed for public inspection December 3, 2004, 9:00 a.m.]

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.

Counsel for Plaintiffs:

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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:

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[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	

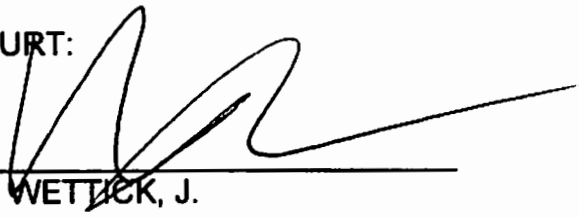
ORDER OF COURT

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, *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
	Counsel for Defendant HealthPort Technologies, LLC
	Don P. Foster, Esq. Pa. I.D. #25809 Patrick J. Troy, Esq. Pa. I.D. #89890 KLEHR HARRISON HARVEY BRANZBURG LLP 1835 Market Street, Suite 1400 Philadelphia, PA 19103
	Counsel for Defendant IOD Incorporated

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
9

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

WAYNE M. CHIURAZZI LAW INC. D/B/A CHIURAZZI & MENGINE, LLC,	CIVIL DIVISION
Plaintiff,	Case No. GD-09-012922
vs.	(coordinated with GD-09-012911; GD-09-012919; GD-09-012923; GD-09-014785; and GD-10-004369)
IOD INCORPORATED,	
Defendant.	

IOD INCORPORATED'S MOTION FOR JUDGMENT ON THE PLEADINGS, PROPOSED ORDER, AND BRIEF IN SUPPORT OF MOTION

Filed on Behalf of: IOD Incorporated

Counsel of Record for this Party:

Don P. Foster, Esquire
Pa. I.D. #25809
Patrick J. Troy, Esquire
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(215) 568-6060
(Party represented by out-of-county counsel only).

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

WAYNE M. CHIURAZZI LAW INC. D/B/A CHIURAZZI & MENGINE, LLC,	:	CIVIL DIVISION
Plaintiff,	:	Case No. GD-09-012922
vs.	:	(coordinated with GD-09-012911; GD-09-012919; GD-09-012923; GD-09-014785; and GD-10-004369)
IOD INCORPORATED,	:	
Defendant.	:	

IOD INCORPORATED'S MOTION
FOR JUDGMENT ON THE PLEADINGS

Defendant IOD Incorporated ("IOD"), by and through its counsel, hereby submits the following Motion for Judgment on the Pleadings pursuant to Pa.R.Civ.P. No. 1034. In support of its motion, IOD states the following:

1. On July 15, 2009, Plaintiff Wayne Chiruazzi Law Inc. d/b/a Chiurazzi & Mengine, LLC ("Plaintiff") filed a Complaint against IOD. A true and correct copy of the Complaint is attached hereto as Exhibit A.

2. Plaintiff alleges that the rate requirements of the Medical Records Act, 42 Pa.C.S. § 6152 et. seq. ("the MRA"), are implied terms of a contract between the parties whereby IOD produced medical records to the plaintiff upon written request. Count I of the complaint seeks damages for breach of a contract, and Count V seeks a Declaration that Plaintiff's construction of the MRA is correct.

3. IOD filed preliminary objections to the Complaint, which were sustained in part and overruled in part. This Court dismissed Plaintiff's claims for: restitution (Count II), the imposition of a constructive trust (Count III) and unjust enrichment (Count IV).

4. IOD filed an answer and new matter, specifically raising the defenses based on the voluntary payment doctrine and prior approval under section 6152(a)(2)(i) of the MRA. Plaintiff replied to the new matter, closing the pleadings. IOD's Answer and New Matter and Plaintiff's Reply are attached hereto as Exhibits B and C, respectively.

5. Based on the pleadings, judgment should be award in IOD's favor on Plaintiff's breach of contract claim because the voluntary payment doctrine bars Plaintiff's claims as plead. Plaintiff voluntarily paid the fees stated in the invoice attached to the Complaint, which are equivalent to those set forth in the MRA and its regulations, and retained the medical records it received without objection.

6. Based on the pleadings, judgment should be awarded in IOD's favor on Plaintiff's breach of contract claim because IOD obtained "prior approval" for the fees that it stated in its invoice as required by 42 Pa.C.S. § 6152(a)(2)(i).

WHEREFORE, for the reasons stated above and in the accompanying Memorandum of Law, which is incorporated by reference, IOD respectfully requests that the Court enter judgment in its favor on Plaintiffs' breach of contract claim, and grant such other relief as the Court deems appropriate.

KLEHR HARRISON HARVEY BRANZBURG, LLP

Dated: October 15, 2010

By: _____

Don P. Foster (Pa. Id. 25809)
Patrick J. Troy (Pa. Id. 89890)

1835 Market Street
Philadelphia, PA 19103
(215) 569-2700

Attorneys for IOD Incorporated

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

WAYNE M. CHIURAZZI LAW INC. D/B/A CHIURAZZI & MENGINE, LLC,	:	CIVIL DIVISION
Plaintiff,	:	Case No. GD-09-012922
vs.	:	(coordinated with GD-09-012911; GD-09-012919; GD-09-012923; GD-09-014785; and GD-10-004369)
IOD INCORPORATED,	:	
Defendant.	:	

ORDER

NOW, this _____ day of _____, 20____, upon consideration of IOD's Motion for Judgment on the Pleadings, Brief in Support, and all responses thereto, it is hereby ORDERED and DECREED that IOD's Motion is GRANTED. Judgment is entered in IOD's favor and against Plaintiff on Count I of the Complaint, alleging breach of contract.

BY THE COURT:

_____

J.

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

WAYNE M. CHIURAZZI LAW INC. D/B/A CHIURAZZI & MENGINE, LLC,	:	CIVIL DIVISION
Plaintiff,	:	Case No. GD-09-012922
vs.	:	(coordinated with GD-09-012911; GD-09-012919; GD-09-012923; GD-09-014785; and GD-10-004369)
IOD INCORPORATED,	:	
Defendant.	:	

IOD INCORPORATED'S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION FOR JUDGMENT ON THE PLEADINGS

Defendant IOD Incorporated ("IOD") submits this brief in support of its Motion for Partial Judgment on the Pleadings pursuant to Pa.R.Civ.P. 1034 (the "Motion").

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. IOD contends that the complaint filed by plaintiff Wayne Chiurazzi Law Inc. d/b/a Chiurazzi & Mengine, LLC ("Plaintiff") relies on an incorrect construction of Pennsylvania's Medical Records Act, 42 Pa.C.S. §§ 6151-6160 (the "MRA"); nonetheless Plaintiff's breach-of-contract claim is barred by the voluntary payment doctrine and its prior approval of IOD's charges. Accordingly, IOD's Motion should be granted and judgment entered in IOD's favor on Count I of Plaintiff's Complaint, alleging breach of contract.

II. FACTUAL BACKGROUND

A. The Allegations of the Complaint.

Plaintiff is a law firm that requests medical records from health care providers on behalf

of its clients. It alleges that it has been repeatedly overcharged by IOD in relation to those medical records requests. Compl. at ¶ 4. The Complaint also alleges the existence of a putative class of plaintiffs comprised of patients, patient designees, representatives and attorneys who also were overcharged by IOD for reproductions of medical records. *Id.* at ¶ 3.

The portions of the Act invoked by the plaintiff are found in paragraph (a) of Section 6152, 42 Pa.C.S. § 6152(a). Subsections 1 and 2 of paragraph (a) provide, in pertinent part, that:

> (1) When a subpoena duces tecum is served upon any healthcare provider...requiring the production of any medical charts or records...it shall be deemed a sufficient response to the subpoena...[to] notif[y] the attorney for the party causing service of this subpoena...of the healthcare 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 healthcare 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 $15.00 for searching for and retrieving the records; $1.00 per page for paper copies for the first 20 pages; $.75 per page for pages 21-60; and $.25 per page for page 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 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) and (2)(i).

Section 6155 (b) of the Act, 42 Pa. C.S. § 6155(b), allows a patient or his designee, including his attorney, to access medical records without the use of a subpoena, and limits the amounts a health care provider or facility can charge to those amounts set forth in section 6152(a)(2)(i).

According to Plaintiff, "[the MRA] 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 ¶ 9. Plaintiff contends that, as a result:

> Pennsylvania law, . . . imposes a duty on [medical records reproduction companies, like IOD] to establish procedures to estimate their actual costs for search, retrieval, reproduction and transmittal of medical records and then to charge [Requestors] 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 ¶ 10.

Plaintiff generally alleges that IOD has violated the MRA 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 ¶¶ 22, 23; *see also* Compl. at ¶¶ 24-25 (reciting the annual adjustments made by the Secretary of Health to the rates initially mandated in section 6152(a)(2)(i) of the MRA).

