

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

A.H. and ADRIANA FLEMING,  
individually and on behalf of all others  
similarly situated,

Plaintiffs,

v.

TO BE FILED IN 16-C-497  
Honorable Jennifer F. Bailey  
A.H. et al. v. Matulis, et al. 18-C-176

STEVEN R. MATULIS, M.D.;  
CHARLESTON GASTROENTEROLOGY  
ASSOCIATES, P.L.L.C.; and  
CHARLESTON AREA MEDICAL CENTER, INC.;

Defendants.

**ORDER GRANTING PRELIMINARY APPROVAL OF PROPOSED SETTLEMENT  
CLASS OF CERTAIN CLAIMS FILED AGAINST DEFENDANT CAMC AND  
GRANTING CERTIFICATION OF SETTLEMENT CLASS FOR PURPOSES OF  
SETTLEMENT AND SCHEDULING FINAL HEARING**

On December 15, 2020 and January 20, 2021, came Plaintiffs individually and on behalf of all others similarly situated ("Plaintiffs"), by counsel, and Defendant Charleston Area Medical Center, Inc., ("CAMC"), by counsel, before the Court for hearing on the Parties' joint motion for preliminary approval of a proposed class settlement of certain claims filed against CAMC in this matter and motion to certify a Settlement Class for purposes of the settlement of certain claims. In addition, the Parties moved the Court to order proper notice to the Settlement Class and to set a date for a final hearing.

**FINDINGS OF FACT**

**I. Introductory Findings**

This Court finds and the parties stipulate that the Court possesses jurisdiction over the subject matter of these proceedings and over all Parties and the members of the Settlement Class, as defined below.

For purposes of this Order, the Court adopts the following definitions and terms, as set forth in the Term Sheet, attached hereto as **Exhibit A**:

1. “The Released Claims” and “The Settled Claims” are all claims and damages, including but not limited to those claims and damages that are or could have been asserted in this litigation, whether known or unknown, except for claims and damages by Plaintiffs against CAMC under any law or public policy for sexual harassment or discrimination, including claims for Sexual Harassment in Violation of the West Virginia Human Rights Act, Sexual Harassment in violation of the West Virginia Common Law, and Statutory Negligence Claims under W. Va. Code §55-7-9 as pled in Counts V, VI, and VII of the Amended Class Action Complaint in the lawsuit styled *A.H., et al. v. Steven R. Matulis, M.D.* (No. 18-C-176) that is currently pending in the Circuit Court of Kanawha County, West Virginia.

2. “The Unreleased Claims” or “The Remaining Claims” are claims by Plaintiffs against CAMC under any law or public policy for sexual harassment or discrimination, including claims for Sexual Harassment in Violation of the West Virginia Human Rights Act, Sexual Harassment in violation of the West Virginia Common Law, and Statutory Negligence Claims under W. Va. Code §55-7-9 as pled in Counts V, VI, and VII of the Amended Class Action Complaint in the lawsuit styled *A.H., et al. v. Steven R. Matulis, M.D.* (No. 18-C-176) that is currently pending in the Circuit Court of Kanawha County, West Virginia.

3. The “Plaintiffs” are Plaintiffs A.H. and Adriana Fleming (together the “Plaintiff Class Representatives”), on their own behalf and on behalf of approximately 2,500 putative class members in Civil Action No. 18- C-176.

4. The “Parties” are collectively the Plaintiffs and CAMC.

5. The “Settlement Class” is, only for purposes of The Settled Claims, all female patients of CAMC who had colonoscopies or sigmoidoscopies performed at CAMC by Dr. Steven R. Matulis, a member of Charleston Gastroenterology Associates, PLLC between January 1, 2010 and February 17, 2016, with the exception of the following, who are excluded from the Settlement Class:

- a) Judicial officers assigned to this case.
- b) Plaintiffs’ counsel and those attorneys who have made an appearance for Defendants in this case.
- c) The Claims Administrator, Guardian Ad Litem, or any other person appointed by the Court to oversee any aspect of the administration of the proposed settlement.
- d) Female patients who have settled claims against CAMC arising out of allegations of misconduct by Dr. Matulis.
- e) Female patients who exclude themselves from the Settlement Class (i.e., opt-outs).

The above-styled civil action is a consolidated putative class action<sup>1</sup> in which Plaintiffs allege a breach of the standard of care as well as other claims as set out below against CAMC, Steven R. Matulis (“Matulis”) and Charleston Gastroenterology Associates, PLLC (“CGA”) with respect to female patients who received colonoscopies and sigmoidoscopies by Matulis at CAMC from January 1, 2010, to February 17, 2016.

## **II. Request for Preliminary Approval**

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<sup>1</sup> This class action was consolidated with other cases against the same defendants by this Court’s Order entered March 4, 2020, and styled T.W. v. Steven R. Matulis, M.D. and Charleston Gastroenterology Associates, PLLC, Civil Action No. 16-C-497.

The Parties jointly moved the Court to preliminarily approve the settlement of The Settled Claims against CAMC. Rule 23(c)(4)(A) of the West Virginia Rules of Civil Procedure permits an action to be maintained as a class action with respect to particular issues only.

W.Va.R.Civ.P. 23(e) provides that a class action shall not be dismissed or compromised without approval of the Court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the Court directs.