Specifically, Plaintiff alleges that, in March 2009, it sent Excela Health Westmoreland Regional Hospital an authorization on behalf of Patient "A," requesting a reproduction of the patient's hospital medical records. *Id.* at ¶ 26. In response to this request, IOD sent Plaintiff an invoice for $42.42, which was comprised of a $19.80 fee for the search and retrieval of documents; a $1.33 per-page fee for the reproduction of sixteen pages of medical records (totaling $21.28); and a delivery or postage fee of $1.34. *Id.* at ¶ 27. Plaintiff further alleges that it "it paid IOD the requested $42.42. In exchange for this payment, IOD provided the requested reproduction of Patient A's hospital record." *Id.* at ¶ 28. Finally, Plaintiff avers that "having no other method of obtaining medical records and believing the invoice comported with

the law, paid IOD the requested $42.42." *Id.* at ¶ 28. In turn, Count I of the complaint asserts a cause of action for breach of contract—alleging that it is implicit in each agreement to provide records that the production will be done in a manner consistent with the MRA. *Id.* at ¶¶ 48-56.

B. Procedural History.

Plaintiff's action against IOD has been coordinated with similar claims against the following medical records providers: the University of Pittsburgh Medical Center – Presbyterian Shadyside (GD-09-012919), HealthPort Technologies LLC (GD-09-012923), MRO Corporation (GD-09-012911), Magee-Womens Hospital of the University of Pittsburgh Medical Center (GD-09-014785) and Duplications, Incorporated (GD-10-004369).

IOD filed preliminary objections to the Complaint, which were sustained in part and overruled in part, and the Court dismissed Plaintiff's claims for: restitution (Count II), the imposition of a constructive trust (Count III) and unjust enrichment (Count IV).

IOD filed an answer and new matter, specifically raising the defenses based on the voluntary payment doctrine and prior approval under section 6152(a)(2)(i) of the MRA. Plaintiff replied to the new matter. This Motion follows the Court's October 5, 2010 order, amending the parties' briefing schedule.

III. ARGUMENT

A. Standard of Review of Motion for Judgment on the Pleadings.

Rule 1034 of the Pennsylvania Rules of Civil Procedure provides that "[a]fter the relevant pleadings are closed, but within such time as not to unreasonably delay the trial, any party may move for judgment on the pleadings." Pa.R.C.P. 1034(a). A motion for judgment on the pleadings should be granted where, on the facts averred, the law says with certainty no recovery is possible. *American Appliance v. E.W. Real Estate Mgmt., Inc.*, 564 Pa. 473, 769 A.2d 444, 446 (2001). On a motion for judgment on the pleadings, which is similar to a

demurrer, the court accepts as true all well-pleaded facts of the non-moving party. *Mellon Bank v. National Union Ins. Co. of Pittsburgh*, 768 A.2d 865, 868 (Pa. Super. 2001). "While a trial court cannot accept the conclusions of law of either party when ruling on a motion for judgment on the pleadings, it is certainly free to reach those same conclusions independently." *Flamer v. New Jersey Transit Corp.*, 607 A.2d 260, 262 (Pa. Super. 1992) (citations omitted).

B. The Voluntary Payment Doctrine Bars Plaintiff's Breach-of-Contract Claim.

The voluntary payment doctrine applies to the facts as alleged by the Plaintiff, and bars Plaintiff's claim for breach of contract. The pleadings are clear that Plaintiff knowingly and voluntarily paid the invoice at issue, and there are no allegations that Plaintiff has been fraudulently induced into a mistaken assumption of material fact.

Pennsylvania courts have endorsed the general doctrine prohibiting recovery for voluntary payments made due to a mistake of law. *Sebastionelli v. Prudential Ins. Co. of Am.*, 337 Pa. 466, 470, 12 A.2d 113, 115 (1940); *see also Exxex Ins. Co. v. RMJC, Inc.* 306 Fed. Appx. 749, 754 (3d Cir. 2009) (discussing *Acme Markets, Inc. v. Valley View Shopping Ctr., Inc.*, 493 A.2d 736 (Pa. Super. Ct. 1985)). Specifically, the voluntary payment doctrine provides 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.*, 439 A.2d at 737; *see also Kline v. Morrison*, 353 Pa. 79, 84, 44 A.2d 267, 269 (1945) ("It is well settled that money, not legally due, but paid voluntarily cannot be recovered back"). A mistake of law is a mistake "as to the legal consequences of an assumed state of facts." *Id.* (citation omitted).

Here, Plaintiff has no cause of action to recover money voluntarily paid in satisfaction of IOD's invoice. The complaint is very clear that the Plaintiff had full knowledge of the facts surrounding the request and payment of the invoice related to Patient A's records. *See* Compl. at

¶¶ 26-28. Similarly, in paragraphs 24 and 25 of the Complaint, Plaintiff alleges that for the calendar years 2005 through 2009, IOD "consistently" charged the rates set forth in the paragraphs for the searching, retrieval, copying and transmittal of medical records. Plaintiff has therefore alleged that for every invoice from June 15, 2005 to the present, IOD has charged the rates required by the MRA, that it did not hide or misrepresent that it was charging these "maximum" rates (because the statutory rate and the invoiced rate are both available to the requestor for comparison), and that Plaintiff voluntarily paid the invoice despite knowing, according to the Complaint, that the statute required cost-based billing as opposed to automatic "maximum" rate billing. These allegations implicate the voluntary payment doctrine and require dismissal of the complaint.[1]

These allegations are similar to the ones made in *Acme Markets*, were the Superior Court held that the plaintiff, a tenant of a shopping center, could not recover payments it had made to its landlord for maintenance of a parking lot. The plaintiff alleged that the lease required certain payments for property maintenance during the initial term of the lease, but that the tenant had continued to make these payments well past the expiration of the lease's initial term. Affirming a demurrer based on the voluntary payment doctrine, the court reasoned that:

> The mistake alleged by [tenant] is clearly a mistake of law and not

[1] In cases involving similar allegations, several courts in other jurisdictions have applied the voluntary payment doctrine to preclude claims of breach of contract for overpricing of medical records. *See, e.g.*, *Boykin v. Smart Corp.*, 669 So. 2d 939, 941 (Ala. Civ. App. 1995) (applying the voluntary payment and stating "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) (dismissing class action complaint alleging overbilling of medical record reproduction costs on basis of voluntary payment defense and noting that complaint did not "allege that the 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 dismissal of complaint because plaintiffs alleged they made payments with all material facts known to them).

> a mistake of fact. The money it seeks to recover was voluntarily and deliberately paid by [tenant] 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.

Acme Markets, 493 A.2d at 738 (citations and quotations omitted).

The court's reasoning in *Acme Markets* applies here as well. Plaintiff alleges that it paid the invoice under a mistaken interpretation of the MRA, specifically stating: "believing the invoice comported with the law, Plaintiff paid IOD the requested $42.42." Compl. at ¶ 28. This is precisely the type of mistake of law that the court applied the voluntary payment doctrine to in *Acme Markets*. It is important to appreciate that the voluntary payment doctrine is not vitiated simply by the payee's incorrect interpretation of the law (which is in essence what the complaint alleges); nor is its effect lessened in any way by the payor's initial thinking that the charges were in compliance with the law. If the charges are clearly set forth in bill, and the payor voluntarily pays those charges, the fact that it realizes after-the-fact that perhaps the charges were illegal is precisely what the voluntary payment doctrine is designed to protect against.

Plaintiff cannot invoke the voluntary payment doctrine's safe harbor that when one has been fraudulently induced into a mistaken assumption of material fact, then the doctrine will not bar a claim for breach of contract after a bill has been paid. Even the most generous reading of the pleadings does not avoid the application of the voluntary payment doctrine in this case. There is no allegation of fraud in the Complaint—indeed, the allegation is precisely the opposite: IOD clearly, and without any pretense, prepared the invoice and billed the rates set by the statute, as modified, thereafter by the Secretary of Health, for producing medical records stored on microfiche, and the rates set by the statute for producing records stored on all other media, whether electronic or paper. *See* Compl. at ¶ 27. Upon receipt of the invoice, Plaintiff paid it

"believing it comported with the law...." *Id.*, at ¶ 28. Furthermore, Plaintiff's reply to new matter raised no allegations of fraud or misrepresentation in response to IOD's defense of voluntary payment.

From the face of the pleadings, it is clear that when the Plaintiff paid the invoice it did so believing it comported with the MRA absent any whiff of fraud or misrepresentation. Thus, the Court should apply the voluntary payment doctrine and enter judgment in IOD's favor on Plaintiff's breach of contract claim.

C. Plaintiff's Prior Approval of the Invoice Under the MRA Precludes Its Claims.

In *Liss & Marion, P.C. v. Recordex Acquisition Corp.*, the Superior Court held that an medical records provider, like IOD, has "the duty to seek prior approval of any charges for the copying of medical records not specifically provided for in the [MRA]." 937 A.2d 503 (Pa. Super. Ct. 2007)("*Liss & Marion I*") aff'd 983 A.2d 652 (Pa. 2009). This duty is found in section 6152(a)(2)(i) of the MRA, 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 the medical records***." *Id.* (emphasis in original.). Here, IOD raised a defense based on prior approval provisions of section 6152(a)(2)(i), which Plaintiff denied as conclusion of law. *See* New Matter at ¶7.

Plaintiff's Complaint clearly alleges that Plaintiff had full knowledge of the facts surrounding the request and payment of the invoice related to Patient A's records. *See* Compl. at ¶¶26-28. The pleadings are devoid of any allegation by Plaintiff that it protested the amounts charged in the invoice in any way, thus, manifesting its approval of the amounts charged in the invoice. Importantly, the complaint specifically alleges that: the Plaintiff requested medical records. *Id.* at ¶26; in response, IOD sent an invoice for $42.42. *Id.* at ¶27; the invoice charged

the statutory rate for search and retrieval, per page reproduction and delivery and postage. *Compare* ¶27 *with* ¶25; then, after submission of the invoice for approval and prepayment, the Plaintiff paid the invoice. *Id.,* ¶28; and, finally, in exchange for this payment, IOD provided the requested reproduction of the requested hospital records. *Id.* at ¶28. What this means is that the per unit charges, and the total, were submitted to the Plaintiff for approval prior to the production of the records and that it manifested its agreement with the proposed charges by paying the invoice. IOD then performed its end of the bargain by supplying the records. There can be no clearer a statement of prior approval than this chronology.

A fundamental rule of statutory construction is that words and phrases in a statute must be construed according to rules of grammar and their common and approved usage. *Martin Media v. Dept. of Transportation*, 641 A.2d 630 (Pa. Cmwlth 1994). "Prior approval" in this statute means approval before the retrieval, copying and shipping or delivery of the requested medical records. That is precisely what the complaint alleges.

Therefore, the complaint fails to allege any breach by IOD of any duty imposed by the MRA because it received "prior approval" for the amounts charged in the invoice by way of Plaintiff's payment without protest. Accordingly, IOD is entitled to judgment on the pleadings.

IV. CONCLUSION

For the foregoing reasons, the Court should grant IOD's Motion for Judgment on the Pleadings and enter judgment in IOD's favor on Plaintiff's breach of contract claim.

KLEHR HARRISON HARVEY BRANZBURG, LLP

Dated: October 15, 2010

By: _____

Don P. Foster (Pa. Id. 25809)
Patrick J. Troy (Pa. Id. 89890)

1835 Market Street
Philadelphia, PA 19103
(215) 569-2700

Attorneys for IOD Incorporated

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **Motion for Judgment on the Pleadings, with Exhibits and Brief,** was served upon Plaintiffs' counsel and all counsel of record, via first class mail, postage prepaid, this 15th day of October, 2010, as follows:

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Patrick J. Troy

EXHIBIT A

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

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

Plaintiff,

vs.

IOD INCORPORATED,

Defendant.

CIVIL DIVISION

Case No.:

GD-09-012922

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

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 IOD Incorporated ("IOD") for reproductions of medical records.

2. By law, a medical records reproduction company ("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 IOD 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 Requesters that was in excess of the actual and reasonable cost of searching for, retrieving, reproducing and transmitting the records.

THE PARTIES

4. Plaintiff Wayne M. Chiurazzi 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. Defendant IOD is a corporation or other entity with headquarters at 1030 Ontario Road, P.O. Box 19025, Green Bay, Wisconsin 54307. 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 Requesters. 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 Reproductions Based Upon The Estimated Actual and Reasonable Cost

6. Under Pennsylvania 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 a legal right to obtain reproductions of their 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.

IOD Operates As An MRRC To Provide Reproductions Of Medical Records To Medical Records Requestors

12. Defendant IOD is an MRRC that has entered into exclusive medical records reproduction contracts with numerous Pennsylvania hospitals and hospital systems, including Excela Health Westmoreland Regional Hospital.

13. Under these contracts, IOD 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, IOD 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 IOD 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 IOD and makes the requested medical records available to IOD, usually electronically. IOD then contacts the Medical Records Requester 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, IOD, 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, IOD 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 IOD. 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.

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

21. IOD 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. IOD 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 IOD 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 IOD 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 IOD

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 IOD 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 IOD 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 IOD 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 IOD's actual and reasonable reproduction costs.

25. With respect to search and retrieval fees, for requests received after January 1, 2009, Defendant IOD 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 IOD 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 IOD 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 IOD 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 IOD 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 IOD's actual and reasonable search and retrieval costs.

Representative Plaintiff Was Subjected To Defendant's Billing Practices

26. In or around March of 2009, Plaintiff sent Excela Health Westmoreland Regional Hospital an authorization from Patient "A" requesting a reproduction of Patient A's hospital medical records.

27. In response to this request, IOD sent Plaintiff an invoice for $42.42. This invoice is attached as Exhibit 1. Unbeknownst to Plaintiff, the invoice did not reflect charges based upon IOD's actual or estimated actual expenses for locating, retrieving, reproducing and transmitting the medical records. The medical records charges included a $19.80 fee for search and retrieval; a $1.33 per page fee for the reproduction of 16 pages of medical records; and a delivery or postage fee of $1.34.

28. Plaintiff having no other method of obtaining the medical records and believing the invoice comported with the law, Plaintiff paid IOD the requested $42.42. In exchange for this payment, IOD provided the requested reproduction of Patient A's hospital record.

CLASS ACTION ALLEGATIONS

29. 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 IOD 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).

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

Numerosity

30. 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 IOD. 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

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

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

e. Does IOD'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?

f. Does IOD'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?

g. Did a constructive trust arise due to IOD's knowing acquisition of monies in excess of its 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?

h. Was Defendant IOD unjustly enriched by its acceptance and retention of payments made by Medical Records Requesters 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?

Typicality

32. 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 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.

33. On information and belief, Plaintiff avers 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 the reproduction of Pennsylvania hospital and affiliated entity medical records.

34. On information and belief, Plaintiff avers that IOD 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 the reproduction of Pennsylvania hospital and affiliated entity medical records.

35. 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; and payment of medical records search and retrieval charges that exceeded Defendant's actual and/or estimated actual and reasonable expenses incurred.

Adequacy of Representation

36. Representative Plaintiff will assure the adequate representation of all members of the Class. Plaintiff's claims are typical of the Class's claims. Plaintiff has no conflict with Class Members in the maintenance of this action, and Plaintiff's interest in this action is antagonistic to Defendant's interests.

37. Plaintiff's interests are coincident with, and not antagonistic to, absent Class Members' interests because, by proving Plaintiff's individual claims Plaintiff will necessarily prove Defendant's liability as to the Class's claims.

38. Plaintiff is also cognizant of and determined to faithfully discharge its fiduciary duties to the absent Class Members as Class Representative. Plaintiff will vigorously pursue the Class's claims. Plaintiff is aware that it cannot settle this Class Action without prior Court approval. Representative Plaintiff has and/or can acquire the financial resources to litigate this Class Action.

39. 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

40. A class action provides 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.

41. The substantive claims of 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.

42. 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.

43. To Plaintiff's knowledge no other similar actions are pending against this Defendant in Pennsylvania.

44. This forum is appropriate for litigation of this Class Action because Plaintiff is located here and Defendant conducts business here.

45. 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.

46. 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.

47. 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

48. Plaintiff re-alleges and incorporates by reference each and every allegation in the preceding paragraphs.

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

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

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

52. By agreeing to provide and/or providing the requested medical records, Defendant IOD 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 the permissible fees that may be charged Medical Records Requestors in relation to these medical records requests and/or activities.

53. 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 IOD's actual and/or estimated actual and reasonable expenses, Defendant IOD 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.

54. Defendant IOD's conduct, as described at length above, constitutes a breach or breaches of contract and/or implied contract between Defendant IOD and Plaintiff, and the contracts and/or implied contracts between Defendant IOD 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.

55. As a result of Defendant IOD'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.

56. Defendant IOD's conduct was intentional, willful, wanton, reckless, and outrageous because Defendant IOD 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

57. Plaintiff re-alleges and incorporates by reference each and every allegation in the preceding paragraphs.

58. At all times material hereto, IOD was aware that it was billing, charging and/or collecting from Medical Records Requesters fees in excess of those authorized by law for the reproduction of Pennsylvania hospital and affiliated entity medical records. On information and belief, IOD 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.

59. Notwithstanding this knowledge, IOD charged and collected from the Representative and Class Plaintiff fees in excess of IOD'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. IOD thus accepted and appreciated an additional benefit over and above what is authorized by law.

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

COUNT III

Constructive Trust

61. Plaintiff re-alleges and incorporates by reference each and every allegation in the preceding paragraphs.

62. Plaintiff paid money to IOD on the condition that the money represented payment for the 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.