The West Virginia Supreme Court of Appeals recently found that while West Virginia Courts are not bound by federal decisions, West Virginia Courts may find “the weight of federal jurisprudence to be persuasive,” with respect to some issues related to class action litigation. *See State ex rel. Surnaik Holdings of WV, LLC v. Bedell*, \_\_\_ W.Va. \_\_\_, \_\_\_ S.E.2d \_\_\_, 2020 WL 7223178, at \*12 (W.Va. Nov. 20, 2020). Courts have held that they should consider whether the settlement is “fair, reasonable and adequate.” A court should direct class notice and schedule a hearing to consider final approval of a class settlement, if it determines that a proposed settlement is within the range of what might ultimately be found fair, reasonable and adequate. *See In re Jiffy Lube Securities Litigation*, 927 F.2d 155, 158-59 (4<sup>th</sup> Cir. 1991); *see also In re Corrugated Containing Antitrust Litigation*, 643 F.2d 1959, 205 (5<sup>th</sup> Cir. 1981) (noting that the District Court granted preliminary approval and held that “these settlements are within the range of possible approval”); *Finn v. FMC Corp.*, 528 F.2d 1169 (4<sup>th</sup> Cir. 1975). In evaluating whether the settlement falls within the range of possible approval, the court’s function should not be to second-guess the settlement terms. *Officers for Justice v. Civil Serv. Comm’n*, 688 F.2d 615, 625 (9<sup>th</sup> Cir. 1982), *cert denied*, 459 U.S. 1217 (1983). Rather, the court’s focus should be on the terms of the settlement, not what might have been. When a proposed settlement appears to fall within the range

of possible approval, it is appropriate to issue preliminary approval and direct notice to the members of the class.

In assessing the fairness of the proposed settlement, the following factors are considered: (1) the posture of the case at the time settlement was proposed; (2) the extent of discovery that had been concluded; (3) the circumstances surrounding the negotiations; and (4) the experience of counsel in the area of class action litigation. The primary procedural factor that courts consider in determining whether to preliminarily approve a proposed settlement is whether the agreement arose out of arms-length, non-collusive negotiations. Courts look to the procedural posture of the case at settlement for indications that the agreement is the product of legitimate arms-length negotiations. Where the proposed settlement was preceded by a lengthy period of adversarial litigation involving substantial discovery, a court is likely to conclude that settlement negotiations occurred at arms-length. Courts also find an absence of collusion when settlement negotiations are conducted by a third party. RUBENSTEIN, 4 NEWBURG ON CLASS ACTIONS §§ 13-14 (5<sup>th</sup> ed.).

Federal Rule 23(e) summarizes factors which should be covered when federal courts review and determine whether a settlement should be preliminarily approved:

**(2) *Approval of the Proposal.*** If the proposal would bind class members, the court may approve it only after a hearing and only on finding that it is fair, reasonable, and adequate after considering whether:

(A) the class representatives and class counsel have adequately represented the class;

(B) the proposal was negotiated at arm's length;

(C) the relief provided for the class is adequate, taking into account:

(i) the costs, risks, and delay of trial and appeal;

(ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims;

(iii) the terms of any proposed award of attorney's fees, including timing of payment; and

(iv) any agreement required to be identified under Rule 23(e)(3); and

(D) the proposal treats class members equitably relative to each other.

(3) **Identifying Agreements.** The parties seeking approval must file a statement identifying any agreement made in connection with the proposal.

(4) **New Opportunity to be Excluded.** If the class action was previously certified under Rule 23(b)(3), the court may refuse to approve a settlement unless it affords a new opportunity to request exclusion to individual class members who had an earlier opportunity to request exclusion but did not do so.

Fed.R.Civ.P. 23(e) (2018) (footnote added).

### **III. Settlement Terms**

Based upon the Parties' Joint Motion and representations to the Court, the Court finds that the essential terms of the settlement<sup>2</sup> agreement are:

1. CAMC agreed to pay a gross amount of \$23.1 million ("the Gross Settlement Amount"), inclusive of attorneys' fees and costs/expenses for Plaintiffs/Class Counsel, any service awards to the Plaintiff Class Representatives, and payment of 1% of the Gross Settlement Amount to the West Virginia Patient Injury Compensation Fund. The Parties have deposited the Gross Settlement Amount in an escrow fund where it is drawing interest pending Court approval of the settlement.

2. In addition to the aforementioned payment of \$23.1 million, CAMC will also pay all costs of administration of the proposed settlement, including the cost of Notice to the Settlement Class, administration of the settlement, and any costs associated with the Fairness Hearing.

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<sup>2</sup> This is a description of the essential terms. This description of the essential terms, however, is not meant to, in any way, affect the settlement agreement itself, which was signed by the Parties and made a part of the record herein.

3. Upon Court approval of the settlement, the Plaintiff Class Representatives, on behalf of themselves and all members of the Settlement Class, in exchange for the sum of \$23,100,000.00, will fully release and dismiss with prejudice all claims and damages, including but not limited to those claims and damages that are or could have been asserted in this litigation, whether known or unknown, except for The Remaining Claims, which is defined above as “claims and damages by Plaintiffs against CAMC under any law or public policy for sexual harassment or discrimination, including claims for Sexual Harassment in Violation of the West Virginia Human Rights Act, Sexual Harassment in Violation of the West Virginia Common Law, and Statutory Negligence Claims under W.Va. Code §55-7-9, as pled in Counts V, VI and VII of the Plaintiffs’ Amended Class Action Complaint filed on October 15, 2018 in Civil Action No. 18-C-176 in the Circuit Court of Kanawha County, West Virginia.”

4. As additional consideration for CAMC’s payment of the Gross Settlement Amount, Plaintiff Class Representatives, on behalf of themselves and all members of the Settlement Class, agree to limit any additional recovery against CAMC for The Remaining Claims to the proceeds available, if any, under the following insurance policies issued to CAMC:

- a) Policy No. MLP 6540112-06 issued by Zurich American Insurance Company;
- b) Policy No. V139E2150301 issued by Beasley Insurance Company, Inc.; and
- c) Policy No. HS662387 issued by RSUI Indemnity Company.

Plaintiffs assume all risks associated with insurability and/or coverage. CAMC makes no representations or warranties as to insurability and/or coverage under any Policy of insurance.

5. The Parties agree that this settlement will not release CAMC from The Remaining Claims and CAMC agreed that the Plaintiffs have not settled such claims.

6. Notwithstanding the lack of a release of CAMC for The Remaining Claims, as set forth in Paragraph 5, above, upon the Court's final approval of the proposed class settlement with CAMC, the Plaintiff Class Representatives, on behalf of themselves and all members of the Settlement Class, covenant and agree to limit any further recovery against CAMC to any insurance funds paid by the Policies and not to collect any judgment obtained against CAMC from CAMC's assets. Likewise, the Parties agree that the settlement agreement shall not impair the ability of the Settlement Class to seek the full amount of any applicable insurance coverage for The Remaining Claims from the aforesaid Policies.

7. CAMC will receive an offset from any verdict on The Remaining Claims in an amount of \$23,100,000.00.

8. The settlement will not affect the Parties' rights, defenses, and arguments with respect to The Remaining Claims except to the extent set forth above in Paragraph 6. CAMC reserves the right to fully defend all of The Remaining Claims.

9. Plaintiffs have not resolved claims against Defendants Matulis and CGA and the proposed settlement with CAMC does not resolve any claims against those defendants.

10. In addition, the settlement agreement provides for the following:

- a) For purposes of The Settled Claims only, the Parties agreed that the Settlement Class includes female patients who underwent a colonoscopy or sigmoidoscopy by Dr. Steven R. Matulis at CAMC between January 1, 2010 and February 17, 2016.
- b) The settlement does not include recovery of damages for medical bills or items paid by a governmental entity, but if there are any applicable



governmental, private insurance or other liens, the Plaintiffs agree to satisfy them, including, but not limited to, any Medicare or Medicaid liens.

- c) CAMC will not retaliate against any of its employees or agents who are Settlement Class members and who participated in the settlement.
- d) CAMC has no obligation to pay taxes on the monies which may be disbursed to the Plaintiffs.

11. Settlement Class Counsel will seek reasonable attorneys' fees for the prosecution of this matter from the Gross Settlement Amount in addition to advanced costs/expenses of up to \$400,000.00. Class Counsel will file a separate petition for attorneys' fees and costs/expenses in advance of the Final Fairness Hearing pursuant to the deadlines established by the Court, with the understanding that the Settlement Funds paid pursuant to this Agreement are inclusive of all Plaintiffs' attorneys' fees, costs and expenses incurred by Plaintiffs' counsel in this case.

12. The Plaintiff Class Representatives appointed by the Court shall be paid a fair and equitable sum from the Gross Settlement Amount, as determined by the Court, for their service as a party in this matter.<sup>3</sup>

13. After payment of (a) Court approved attorneys' fees, (b) litigation costs/expenses incurred by the Class Counsel, (c) all service awards to Plaintiff Class Representatives, and (d) monies owed to the West Virginia Patient Injury Compensation Fund from the Gross Settlement Amount, the remaining monies (i.e., "the Net Settlement Amount") will be distributed through the approved claims process to members of the Settlement Class who qualify to participate in the

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<sup>3</sup> This payment for Plaintiff Class Representative services is in addition to any payments these Plaintiff Class Representatives are entitled to receive as members of the class. Plaintiff Class Representatives have requested service awards not exceeding \$42,000 each.

settlement pursuant to terms set forth by the Court below.<sup>4</sup> Any unclaimed funds shall be distributed pursuant to West Virginia law and the Court's discretion, with the understanding that CAMC's position is that any additional costs or fees associated with any second distribution to the Class Members, if any, should be paid from the unclaimed settlement proceeds.

**IV. The Proposed Settlement is Fair, Reasonable and Adequate and Was Reached in Good Faith**

Applying the above factors, the Court finds as follows:

1. The settlement is fair, reasonable, and adequate and was reached in good faith.
2. The Plaintiff Class Representatives and Settlement Class Counsel have adequately represented the Settlement Class. The experience of counsel in the area of class litigation is significant, including experience with regard to class action and complex litigation. Discovery in this case was extensive and thorough. Plaintiffs' Counsel have deposed over 21 witnesses in this case. They retained six experts in the areas of hospital management, psychiatry and gastroenterology.<sup>5</sup> The record reflects that Plaintiffs' Counsel have zealously prosecuted the litigation.
3. The Settlement was negotiated at arm's length after three days of formal mediations and additional ongoing negotiations with Don O'Dell, Esq., who is both an experienced trial counsel and an experienced mediator.
4. Plaintiffs' Counsel had an adequate basis on which to negotiate and reach the subject settlement.
5. Any trial and appeals from trial would take substantial money and time.

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<sup>4</sup> The Settlement Class members will not receive multiple payments if they happened to have received multiple colonoscopies and/or sigmoidoscopies from Dr. Matulis at CAMC during the class period.

<sup>5</sup> Plaintiffs filed a complete motion for certification of the class on September 3, 2019 with exhibits including expert witness affidavits and other supporting documents.

6. There are no agreements between Plaintiffs and CAMC pertaining to the settlement in any way, other than the settlement described in the settlement agreement.

7. The payment of \$23,100,000 is fair, reasonable and adequate given the overall circumstances of the case. In this case, the Parties proposed plan seeks to provide each of the members of the Settlement Class an equal amount of the Net Settlement Amount. Further, the exigencies and unknown outcome of litigation must be considered. Here, the Plaintiffs have negotiated a substantial lump sum and have also retained the right to proceed with certain limited and defined claims against the settling defendant, CAMC, to the extent of additional insurance coverage available, as well as the claims against the non-settling defendants.