63. IOD 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.

64. IOD has wrongfully acquired and retained money obtained from Plaintiff.

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

COUNT IV

Unjust Enrichment – Quasi Contract

66. Plaintiff re-alleges and incorporates by reference each and every allegation in the preceding paragraphs.

67. Plaintiff has conferred benefits upon IOD 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 IOD's actual and/or estimated actual and reasonable costs incurred in these activities.

68. Defendant IOD has accepted and appreciates these conferred benefits in that IOD 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.

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

70. Accordingly, Plaintiff is entitled to judgment in the amount of money unjustly conferred on Defendant IOD.

COUNT V

Relief Pursuant To Declaratory Judgments Act

71. Plaintiff re-alleges and incorporates by reference each and every allegation in the preceding paragraphs.

72. An actual controversy has arisen between Plaintiff and all others similarly situated, on the one hand, and IOD 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.

73. Plaintiff contends that IOD'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. Plaintiff is informed and believes that IOD contends the contrary.

74. 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 IOD are continuing in that regard, and apparently will be continued into the indefinite future, Plaintiff and all others similarly situated have no adequate remedy at law to protect themselves from such ongoing practices other than through declaratory relief.

75. Plaintiff thus seeks 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. Plaintiff further seeks 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, Plaintiff demands judgment against Defendant IOD as follows:

1. Certifying this action as a Class Action with Plaintiff as the Representative 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. 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;

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

d. Awarding damages to Plaintiff 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;

e. 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;

f 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: _____

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ATTORNEYS FOR PLAINTIFF

WAYNE M. CHIURAZZI LAW INC.
CLIENT EXPENSES
101 SMITHFIELD STREET
PITTSBURGH, PA 15222

3242

DATE 4-20-09

8-9/430
678

PAY TO THE ORDER OF IOD Incorporated $ 42.42

Forty two & 42/100 DOLLARS

PNCBANK
PNC Bank, N.A. 001
Pittsburgh, PA

FOR [redacted]

⑈003242⑈ ⑆043000096⑆ 4013182223⑈

Mastercard, Visa, Discover & Checks accepted.

Account Activity

Invoice #	Patient Name / Facility Name	Reference Number	Date	Invoice Total	Balance Due
1-KP33582-0	[redacted] EXCELA HEALTH WESTMORELAND REGIONAL HOSPITAL	NA	4/7/2009	42.42	42.42
			Total Balance Due		42.42

** The above charges are for copies of medical records ** Credit balances will be applied to invoices over 60 days **

Detach and return the bottom portion with payment — Retain top portion for your records

Statement Date: 4/8/2009
Customer Number: 412434077302
CHIURAZZI & MEGINE

Total Balance Due 42.42

☐ Please check here for change of address
See back for change of address form

Total Amount Enclosed

$

Include invoice number(s) on check and make payable to:

IOD INCORPORATED
PO BOX 19058
GREEN BAY WI 54307

[redacted] send cash. Please allow 7 to 10 days for postal delivery

EXHIBIT
1

PENGAD 800-631-6989

EXHIBIT B

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

WAYNE CHIURAZZI LAW INC. D/B/A CHIURAZZI & MENGINE LLC	:	CIVIL DIVISION
Plaintiff,	:	Case No. GD-09-012922
vs.	:	(coordinated with GD-09-012919; GD-09-012911; GD-09-014785)
IOD INCORPORATED	:	
Defendant.	:	**IOD INCORPORATED'S ANSWER AND NEW MATTER TO PLAINTIFF'S CLASS ACTION COMPLAINT**

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 there service hereof or a judgment may be entered against you.

Don P. Foster, Esquire
Patrick J. Troy, Esquire
Counsel for Defendant

Filed on behalf of: Defendant IOD Incorporated

Counsel of Record for this Party:

Don P. Foster, Esquire
Pa. I.D. No. 25809
Patrick J. Troy, Esquire
Pa. I.D. No. 89890

Klehr Harrison Harvey Branzburg LLP
1835 Market Street, 14th Floor
Philadelphia, PA 19103
215-569-2700

(Party represented by out-of-county counsel only)

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

WAYNE CHIURAZZI LAW INC. D/B/A CHIURAZZI & MENGINE LLC	:	CIVIL DIVISION
Plaintiff,	:	Case No. GD-09-012922
vs.	:	(coordinated with GD-09-012919; GD-09-012911; GD-09-014785)
IOD INCORPORATED	:	
Defendant.	:	

IOD INCORPORATED'S ANSWER AND NEW MATTER TO PLAINTIFF'S CLASS ACTION COMPLAINT

Defendant, IOD Incorporated ("IOD"), by and through its counsel, files this Answer and New Matter to the Class Action Complaint ("Complaint")[1] filed by Wayne M. Chiurazzi Law Inc. d/b/a Chiurazzi & Mengine, LLC ("Plaintiff") and states as follows:

1. Denied. IOD denies the allegations of this paragraph of the Complaint as conclusions of law to which no response is required. To the extent a response is required, IOD denies that this action is properly a class action. IOD further denies that it overcharged any of patients, patient designees, representatives and attorneys (the "Requestors") for the reproduction of medical records.

2. Admitted in part, denied in part. IOD admits that it is a company that reproduces medical records—or a medical records reproduction company ("MRRC") as defined in the Complaint. The remaining allegations of this paragraph of the Complaint are denied as

[1] On February 4, 2010, the Court sustained IOD's preliminary objections and dismissed Plaintiff's claims for restitution (Count II); a constructive trust (Count III); and unjust enrichment (Count IV).

conclusions of law to which no response is required. By way of further response, the Pennsylvania Supreme Court interpreted Pennsylvania's Medical Records Act ("MRA"), 42 Pa. C. S. § 6151 *et. seq.*, to mandate that one of the two rates set forth in section 6152(a)(2)(i) must be charged whenever records were being produced pursuant to the MRA—one rate when the requested records are stored on microfilm and another rate for everything else. *Liss & Marion, P.C. v. Recordex Acquisition Corp.*, 983 A.2d 652 (Pa. 2009).

3. Admitted in part, denied in part. IOD admits that it is a for-profit corporation that charges Requestors for the searching for, retrieving, reproducing and transmitting of medical records. To the extent that this paragraph alleges that the MRA requires that MRRCs such as IOD charge the "actual and reasonable" expenses of reproducing medical charts or records, it is denied. To the contrary, the MRA mandates that one of the two rates must be charged whenever records are being produced—one rate when the requested records are stored on microfilm and another rate for everything else. Thus, IOD denies that it charged any Requestor any fee not permitted by the MRA. IOD denies the remaining allegations of this paragraph of the Complaint as conclusions of law to which no response is required.

4. Admitted in part, denied in part. IOD admits that Plaintiff is a law firm located at 101 Smithfield Street, Pittsburgh, Pennsylvania. IOD denies it overcharged Plaintiff for Plaintiff's medical records requests.

5. Admitted in part, denied in part. IOD admits that it is a corporation headquartered in Green Bay, Wisconsin. IOD also admits that it is an MRRC—as that term is defined in the Complaint—and, as such, entered into agreements with hospitals in Pennsylvania to provide medical records to Requestors. To the extent that the allegations of this paragraph characterize the agreements IOD entered into with hospitals relating to medical records, those allegations are

denied because the agreements are writings that speak for themselves.

6. Denied. IOD denies the allegations of this paragraph of the Complaint as conclusions of law to which no response is required. To the extent a response is required, the creation, maintenance and preservation of medical records in Pennsylvania is governed by the MRA and other applicable statutes and regulations.

7. Denied. IOD denies the allegations of this paragraph of the Complaint as conclusions of law to which no response is required. To the extent a response is required, property interests in medical records in Pennsylvania are governed by the MRA and other applicable statutes and regulations.

8. Denied. IOD denies the allegations of this paragraph of the Complaint as conclusions of law to which no response is required. To the extent a response is required, IOD denies that the MRA requires that MRRCs base their reproduction fees on "the reproduction provider's estimated actual and reasonable costs." To the contrary, the MRA mandates that one of the two rates must be charged whenever records are being produced—one rate when the requested records are stored on microfilm and another rate for everything else.

9. Admitted in part, denied in part. IOD admits that 42 Pa.C.S. § 6152(a)(2)(i) contains language limiting the amounts an MRRC can charge and such limits are adjusted by the Secretary of Health based on the consumer price index. IOD denies the remaining allegations of this paragraph of the Complaint as conclusions of law to which no response is required.

10. Denied. IOD denies the allegations of this paragraph of the Complaint as conclusions of law to which no response is required. To the extent a response is required, IOD denies that the MRA requires an MRRC to estimate its actual costs for the search, retrieval, reproduction and transmittal of medical records and then charge Requestors only that cost. To

the contrary, the MRA mandates that one of the two rates must be charged whenever records are being produced—one rate when the requested records are stored on microfilm and another rate for everything else.