**V. Certification of a Settlement Class for Purposes of The Settled Claims**

**A. A Class May be Certified with Respect to The Settled Claims Under W.Va.R.Civ.P. 23(c)(4)**

Rule 23(c)(4) provides that when appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly. The Court has various tools available to assist in managing a class action like this case.

“There are a number of management tools available to a [trial] court to address any individualized damages issues that might arise in a class action, including: (1) bifurcating liability and damage trials with the same or different juries; (2) appointing a magistrate judge or special master to preside over individual damages proceedings; (3) decertifying the class after the liability trial and providing notice to class members concerning how they may proceed to prove damages; (4) creating subclasses; or (5) altering or amending the class.” (footnote omitted).

*In re Visa Check/MasterMoney Antitrust Litigation*, 280 F.2d 124, 141, 2001-2 Trade Cas. (CCH) ¶73459, 57 Fed. R. Evid. Serv., 583, 50 Fed. R. Serv. 3d 993 (2d Cir. 2001) (citing Newberg on Class Actions).

This Court finds that it is appropriate to certify a class for The Settled Claims only, and to reserve any ruling on class certification for The Remaining Claims.<sup>6</sup>

**B. Class Certification**

CAMC and Plaintiffs move this Court to certify the Settlement Class for purposes of distribution and approval of The Settled Claims. For purposes of the Settlement Class, the class includes the following persons:

**All female patients of CAMC who had colonoscopies or sigmoidoscopies performed at CAMC by Dr. Steven R. Matulis, a member of Charleston Gastroenterology Associates, PLLC between the time period January 1, 2010 to February 17, 2016.**

The following are excluded from the Settlement Class:

- a) Judicial officers assigned to this case.
- b) Plaintiffs' Counsel and those attorneys who have made an appearance for Defendants in this case.

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<sup>6</sup> Nothing related to the Court's preliminary approval of this settlement between plaintiffs and Charleston Area Medical Center, Inc. – and this Court's certification of a settlement class for the same – impairs the rights of Defendants Steven R. Matulis, M.D. and Charleston Gastroenterology Associates, P.L.L.C. to object to or oppose any class certification of any claims against said Defendants, or the rights of CAMC to object to or oppose any class certification of the Remaining Claims, which objections/exceptions are noted and preserved. All rights and remedies available to Steven R. Matulis, M.D. and Charleston Gastroenterology Associates, P.L.L.C. with respect to entitlement to an offset/setoff in the sum of the settlement between plaintiffs and Charleston Area Medical Center, Inc., are also noted and preserved.

- c) The Claims Administrator, Guardian Ad Litem, or any other person appointed by the Court to oversee any aspect of the administration of the proposed settlement.
- d) Female patients who have settled claims against CAMC arising out of allegations of misconduct by Dr. Matulis.
- e) Female patients who exclude themselves from the Settlement Class (i.e., opt-outs).

The proposed Settlement Class consists of approximately 2,500 members, according to a review of records conducted by CAMC.<sup>7</sup>

The Court's role in determining whether a class should be certified as a settlement or conditional class is primarily to protect absentee class members. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620, 117 S. Ct. 2231, 138 L.Ed.2d 689 (1997).; *Sims v. Pfizer, Inc.*, Case No. 10-cv-10743, 2015 WL 12748836, at \*1 (E.D.Mich. Nov. 13, 2015). In addition, the trial court may consider the facilitation of settlement as a factor in favor of class certification. *In re A.H. Robins, Co.*, 880 F.2d 709 (4<sup>th</sup> Cir.), cert den., 493 U.S. 959 (1989)(abrogated on other grounds).

A trial court's decision granting or denying a motion to certify a class action is reviewed under an "abuse of discretion standard." Syl. Pt. 1, *In re West Virginia Rezulin Litigation*, 214 W.Va. 214 W. Va. 52, 585 S.E.2d 52 (2003); Syl. Pt. 1, *State ex rel. Surnaik Holdings of WV, LLC v. Bedell*, \_\_\_ W.Va. \_\_\_, \_\_\_ S.E.2d \_\_\_, 2020 WL 7223178 (W.Va. Nov. 20, 2020).

The Court preliminarily finds for purposes of the settlement of the Settled Claims, and only for such purpose, and without an adjudication on the merits or a determination of whether the Settled Class should be certified for the Remaining Claims or if the settlement does not become

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<sup>7</sup> See the Affidavit from CAMC administrator, attached to Plaintiffs' motion as Exhibit D, describing how the putative Settlement Class members were identified and counted.

final, that the Settlement Class should be certified in this case for purposes of approving the settlement of The Settled Claims against CAMC, as the proposed settlement of The Settled Claims satisfies all requirements necessary for Court approval and certification as set forth in W.Va.R.Civ.P. Rule 23, and the case law applicable to class actions.

**C. The Settlement Class Satisfies Wa.V.R.Civ.P. 23(a)**

W.Va.R.Civ.P. 23(a) establishes four prerequisites to a class action:

One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

W.Va.R.Civ.P. 23(a).