11. Denied. IOD denies the allegations of this paragraph of the Complaint as conclusions of law to which no response is required. To the extent a response is required, the types or categories of fees that charged for in medical records in Pennsylvania are governed by the MRA and other applicable statutes and regulations.

12. Admitted in part, denied in part. IOD admits that it is a MRRC—as that term is defined in the Complaint—and entered into agreements with hospitals in Pennsylvania, including Excela Westmoreland Regional Hospital, to provide medical records to Requestors. To the extent that the allegations of this paragraph characterize the agreements IOD entered into with hospitals relating to medical records, those allegations are denied because the agreements are writings that speak for themselves.

13. Denied. The allegations of this paragraph characterize the agreements IOD entered into with hospitals relating to medical records, and IOD denies the allegations because the agreements are writings that speak for themselves.

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

15. Denied. The allegations of this paragraph seek to characterize the agreements IOD entered into with hospitals relating to medical records, and IOD denies the allegations because the agreements are writings that speak for themselves. To the extent that this paragraph seeks to allege that IOD usually provides medical records in electronic format, IOD denies that

allegation. To the contrary, to date IOD has typically provided records in paper format, unless specifically requested to produce the records electronically. Furthermore, to the extent that this paragraph seeks to allege that IOD requires payment of its invoice prior to the production of medical records, that allegation is denied. IOD only requires prepayment in certain limited circumstances. To the contrary, IOD typically produces the records with an invoice which sets forth the per unit billing rate and the total bill. These charges are accepted by the requestor when it pays the invoice.

16. Denied. This paragraph characterizes the agreements IOD entered into with hospitals relating to medical records, and IOD denies the allegations because the agreements are writings that speak for themselves. The allegation that IOD "sells" medical records is specifically denied. Furthermore, to the extent that this paragraph seeks to allege that IOD regularly shares revenues with hospitals and/or affiliated entities with which it has contracted to provide medical records, IOD denies that allegation. By way of further allegation, to the extent that IOD does provide additional services to hospitals and/or affiliated entities, IOD denies that such services are regularly provided at no charge or at a greatly reduced charge. Some of the services identified by the plaintiff in this paragraph of the complaint are subsumed within the release of medical records and the copying and scanning services contemplated by the basic contract with the hospital and/or affiliated entity, for which there is no additional charge beyond that set forth in the contract. Other services, if requested and if provided, are billed at agreed upon rates.

17. Denied. Plaintiff's broad mischaracterization and oversimplification of the steps taken to produce medical records as part of the release of patient information, whether in paper or electronic format, is incomplete and inaccurate, and IOD therefore denies these allegations.

By way of further allegation IOD denies that 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 IOD. By way of further allegation, the allegations and denials set forth in paragraph 15 above are incorporated by reference.

18. Denied. The policy considerations behind creating electronic medical records are unrelated to the cost of producing those records. By way of further allegation, the allegations and denials of paragraphs 15 and 17 are incorporated by reference.

19. Denied. The allegations and denials of paragraphs 15-18 above are incorporated by reference.

20. Denied. The allegations and denials of paragraphs 15-19 above are incorporated by reference. To the extent that this paragraph alleges that the MRA requires that IOD charge the "actual and reasonable" expenses of reproducing medical records, IOD denies the allegations. Further, to the extent that this paragraph alleges that the MRA only provides a "ceiling" on any such charges for the search, retrieval and reproduction of medical records, IOD denies the allegations. To the contrary, the MRA mandates that one of the two rates must be charged whenever records are being produced—one rate when the requested records are stored on microfilm and another rate for everything else. IOD denies the remaining allegations of this paragraph of the Complaint as conclusions of law to which no response is required.

21. Denied. IOD denies the allegations of this paragraph of the Complaint as conclusions of law to which no response is required. To the extent a response is required, IOD denies that the MRA requires IOD to estimate and charge the Requestors' IOD's actual and reasonable expenses incurred in connection with the search for, retrieval, reproduction and transmission of medical records. To the contrary, the MRA mandates that one of the two rates

must be charged whenever records are being produced—one rate when the requested records are stored on microfilm and another rate for everything else.

22. Denied. IOD denies the allegations of this paragraph of the Complaint as conclusions of law to which no response is required. To the extent a response is required, IOD denies that the MRA requires IOD to estimate and charge the Requestors' IOD's 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, IOD complied with the MRA's requirements for charges in connection with the search for, retrieval, reproduction and transmission of Requestor's medical records.

23. Denied. IOD denies the allegations of this paragraph of the Complaint as conclusions of law to which no response is required. To the extent a response is required, IOD denies that the MRA requires IOD to estimate and charge the Requestors' IOD's 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, IOD complied with the MRA's requirements for charges in connection with the search for, retrieval, reproduction and transmission of Requestor's medical records.

24. Denied. IOD denies that the MRA requires IOD to estimate and charge the Requestors' IOD's actual and reasonable expenses incurred in connection with the reproduction of medical records. By way of further response, at all relevant times, IOD complied with the MRA's requirements for charges in connection with the reproduction of Requestor's 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. IOD denies the remaining allegations of this paragraph of the Complaint as conclusions of law to which no response is required.

25. Denied. IOD denies that the MRA requires IOD to estimate and charge the Requestors' IOD's actual and reasonable expenses incurred in connection with the search for and retrieval of medical records. IOD denies the remaining allegations of this paragraph of the Complaint as conclusions of law to which no response is required. By way of further response, at all relevant times, IOD complied with the MRA's requirements for charges in connection with the search for and retrieval of Requestor's 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.

26. Admitted.

27. Admitted in part, denied in part. It is admitted that IOD issued the invoice attached 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. IOD is without knowledge or information regarding Plaintiff's knowledge of the charges reflected in the invoice, and, therefore, IOD denies such allegations. By way of further response, at all relevant times, IOD complied with the MRA's requirements for charges in connection with the search for, retrieval, reproduction and transmission of Requestor's medical records.

28. Admitted in part, denied in part. It is admitted that IOD provided the medical records requested for so-called Patient A and Plaintiff twice paid IOD $42.42. IOD returned the duplicate payment. IOD is without knowledge or information regarding the methods available to Plaintiff to obtain medical records or Plaintiff's beliefs with respect to the invoice, and IOD therefore denies such allegations. IOD denies the remaining allegations of this paragraph of the Complaint as conclusions of law to which no response is required. By way of further response, at all relevant times, IOD complied with the MRA's requirements for charges in connection with

the search for, retrieval, reproduction and transmission of Requestor's medical records.

29. Denied. IOD denies the allegations of this paragraph of the Complaint as conclusions of law to which no response is required. To the extent a response is required, IOD denies that this action is properly brought as a class action because requirements in Pa.R.Civ.P. 1701 *et seq.*, including but not limited to the commonality and typicality requirements, are not met. By way of further response, at all relevant times, IOD complied with the MRA's requirements for charges in connection with the search for, retrieval, reproduction and transmission of Requestor's 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.

30. Denied. IOD incorporates Paragraph 29 of this answer as if fully set forth herein. After reasonable investigation, IOD is without knowledge or information regarding the number of claimants in the putative class, and, therefore, IOD denies such allegations. Further, after reasonable investigation, IOD 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 have sustained, and, therefore, IOD denies such allegations. IOD denies the remaining allegations of this paragraph of the Complaint as conclusions of law to which no response is required

31. Denied. IOD denies the allegations of this paragraph and its subparts of the Complaint as conclusions of law to which no response is required. To the extent that this paragraph and its subparts allege that the MRA requires that IOD charge the cost-based fee based "actual and reasonable" expenses of reproducing medical charts or records it is denied. To the contrary, the MRA mandates that one of the two rates must be charged whenever records are being produced—one rate when the requested records are stored on microfilm and another rate

for everything else. 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 (g) and (h) is required because they pertain to causes of action that were dismissed.

32. Denied. IOD denies the allegations of this paragraph of the Complaint as conclusions of law to which no response is required. To the extent that this paragraph alleges that the MRA requires that IOD charge the cost-based fee based "actual and reasonable" expenses of reproducing medical charts or records it is denied. To the contrary, the MRA mandates that one of the two rates must be charged whenever records are being produced—one rate when the requested records are stored on microfilm and another rate for everything else. 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.

33. Admitted in part and denied in part. IOD has charged the same rate for medical records stored on the same format and requested in the same calendar year as the records identified in the invoice attached as an exhibit to the complaint. IOD charged those rates in reliance upon the interpretation of the MRA by the courts of the Commonwealth of Pennsylvania. IOD admits that it all times charged the same rates to all requestors requesting documents during the same calendar year, and stored on the same medium.

34. Admitted in part and denied in part. The allegations and denials set forth above in paragraph 33 are incorporated by reference.

35. Denied. The allegations of this paragraph of the Complaint contain conclusions of law to which no response is required. By way of further allegation, IOD denies that the plaintiff has suffered an compensable loss or damage or that IOD has charged any excessive or illegal rate for the production of medical records. At all relevant times, IOD has complied with the requirements of the MRA as that statute has been interpreted by the courts of Pennsylvania.

36. Denied. IOD denies the allegations of this paragraph of the Complaint as conclusions of law to which no response is required.

37. Denied. IOD denies the allegations of this paragraph of the Complaint as conclusions of law to which no response is required.

38. Denied. IOD denies the allegations of this paragraph of the Complaint as conclusions of law to which no response is required.

39. Denied. IOD denies the allegations of this paragraph of the Complaint as conclusions of law to which no response is required.

40. Denied. IOD denies the allegations of this paragraph of the Complaint as conclusions of law to which no response is required.

41. Denied. IOD denies the allegations of this paragraph of the Complaint as conclusions of law to which no response is required.

42. Denied. IOD denies the allegations of this paragraph of the Complaint as conclusions of law to which no response is required.

43. Denied. IOD denies the allegations of this paragraph of the Complaint as conclusions of law to which no response is required.

44. Denied. IOD denies the allegations of this paragraph of the Complaint as conclusions of law to which no response is required.

45. Denied. IOD denies the allegations of this paragraph of the Complaint as conclusions of law to which no response is required.

46. Denied. IOD denies the allegations of this paragraph of the Complaint as conclusions of law to which no response is required.

47. Denied. IOD denies the allegations of this paragraph of the Complaint as conclusions of law to which no response is required.

COUNT I

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

49. Denied. IOD denies the allegations of this paragraph of the Complaint as conclusions of law to which no response is required.

50. Denied. IOD denies the allegations of this paragraph of the Complaint as conclusions of law to which no response is required.

51. Denied. IOD denies the allegations of this paragraph of the Complaint as conclusions of law to which no response is required.

52. Denied. IOD denies the allegations of this paragraph of the Complaint as conclusions of law to which no response is required.

53. Denied. IOD denies the allegations of this paragraph of the Complaint as conclusions of law to which no response is required.

54. Denied. IOD denies the allegations of this paragraph of the Complaint as conclusions of law to which no response is required.

55. Denied. IOD denies the allegations of this paragraph of the Complaint as conclusions of law to which no response is required.

56. Denied. IOD denies the allegations of this paragraph of the Complaint as conclusions of law to which no response is required.

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

COUNTS II - IV

On February 4, 2010, the Court sustained IOD's preliminary objections and dismissed Plaintiff's claims for restitution (Count II; paragraphs 57-60); a constructive trust (Count III; paragraphs 61-65); and unjust enrichment (Count IV; paragraphs 66-70). Accordingly, no responses to the allegations of paragraphs 57 to 70 are required.

COUNT V

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

72. Denied. IOD denies the allegations of this paragraph of the Complaint as conclusions of law to which no response is required.

73. Denied. IOD denies the allegations of this paragraph of the Complaint as conclusions of law to which no response is required.

74. Denied. IOD denies the allegations of this paragraph of the Complaint as conclusions of law to which no response is required.

75. Denied. IOD denies the allegations of this paragraph of the Complaint as conclusions of law to which no response is required.

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

NEW MATTER

1. IOD incorporates by reference each and every paragraph of its forgoing Answers to the Complaint as if set forth in full herein.

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

3. Plaintiff's claims are barred in whole or in part because, at all relevant times, IOD complied with the MRA's requirements for charges in connection with the search for, retrieval, reproduction and transmission of Requestor's medical records.

4. Plaintiff's 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 everything else.

5. Plaintiff's claims are barred because the MRA does not require IOD charge its "actual and reasonable" expenses of reproducing medical charts or records.

6. Plaintiff's claims are barred in whole or in part because IOD did not it overcharged any of patients, patient designees, representatives and attorneys for the reproduction of medical records under the MRA.

7. Plaintiff's claims are barred by the MRA's the prior approval provisions of 6152(a)(2)(i).

8. Plaintiff's claims are barred by the doctrine of voluntary payment.

9. Plaintiff's claims are barred by the exclusivity of the remedies available under the MRA and other provisions of the Pennsylvania Code.

10. Plaintiff's claims are barred by the doctrine of accord and satisfaction.

11. Plaintiff's claims are barred by the doctrine of consent.

12. Plaintiff's claims are barred by the doctrine of estoppel.

13. Plaintiff's claims are barred by the doctrine of failure of consideration.

14. Plaintiff's claims are barred by the doctrine of payment.

15. Plaintiff's claims are barred by the statute of limitations.

16. Plaintiff's claims are barred, in whole or in part, by its failure to mitigate any damages to which it may be entitled.

17. Plaintiff's claims are barred because it has suffered no damages.

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

19. To the extent the Complaint seeks equitable relief, Plaintiff's claims are barred by the doctrine of laches.

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

Respectfully submitted,

KLEHR HARRISON HARVEY BRANZBURG, LLP

Dated: July 19, 2010

By: _____

Don P. Foster, Esquire
Pa. Id. No. 25809
Patrick J. Troy, Esquire
Pa. Id. No. 89890

1835 Market Street
Philadelphia, PA 19103
Phone: 215.568.6060
Facsimile: 215.568.6603

Attorneys for Defendant
IOD Incorporated

VERIFICATION

I, Dixie L. Randle, am authorized to make this verification on behalf of defendant IOD Incorporated and hereby verify that the facts set forth in the foregoing Answer and New Matter are true and correct to the best of my knowledge, information and belief.

This statement is made subject to the penalties of 19 Pa.C.S.§4904, relating to unsworn falsifications to authorities.

Dixie L. Randle

Dated: July 19, 2010

CERTIFICATION OF SERVICE

I, Patrick J. Troy, hereby certify that on July 19, 2010, I served a true and correct copy of the foregoing IOD Incorporated's Answer and New Matter upon the following via first-class mail:

Paul A. Lagnese, Esquire
David M. Paul, Esquire
BERGER & LAGNESE, LLC
310 Grant Street
Suite 720
Pittsburgh, PA 15219
Attorneys for Plaintiffs

James M. Pietz, Esquire
Mitchell Building
304 Ross Street, Suite 700
Pittsburgh, PA 15219
Attorneys for Plaintiffs

Howard A. Chajson, Esquire
Jeffrey J. Wetzel, Esquire
DICKIE MCCAMEY
Two PPG Place, Suite 400
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Counsel for Defendants UPMC Presbyterian Shadyside and Magee-Women's Hospital of UPMC

David Smith, Esquire
SCHNADER
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John K. Gisleson, Esquire
Jennifer A. Callery, Esquire
SCHNADER
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Pittsburgh, PA 15222
Counsel for Defendant MRO Corporation

Richard Hosking, Esquire
James C. Swetz, Esquire
K&L GATES LLP
535 Smithfield Street
Pittsburgh, PA 15222
Counsel for HealthPort

Patrick J. Troy

EXHIBIT C

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

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

Plaintiff,

vs.

IOD INCORPORATED,

Defendant.

CIVIL DIVISION

Case No.: GD-09-012922

PLAINTIFF'S REPLY TO NEW MATTER OF DEFENDANT IOD INCORPORATED

Filed on behalf of: PLAINTIFF

Counsel of Record for this party:

Paul A. Lagnese, Esquire
Pa. I.D. #51281
David M. Paul, Esquire
Pa .I.D. #70552
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(412) 471-4300

James M. Pietz, Esquire
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304 Ross Street, Suite 700
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(412) 288-4333

JURY TRIAL DEMANDED

PLAINTIFF'S REPLY TO NEW MATTER OF DEFENDANT IOD INCORPORATED

Plaintiff, by its undersigned counsel, files the following Reply to New Matter of Defendant IOD Incorporated:

1. Paragraph 1 of Defendant's New Matter contains no averments and therefore no response is required.

2. Paragraph 2 of Defendant's New Matter is a conclusion of law to which no response is required.

3. Paragraph 3 of Defendant's New Matter is a conclusion of law to which no response is required.

4. Paragraph 4 of Defendant's New Matter is a conclusion of law to which no response is required.

5. Paragraph 5 of Defendant's New Matter is a conclusion of law to which no response is required.

6. Paragraph 6 of Defendant's New Matter is a conclusion of law to which no response is required.

7. Paragraph 7 of Defendant's New Matter is a conclusion of law to which no response is required.

8. Paragraph 8 of Defendant's New Matter is a conclusion of law to which no response is required.

9. Paragraph 9 of Defendant's New Matter is a conclusion of law to which no response is required.

10. Paragraph 10 of Defendant's New Matter is a conclusion of law to which no response is required.

11. Paragraph 11 of Defendant's New Matter is a conclusion of law to which no response is required.

12. Paragraph 12 of Defendant's New Matter is a conclusion of law to which no response is required.

13. Paragraph 13 of Defendant's New Matter is a conclusion of law to which no response is required.

14. Paragraph 14 of Defendant's New Matter is a conclusion of law to which no response is required.

15. Paragraph 15 of Defendant's New Matter is a conclusion of law to which no response is required.

16. Paragraph 16 of Defendant's New Matter is a conclusion of law to which no response is required.

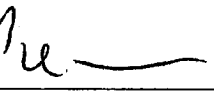
17. Paragraph 17 of Defendant's New Matter is a conclusion of law to which no response is required.