**Numerosity** is satisfied under W.Va.R.Civ.P. 23(a)(1) when “the class is so numerous that joinder of all members is impracticable.” There is no “magic number that breathes life into a class...and lack of knowledge of the exact number is not a bar to certification.” *In re West Virginia Rezulin Litigation*, 214 W. Va. at 65, 585 S.E.2d at 65 (citing *Clarkson v. Coughlen*, 783 F.Supp. 789, 798 (S.D.N.Y. 1992)). The West Virginia Supreme Court of Appeals has noted that Courts have certified cases with as few as 20 to 70 members. *Id.* Defendants, by their counsel, have represented that there are approximately 2,500 members of the putative Settlement Class. Therefore, the Court finds that Plaintiffs have satisfied the numerosity requirement of Rule 23(a)(1).

**Commonality** is satisfied under W.Va.R.Civ.P. 23(a)(2), when “there are questions of law and alleged facts common to the class.” This Court finds that, for purposes of the Settled Claims,

there are alleged facts common to the Settlement Class. Some, but not all, of the common issues are summarized as follows, as they relate to The Settled Claims:

- a) The alleged conduct occurred at CAMC.
- b) All Plaintiffs were unconscious or sedated during their procedures and were not aware of the alleged misconduct of Dr. Matulis described herein.
- c) Any Plaintiff who learned of alleged misconduct by Dr. Matulis did so by media accounts, word of mouth or otherwise, after February 17, 2016.
- d) Plaintiffs allege that CAMC had the affirmative duty to protect their unconscious female patients from Dr. Matulis' misconduct and did not do so until after February 16, 2016.
- e) Plaintiffs allege that when they did learn that they may have been exposed to the alleged misconduct, they suffered severe and real emotional distress and injury.
- f) With regard to The Settled Claims, each Plaintiff (i) alleges that she was exposed to the same or substantially similar misconduct by Dr. Matulis at CAMC; and (ii) learned about the alleged misconduct of Dr. Matulis after her own colonoscopy or sigmoidoscopy (no sooner than February 17, 2016).

Based on the factors outlined above, the Court finds that The Settled Claims involve common issues.

Under Rule 23(a)(3), the **Typicality** requirement provides that “the claims or defenses of the representative parties are typical of the claims or defenses of the class.” The typicality requirement does not require each class be identical when the case arises out of the same legal theory. Variations in the facts will not preclude certification. *Id.* Here, as stated above, Plaintiffs

and the Settlement Class were all unconscious or sedated and allegedly exposed to the same conduct by Dr. Matulis at CAMC and allegedly learned of the alleged abuse from media or by word of mouth. Also, the alleged duties and responsibilities of CAMC with regard to The Settled Claims were the same as to each member of the Settlement Class and the alleged breaches of the standard of care for The Settled Claims will be proven or disproven with the same evidence. This Court finds that the Plaintiff Class Representatives' Settled Claims are typical of the rest of the class, thereby meeting the requirement of typicality for purposes of the Settled Claims. *See In re West Virginia Rezulin Litigation*, 214 W. Va. at 68, 585 S.E.2d at 68.

Rule 23(a)(4) requires **Adequacy of Representation**, as follows: “the representative parties will fairly and adequately protect the interests of the class.” This rule requires the plaintiffs seeking representative status to demonstrate that they will fairly and adequately protect the interests of the class. This is demonstrated if the representatives have chosen qualified counsel to represent the class and can show that the representatives have no conflicts between them and the class members. This inquiry requires the Court to assure that the attorneys or the plaintiffs have the financial resources to pursue the case vigorously. *See In re West Virginia Rezulin Litigation*, 214 W.Va. at 69, 585 S.E.2d at 69.

There is no conflict between Plaintiffs A.H. and Adriana Fleming and the Settlement Class. They are vigorously pursuing this case as a class action. A.H. and Adriana Fleming have already been extensively deposed and are actively participating in all required aspects of the case. A.H. and Adriana Fleming hired the undersigned attorneys and law firms to represent them and the Settlement Class. The attorneys have extensive experience in complex cases and class action litigation. Therefore, this Court finds that the Plaintiff Class Representatives and Plaintiffs' Counsel fairly and adequately represent the Settlement Class.



**D. The Settlement Class Satisfies the Elements of Rule 23(b)(2)**

Rule 23(b)(2) provides:

“The party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole.”

Plaintiffs request and move the Court to certify The Settled Claims of this case as a (b)(2) class. The identity of the Settlement Class is contained in records of CAMC, Dr. Matulis or CGA. Their medical records are HIPAA protected. Plaintiffs, therefore, request that the Court grant the Rule 23(b)(2) certification by granting them equitable relief by promptly appointing a Guardian Ad Litem to protect the medical records of the Settlement Class, coordinate with the Claims Administrator, and assist in providing Notice to the members of the Settlement Class. The Court therefore, finds that Rule 23(b)(2) class is proper for the settlement of The Settled Claims and should provide protection for Plaintiffs’ personal protected information and medical records.

**E. The Proposed Settlement Class Satisfies the Elements of W.Va.R.Civ.P. 23(b)(3) for The Settled Claims**

Plaintiffs request and move the Court to certify the proposed Settlement Class as a W.Va.R.Civ.P. 23(b)(3) class for purposes of The Settled Claims only. In order for the Court to grant certification of W.Va.R.Civ.P. 23(b)(3) class, the Court must find that the class meets all requirements of W.Va.R.Civ.P. 23(a) and that it also meets the requirements of W.Va.R.Civ.P. 23(b)(3); Syl. Pt. 8, *In re West Virginia Rezulin Litigation, supra*; accord Syl. Pt. 4, *State ex. Rel. Surnaik Holdings of WV, LLC v. Bedell*, \_\_\_ W.Va. \_\_\_, \_\_\_ S.E.2d \_\_\_, 2020 WL 7223178 (W.Va. Nov. 20, 2020). Rule 23(b)(3) requires the Court to make the following findings:

The court finds that the questions of law or fact common to the members of the class **predominate** over any questions affecting only individual members, and that a class action is **superior** to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A)

the interest of members of the class in individually controlling the prosecution or defense of separate actions; **(B)** the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; **(C)** the desirability or undesirability of concentrating the litigation of the claims in the particular forum; **(D)** the difficulties likely to be encountered in the management of a class action.

The Court finds that the record demonstrates that there is no significant interest by the proposed class members in bringing separate actions or in controlling the litigation. Further, there are no other actions pending wherein different parties have requested relief for the putative class which is requested in this case. Therefore, the Court finds that W.Va.R.Civ.P. 23(b)(3)(A) and (B) are satisfied for purposes of this proposed Settlement Class.

The Court also finds that 23(b)(3)(C) is satisfied in this case. All of the acts and conduct complained of are alleged to have occurred in Kanawha County, West Virginia. Defendants CAMC and Charleston Gastroenterology Associates, Inc. have their principal places of business in Kanawha County and Dr. Matulis resided and practiced in Kanawha County at the time of the alleged occurrences. The Court therefore finds that Kanawha County is the most convenient forum, and concentrating this litigation in this jurisdiction is the most desirable to litigate this class action. Therefore, Rule 23(b)(3)(C) is satisfied.

The Court has considered the difficulties likely to be encountered in management of this class action as required by Rule 23(b)(3)(D). The Court, having reviewed the Plaintiffs' contentions as pled in their Amended Class Action Complaint and Plaintiffs' previously filed motions and memoranda in the Court's file finds that while there are potential difficulties in managing the class action, those difficulties can be managed by use of the tools available to the Court as set forth in Rule 23(d) for The Settled Claims.

In consideration of the predominance requirement, the West Virginia Supreme Court of Appeals outlined the following factors for consideration by the trial court:

When a class action certification is being sought pursuant to West Virginia Rule of Civil Procedure 23(b)(3), a class action may be certified only if the circuit court is satisfied, after a thorough analysis, that the predominance and superiority prerequisites of Rule 23(b)(3) have been satisfied. The thorough analysis of the predominance requirement of West Virginia Rule of Civil Procedure 23(b)(3) includes (1) identifying the parties' claims and defenses and their respective elements; (2) determining whether these issues are common questions by analyzing how each party will prove them at trial; and (3) determining whether the common questions predominate. In addition, circuit courts should assess predominance with its overarching purpose in mind—namely, ensuring that a class action would achieve economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results. This analysis must be placed in the written record of the case by including it in the circuit court's order regarding class certification.

*State ex. Rel. Surnaik Holdings of WV, LLC v. Bedell*, \_\_\_ W.Va. \_\_\_, \_\_\_ S.E.2d \_\_\_, 2020 WL 7223178.

Plaintiffs allege that CAMC violated the standard of care owed to its female patients, and assert other related causes of action including negligence and lack of informed consent, all as more fully set forth the Plaintiffs' Amended Class Action Complaint. The proposed settlement would resolve all claims except for claims by Plaintiffs against CAMC under any law or public policy for sexual harassment or discrimination, including claims for Sexual Harassment in violation of the West Virginia Human Rights Act, Sexual Harassment in violation of the West Virginia Common Law, and Statutory Negligence Claims under W.Va. Code 55-7-9 as pled in Counts V, VI and VII of the Amended Class Action Complaint. In addition, the trial court may consider the facilitation of settlement as a factor in favor of class certification. *In re A.H. Robins, Co.*, 880 F. 2d 709 (4<sup>th</sup> Cir.), *cert den.*, 493 U.S. 959 (1989)(abrogated on other grounds). In this case, the needs of the Settlement Class, particularly at this difficult economic time, lend further support for a settlement and distribution of the settlement funds.

Plaintiffs' allegations with regard to The Settled Claims include that the Settlement Class members were not made aware of the alleged misconduct until after February 16, 2016. Further,

Plaintiffs allege that no consent was obtained and no record was made in Plaintiffs' medical records pertaining to the vaginal and breast examinations allegedly performed by Matulis. Plaintiffs' allegations also include that CAMC, by its employees were aware of Matulis' alleged misconduct. Because the Settlement Class members were unconscious or sedated at the time of the alleged misconduct, they all allegedly learned of such alleged misconduct after the misconduct was reported in public media or by word of mouth after February 16, 2016.

In Rule 23(b)(3) class actions, liability is often a common issue, as is causation. *See, e.g.*, 32B Am. Jur. 2d § 1985 (1996). "A conclusion on the issue of predominance requires an evaluation of the legal issues and the proof needed to establish them." *In re West Virginia Rezulin Litig., supra*, at 72. "As a matter of efficient judicial administration, the goal is to save time and money for the parties and to promote consistent decisions for people with similar claims. (internal quotation marks omitted). Here, Plaintiffs contend that trial of liability would take three weeks or more to complete and it would add months of time and thousands of dollars in costs for each case individually.

In *Tabata, et al. v. Charleston Area Medical Center, Inc. et al.*, 233 W.Va. 519, 759 S.E.2d 467 (2014), the West Virginia Supreme Court of Appeals stated that the predominance requirement is not a rigid test, but rather contemplates a review of many factors, the central question being whether adjudication of the common issues in the particular suit has important and desirable advantages of judicial economy compared to all other issues, or when viewed by themselves. The Court then concluded that "[w]hen this Court applies these guidelines to the instant facts, it is clear that common issues of law predominate over individual questions. *Tabata*, 759 S.E. 2d at 467.