18. Paragraph 18 of Defendant's New Matter is a conclusion of law to which no response is required.

19. Paragraph 19 of Defendant's New Matter is a conclusion of law to which no response is required.

WHEREFORE, Plaintiff respectfully requests that judgment be entered in its behalf and against Defendant IOD Incorporated.

BERGER & LAGNESE

by: 

Paul A. Lagnese, Esquire
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David Paul, Esquire
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and

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

ATTORNEYS FOR PLAINTIFF

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the within **PLAINTIFF'S REPLY TO NEW MATTER OF DEFENDANT IOD INCORPORATED** was served upon all counsel of record, by First Class Mail, postage pre-paid, this **10th** day of **August, 2010** as follows:

Patrick J. Troy, Esquire
Klehr Harrison Harvey Branzburg LLP
1835 Market Street
Philadelphia, PA 19103

Paul A. Lagnese, Esquire
Counsel for Plaintiffs

EXHIBIT
10

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:

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[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
11

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
12

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
13

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.

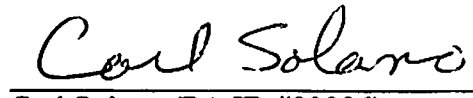
6. In light of Act No. 2012-139, this Court should summarily affirm the decision of the Superior Court that directed that this action be dismissed, since the Legislature has now made clear that the Superior Court's construction of the statute is consistent with that of the General Assembly.

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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Counsel for Appellee MRO Corporation

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
14

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

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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:

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Dated: July 30 2012

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EXHIBIT
15

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
16

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
17

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

DAVID M. LANDAY,

Plaintiff,

vs.

IOD INCORPORATED,

Defendant.

CIVIL DIVISION

Case No.: GD-09-012922

FIRST 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

FIRST 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 IOD Incorporated ("IOD") for reproductions of medical records.

2. By law, a medical records reproduction company ("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 IOD 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 Requesters that was in excess of the actual and reasonable cost of searching for, retrieving, reproducing and transmitting the records.

THE PARTIES

4. Plaintiff David Landay is a lawyer with an office located at 310 Grant Street, Suite 1420, Pittsburgh, Pennsylvania, 15219. In the course of representing his clients, Plaintiff David Landay has been repeatedly overcharged by Defendant in relation to medical records requests.

5. Defendant IOD is a corporation or other entity with headquarters at 1030 Ontario Road, P.O. Box 19025, Green Bay, Wisconsin 54307. 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 Requesters. 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 Reproductions Based Upon The Estimated Actual and Reasonable Cost

6. Under Pennsylvania 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 a legal right to obtain reproductions of their 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.

IOD Operates As An MRRC To Provide Reproductions Of Medical Records To Medical Records Requestors

12. Defendant IOD is an MRRC that has entered into exclusive medical records reproduction contracts with numerous Pennsylvania hospitals and hospital systems, including Excela Health Westmoreland Regional Hospital.

13. Under these contracts, IOD 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, IOD 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 IOD 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 IOD and makes the requested medical records available to IOD, usually electronically. IOD then contacts the Medical Records Requester 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, IOD, 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, IOD 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 IOD. 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.

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

21. IOD 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. IOD 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 IOD 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 IOD 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 IOD 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 IOD 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 IOD 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 IOD 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 IOD's actual and reasonable reproduction costs.

25. With respect to search and retrieval fees, for requests received after January 1, 2009, Defendant IOD 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 IOD 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 IOD 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 IOD 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 IOD 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 IOD's actual and reasonable search and retrieval costs.

Representative Plaintiff Was Subjected To Defendant's Billing Practices

26. In or around March of 2009, Plaintiff sent Excela Health Frick Hospital an authorization from Patient "A" requesting a reproduction of Patient A's hospital medical records.

27. In response to this request, IOD sent Plaintiff an invoice for $49.89. This invoice is attached as Exhibit 1. Unbeknownst to Plaintiff, the invoice did not reflect charges based upon IOD's actual or estimated actual expenses for locating, retrieving, reproducing and transmitting the medical records. The medical records charges included a $19.80 fee for search and retrieval; a $1.33 per page fee for the reproduction of 20 pages of medical records; a $0.99 per page fee for the reproduction of 2 pages and a postage fee of $1.51.

28. Plaintiff having no other method of obtaining the medical records and believing the invoice comported with the law, Plaintiff paid IOD the requested $49.89. In exchange for this payment, IOD provided the requested reproduction of Patient A's hospital record.

CLASS ACTION ALLEGATIONS

29. 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 IOD 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).

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

Numerosity

30. 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 IOD. 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

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

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

e. Does IOD'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?

f. Does IOD'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?

g. Did a constructive trust arise due to IOD's knowing acquisition of monies in excess of its 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?

h. Was Defendant IOD unjustly enriched by its acceptance and retention of payments made by Medical Records Requesters 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?

Typicality

32. 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 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.

33. On information and belief, Plaintiff avers 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 the reproduction of Pennsylvania hospital and affiliated entity medical records.

34. On information and belief, Plaintiff avers that IOD 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 the reproduction of Pennsylvania hospital and affiliated entity medical records.

35. 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; and payment of medical records search and retrieval charges that exceeded Defendant's actual and/or estimated actual and reasonable expenses incurred.

Adequacy of Representation

36. Representative Plaintiff will assure the adequate representation of all members of the Class. Plaintiff's claims are typical of the Class's claims. Plaintiff has no conflict with Class Members in the maintenance of this action, and Plaintiff's interest in this action is antagonistic to Defendant's interests.

37. Plaintiff's interests are coincident with, and not antagonistic to, absent Class Members' interests because, by proving Plaintiff's individual claims Plaintiff will necessarily prove Defendant's liability as to the Class's claims.

38. Plaintiff is also cognizant of and determined to faithfully discharge its fiduciary duties to the absent Class Members as Class Representative. Plaintiff will vigorously pursue the Class's claims. Plaintiff is aware that it cannot settle this Class Action without prior Court approval. Representative Plaintiff has and/or can acquire the financial resources to litigate this Class Action.

39. 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

40. A class action provides 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.

41. The substantive claims of 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.

42. 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.

43. To Plaintiff's knowledge no other similar actions are pending against this Defendant in Pennsylvania.

44. This forum is appropriate for litigation of this Class Action because Plaintiff is located here and Defendant conducts business here.

45. 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.

46. 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.

47. 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

48. Plaintiff re-alleges and incorporates by reference each and every allegation in the preceding paragraphs.

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

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

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

52. By agreeing to provide and/or providing the requested medical records, Defendant IOD 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 the permissible fees that may be charged Medical Records Requestors in relation to these medical records requests and/or activities.

53. 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 IOD's actual and/or estimated actual and reasonable expenses, Defendant IOD 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.

54. Defendant IOD's conduct, as described at length above, constitutes a breach or breaches of contract and/or implied contract between Defendant IOD and Plaintiff, and the contracts and/or implied contracts between Defendant IOD 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.

55. As a result of Defendant IOD'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.

56. Defendant IOD's conduct was intentional, willful, wanton, reckless, and outrageous because Defendant IOD 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 IOD as follows:

1. Certifying this action as a Class Action with Plaintiff as the Representative of the Class;

2. Declaring that the conduct of Defendant was in breach of contract and unlawful;

   Awarding damages according to proof at trial;

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

4. 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
Pa. I.D. No. 55406
429 Forbes Avenue, Suite 1710
Pittsburgh, PA 15219
Telephone: (412) 288-4333

VERIFICATION

I, DAVID M. LANDAY, hereby state that the averments of fact contained in the foregoing FIRST AMENDED 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.