Due to the settlement proposed herein, the Court finds that it will have no management problems in addressing potential individual damage questions since no trial is required to determine such individual damages. The Court also finds that certifying this Settlement Class as requested will provide fair and efficient adjudication of The Settled Claims. The settlement provides that the Settlement Class members, will have the opportunity to equally share in the settlement or they have the right to opt-out of the settlement. Accordingly, the Court finds that in addressing the certification of the proposed Settlement Class, common issues predominate over individual issues. *See* Syl. Pt. 7, *State ex rel. Surnaik Holdings of WV, LLC v. Bedell, supra*.

The “superiority” requirement of Rule 23(b)(3) focuses on judicial economy, and a comparison of other available alternatives to resolve the controversy. *In re West Virginia Rezulin Litig.*, 214 W.Va. at 75, 585 S.E.2d at 75. *See also* Syl. Pt. 7, *State ex rel. Surnaik Holdings of WV, LLC v. Bedell, supra*. A class action preserves the legislative objective of deterrence and protects those who for various reasons do not pursue individual actions. *Sarafin v. Sears Roebuck & Co.*, 73 F.R.D. 585 (N.D. Ill. 1977); *Chevalier v. Baird Savings Ass’n*, 72 F.R.D. 140 (E.D. Pa. 1976). This Court considers the need for class actions “to prevent violators . . . from limiting recovery to a few individuals where actual, wide-spread noncompliance is found to exist.” *Haynes v. Logan Furniture Mart, Inc.*, 503 F.2d 1161, 1164 (7<sup>th</sup> Cir. 1974).

Considering the proposed evidence and claims as a whole, as they relate to The Settled Claims, this Court Finds that common issues predominate over individual issues and that the proposed class action is the superior method of litigating and resolving The Settled Claims. Therefore, the Court Finds that the Settlement Class should be certified as a W.Va.R.Civ.P. 23(b)(3) class for purposes of The Settled Claims.

#### **CONCLUSIONS OF LAW**

Based on the foregoing, this Court Orders as follows:

1. The Settlement Class is certified for purposes of The Settled Claims only as a class under W. Va. R. Civ. P. 23(c)(4) and W.Va.R.Civ.P. 23(b)(2) and 23(b)(3).

2. The Court previously appointed Plaintiffs A.H. and Adriana Fleming as Plaintiff Class Representatives for the Settlement Class by Order dated January 28, 2021.

3. The Court previously appointed the following attorneys as Class Counsel for the Settlement Class in an Order dated January 28, 2021: Robert V. Berthold, Jr., of the Berthold Law Firm PLLC, Marvin W. Masters, Esq., of The Masters Law Firm LC, Ben Salango, Esq., and Kristy Salango, Esq., of Preston & Salango, PLLC, P. Rodney Jackson, Esq., of P. Rodney Jackson & Associates, and L. Dante diTrapano, Esq., and David H. Carriger, Esq., of Calwell Luce diTrapano, PLLC. Throughout this litigation, the aforementioned Class Counsel (in their capacity as counsel for Plaintiffs) have zealously represented the alleged impacted individuals with specialized litigation knowledge and applied their collective legal experience to achieve a positive result for the Settlement Class.

4. On January 28, 2021, the Court further appointed Matthew W. Stonestreet, Esq., as additional Class Counsel. Mr. Stonestreet's zealous litigation techniques, prior experience before this Court, and specialized class action experience in achieving positive results, in this Judicial Circuit, firmly support the prior appointment of the Court.

5. The Court has previously appointed The Ilym Group Inc., as Claims Administrator for the Settlement Class. As Claims Administrator, The Ilym Group shall administer a Court-approved notice plan, including, but not limited to, running database searches and otherwise confirming current mailing addresses for class members and mailing a Court-approved notice to members of the Settlement Class, staff a toll-free call-in number, field and return calls from

members of the Settlement Class, process opt-out requests, distribute settlement funds upon entry of a Final Order from the Court, including settlement funds owed to estates of deceased members of the Settlement Class, follow-up on uncashed checks, provide written reminders to members of the Settlement Class regarding uncashed checks if Ordered by the Court, report data to the Court, counsel and the Guardian Ad Litem, and perform such other tasks as necessary to fully administer the settlement. The Claims Administrator shall maintain a website for the convenience of the Settlement Class at the domain [www.wvhospital-settlement.com](http://www.wvhospital-settlement.com)

6. The Court has previously appointed Perry L. Shumate, Esq., as Guardian Ad Litem for the Settlement Class. As Guardian Ad Litem, Attorney Shumate shall protect the privacy of members of the Settlement Class and serve as a liaison between the Claims Administrator, the Parties and the Court. In so doing, Attorney Shumate shall assist in the claims administration process as requested by the Claims Administrator and/or by the Court.

7. W.Va.R.Civ.P. 23(c) requires that the notice for the subject provisional Settlement to be the best notice practicable under the circumstances. *Amchem Products, Inc. v. Windsor*, 521 US 591, 593 (1997). Based on the information provided by the Parties, providing notice to members of the Settlement Class via first class direct mail represents the best notice practicable under the circumstances. *Eisen v. Carlisle and Jacquelin*, 417 U.S. 156 (1974). *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985).

8. The Court previously directed CAMC to provide the Guardian Ad Litem and the Claims Administrator with the name, address and contact information including, only if necessary, the last four digits of their social security number, date of birth, and other contact information for each member of the Settlement Class for the purpose of providing direct notice to each Class Member.

9. The Guardian Ad Litem and the Claims Administrator shall maintain the confidentiality of Settlement Class members' protected health and other identifying information. The Court finds that the use of a Guardian Ad Litem and Claims Administrator to protect the names, addresses and other information of Settlement Class members will adequately protect the Settlement Class.