DAVID M. LANDAY

iod incorporated
PO BOX 19058
GREEN BAY, WI 54307
PH: 866-420-7455 - FAX: 920-406-3771
TAX I.D. No.: 65-0765287

ENTERED

INVOICE
0009-BV-16877

Attention: NA
DAVID M. LANDAY
THE GRANT BUILDING
SUITE 1420
310 GRANT STREET
PITTSBURGH, PA 15219

PAYMENT INFORMATION

Please submit your check or credit card (MasterCard, Visa, Discover or American Express) payment by visiting our website at 'payments.iodincorporated.com'. Or by calling 1-866-420-7455

Your Payment: _____
Amount Due: 49.89
Date Due: DUE UPON RECEIPT

----------PLEASE CUT ALONG THE DOTTED LINE AND RETURN THE ABOVE STUB WITH YOUR PAYMENT----------

iod incorporated
PO BOX 19058
GREEN BAY, WI 54307
PH: 866-420-7455 - FAX: 920-406-3771
TAX I.D. No.: 65-0765287

INVOICE
0009-BV-16877

Account : [redacted]
Customer Ref. : [redacted]
Facility : EXCELA HEALTH FRICK HOSPITAL
Price Class : ATTORNEY
Patient : [redacted]
Invoice Date : 4/17/2009
S.S.N. :
Request No. : 5944376

Description	*Quantity*	*Rate*	*Amount*
Hard Copy	22	0.00	0.00
Basic Charge	1	19.80	19.80
Combined Pages	20	1.33	26.60
Combined Pages	2	0.99	1.98
		Sub Total :	48.38
		Tax :	0.00
		Postage :	1.51
		Prepayment :	0.00
		AMOUNT DUE :	49.89

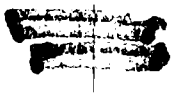
TERMS: NET UPON RECEIPT, PAST DUE AFTER 30 DAYS. IN THE EVENT THAT THIS OBLIGATION IS TURNED OVER TO AN ATTORNEY TO ENFORCE COLLECTION, THE PURCHASER AGREES TO PAY ALL REASONABLE FEES, INTEREST 1.5% PER MONTH AND COST OF COLLECTION. WE ACCEPT ALL MAJOR CREDIT CARDS. U.S. FUNDS ONLY

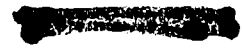
CUSTOMER

PLEASE RETURN THE TOP STUB WITH YOUR PAYMENT AND KEEP BOTTOM PART FOR YOUR RECORDS

4-27-09
10460

PENGAD 800-631-6989
EXHIBIT
1





CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the within **FIRST AMENDED CLASS ACTION COMPLAINT** was served upon all Defendants, by First Class Mail, postage pre-paid, this 16th day of **June, 2015**, as follows:

David Smith, Esquire
Schnader Harrison Segal & Lewis, LLP
1600 Market Street, Suite 3600
Philadelphia, PA 19103

Don P. Foster, Esquire
Offit Kurman
Ten Penn Center, 1801 Market Street
Philadelphia, PA 19103

Howard A. Chajson, Esquire
Dickie McCamey & Chilcote, PC
Two PPG Place, Suite 400
Pittsburgh, PA 15222

J. Nicholas Ranjan, Esquire
K&L Gates LLP
210 Sixth Avenue
Pittsburgh, PA 15222-2613

Clifford A. Rieders, Esquire
Rieders, Travis, Humphrey, Waters & Dohrmann
161 West Third Street
Williamsport, PA 17701

Paul A. Lagnese, Esquire
David M. Paul, Esquire
Counsel for Class Plaintiffs

EXHIBIT
18

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

DAVID M. LANDAY,

Plaintiff,

v.

IOD INCORPORATED,

Defendant.

CIVIL DIVISION

No. GD-09-012922

(coordinated with GD-09-012911; GD-09-012919; GD-09-012923; GD-09-014785; and GD-11-011194)

DEFENDANT'S ANSWER AND NEW MATTER TO PLAINTIFF'S FIRST AMENDED CLASS ACTION COMPLAINT

Submitted On Behalf of Defendant IOD Incorporated

COUNSEL OF RECORD FOR THIS PARTY:

Amy L. Groff (Pa. ID 94007)
K&L Gates LLP
17 North Second Street, 18th Floor
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Firm No. 148
Telephone: (717) 231-4500
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Anna Shabalov (Pa. ID 315949)
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210 Sixth Avenue
Pittsburgh, PA 15222
Firm No. 148
Telephone: (412) 355-6500
Facsimile: (412) 355-6501

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

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

DAVID M. LANDAY,	)	CIVIL DIVISION
	)	
Plaintiff,	)	No. GD-09-012922
	)	
v.	)	
	)	
IOD INCORPORATED,	)	
	)	
Defendant.	)	
	)	
	)	

DEFENDANT'S ANSWER AND NEW MATTER TO PLAINTIFF'S FIRST AMENDED CLASS ACTION COMPLAINT

CIOX Health, LLC hereby submits this Answer and New Matter of Defendant IOD Incorporated ("IOD")[1] to Plaintiff David M. Landay's ("Plaintiff's") First Amended Class Action Complaint ("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

[1] IOD Incorporated and HealthPort Technologies, LLC merged as of December 31, 2015, and HealthPort Technologies, LLC was the surviving entity. HealthPort Technologies, LLC subsequently changed its name to CIOX Health, LLC, effective March 1, 2016. The answers in this pleading respond to the allegations as of the time the Amended Complaint was filed and as they relate to the entity then existing and known as IOD Incorporated.

response is required. To the extent a response is required, these allegations are denied. By way of further response, IOD 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 IOD 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) IOD was a corporation, (ii) it conducted business at 1030 Ontario Road, Green Bay, Wisconsin, 54307, and (iii) it was 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 IOD entered into agreements with certain hospitals and hospital systems in Pennsylvania, including Excela Health Westmoreland Regional 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 IOD 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 IOD 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 IOD 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 IOD 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 IOD 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 IOD shared any revenue with hospitals and/or affiliated entities related to medical records requests. By way of further response, IOD 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 IOD "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, IOD 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, IOD 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, IOD 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, IOD 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, IOD 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. IOD admits the allegations set forth in paragraph 26.

27. The allegations contained in paragraph 27 are admitted in part and denied in part. It is admitted that IOD issued the invoice attached as Exhibit 1 to the Amended Complaint. To the extent the allegations in paragraph 27 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 27 state conclusions of law to which no response is required. If a response is required, the remaining allegations are denied.

28. The allegations contained in paragraph 28 are denied as stated. Plaintiff had the choice of obtaining copies of the medical records from IOD at the rates and fees specified in the invoice attached as Exhibit 1 to the 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, IOD provided the requested records to Plaintiff.

RESPONSE TO CLASS ACTION ALLEGATIONS

29. The allegations set forth in paragraph 29 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 Amended Complaint are proper for class certification, as, to the contrary, Plaintiff cannot satisfy the requirements to certify a class.

30. The allegations set forth in paragraph 30 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 30 and, therefore, the allegations are denied. By way of further response, the defense 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.

31. The allegations set forth in paragraph 31, including subparts (a) through (h), 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 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, it is denied that IOD charged excessive fees as defined by the MRA. Additionally, Plaintiff repeatedly approved and voluntarily paid any invoices submitted by IOD. 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 Amended Complaint are proper for class certification, as, to the contrary, Plaintiff cannot satisfy the requirements to certify a class.

33. The allegations set forth in paragraph 33 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 33 and, therefore, the allegations are denied. By way of further response, it is specifically denied that the claims set forth in the 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, after a reasonable investigation, there is insufficient knowledge or information to form a belief as to the truth of the allegations contained in paragraph 34 and, therefore, the allegations are denied. By way of further response, it is specifically denied that the claims set forth in the 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 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, the allegations contained in paragraph 36 are denied. By way of further response, it is specifically denied that the claims set forth in the 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 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, after a reasonable investigation, there is insufficient knowledge or information to form a belief as to the truth of the allegations contained in paragraph 38 and, therefore, the allegations are denied. By way of further response, it is specifically denied that the claims set forth in the 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 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 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 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 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 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, it is admitted only that Plaintiff is located here and IOD 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 44 and, therefore, the allegations are denied. By

way of further response, it is specifically denied that the claims set forth in the 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 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, the allegations contained in paragraph 46 are denied. By way of further response, it is specifically denied that the claims set forth in the 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, after a reasonable investigation, there is insufficient knowledge or information to form a belief as to the truth of the 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 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

48. 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 47 of the Amended

Complaint are incorporated by reference and realleged, as if fully set forth herein.

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, these allegations are denied.

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, these allegations are denied.

51. The allegations set forth in paragraph 51 state conclusions of law to which no response is required. To the extent a response is required, these allegations are denied.

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.

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 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 Amended Complaint fails to state a claim upon which relief may be granted.

4. Plaintiff's Amended Complaint fails because IOD was 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 IOD'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 IOD 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 IOD 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 IOD's conduct.

16. Plaintiff's 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 IOD's favor and against Plaintiff with cost of suit sustained.

Dated: March 4, 2020

Respectfully Submitted:

/s/ Anna Shabalov
Amy L. Groff (Pa. ID 94007)
K&L Gates LLP

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Facsimile: (412) 355-6501

Counsel for Defendant IOD Incorporated and CIOX Health LLC

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 4, 2020

/s/ Anna Shabalov
Anna Shabalov

CERTIFICATE OF SERVICE

I hereby certify that on March 4, 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:

Paul A. Lagnese, Esq.
David Paul, Esq.
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