10. In ordering CAMC to provide the Settlement Class members' information as set forth above, the Court hereby finds that CAMC shall not be subject to liability for any claims against it arising out of or related to the provision of the Settlement Class members' information as directed herein.

11. The Claims Administrator, with the assistance of the Guardian Ad Litem, will ascertain the best-known addresses for each Settlement Class member, utilizing the Social Security Death Index or other like index or database to identify any deceased Settlement Class members, checking all addresses against the National Change of Address database as maintained by the United States Postal Service, and using any other resources available and necessary to obtain the best-known addresses for each Settlement Class member.

12. The Court adopts the Notice Plan proposed by the Parties (except as modified by the Court) and the Notice Form attached to this Order as **Exhibit B**, and finds that it is clear, concise and written in plain, easily understood language. It provides substantial information, including specific instructions that Settlement Class members need to follow to exercise their rights, as well as background on issues in the case. The Notice Plan is also designed to encourage understanding in a reader-friendly format.

13. The Parties, through the Claims Administrator and Guardian Ad Litem, will provide direct notice of the proposed settlement to all Settlement Class members by First Class



United States Mail. Direct notice will consist of mailing a Notice Package consisting of a cover letter and Notice Form to Settlement Class members and to any personal representative, or to any representative, including the Executrix, Executor, Administratrix or Administrator of any estate of a deceased Settlement Class member.

14. The outside of the envelope mailed to Settlement Class members, or to any personal representative, or to any representative, including the Executrix, Executor, Administratrix or Administrator of any estate of a deceased Settlement Class member, shall include a call-out that reads “Important Notice About Class Action Settlement” or other similar language to alert or allow recipients to distinguish between it and potential junk mail.

15. The Guardian Ad Litem and Claims Administrator shall mail the Notice Form in accordance with the deadlines set forth below.

16. The direct notice procedures set forth above are reasonably calculated, under all the circumstances, to apprise each member of the Settlement Class of this litigation and the terms of the settlement.

17. Requests for Exclusions or Opt-Outs from the settlement shall be made returnable to the Claims Administrator. The Claims Administrator shall provide a weekly summary of Opt-Outs to Class Counsel and counsel for CAMC.

18. The Claims Administrator, in coordination with the Guardian Ad Litem, shall maintain a properly staffed toll-free telephone number for purposes of accepting, fielding and responding to questions from members of the Settlement Class, and further shall accept, field and respond to written inquiries from members of the Settlement Class or their representatives.

19. The Parties moved the Court to approve the Term Sheet, attached as **Exhibit A**. The Court, having reviewed the Term Sheet, finds that it fairly sets forth the essential terms of the

settlement by Plaintiffs and CAMC with respect to The Settled Claims and clearly provides that The Remaining Claims will remain to be litigated. The Court approves the Term Sheet for use by the Guardian Ad Litem and Claims Administrator in providing additional information to the Settlement Class during the notice process.

20. The costs of administering the settlement, including all compensation to the Guardian Ad Litem and Claims Administrator, are the responsibility of CAMC and are separate and apart from CAMC's payment of the Gross Settlement Amount.

21. The deadline for any Request for Exclusion is set forth below. Requests for Exclusion and all other deadlines for filing or serving papers by putative members of the Settlement Class *must be postmarked by the date of the stated deadline.*

22. The Court's Preliminary Approval of the settlement shall be subject to further consideration at a hearing to be held before this Court on **May 6, 2021 at 10:00 a.m.**, Eastern Standard Time at the Kanawha County Courthouse (the "Fairness Hearing").<sup>8</sup> The Court will make a final decision at or following the Fairness Hearing as to whether the Parties' proposed settlement, as set forth in the Settlement Agreement, is fair, reasonable, and adequate and whether it should be finally approved by the Court; the amount of fees and expenses that should be paid and reimbursed to Class Counsel; the amount of the money to be paid related to the administration of the Settlement; the amount of service payments to the Plaintiff Class Representatives, if any; and the amount payable to each eligible Settlement Class member, and such other and further relief as to the matters which the Court deems just and proper.

23. Any Settlement Class member may appear at the Fairness Hearing, in person or by counsel, and subject to complying with this Order and deadlines therein, may be heard to

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<sup>8</sup> This hearing may be conducted by remote means, as dictated by the specific circumstances of the COVID-19 pandemic on the specific hearing date.

the extent allowed by the Court in support of or in opposition to class certification, the fairness, reasonableness, and adequacy of the settlement, and any applications for an award of attorney's fees, costs, and expenses.

24. No person shall be heard in opposition to the settlement, or any of the provisions of the settlement or procedures for the hearing, including the application for an award of attorney's fees, costs, and expenses, unless, on or before the deadline set forth below, such person files with the Clerk of the Court (a) a notice of an intention to appear and provides a written statement that indicates all bases for objection; (b) all documentation in support of the objection; (c) legal authority, if any, supporting the objection; and (d) a list of any witnesses the person may call for live testimony. Copies of such notice, statement, and documentation, together with copies of any other papers or briefs filed with the Clerk, must be filed or served on the Court and must be served on the counsel for the Plaintiffs and CAMC by the deadline. Any Settlement Class member who does not object in the foregoing manner or does not comply with the procedure and the deadlines shall be deemed to have waived all objections and shall be foreclosed from making any objections to class certification, attorney fee and cost petition, the settlement as set forth in the Settlement Agreement, or any part thereof or any other related issue arising out of the proposed settlement.

25. The Notice Form advises each member of the Settlement Class of the right to assert an objection and the process for presenting the objection at the final hearing. It further advises each member of the Settlement Class of the right to exclude themselves from the settlement altogether. Thus, this Notice Form and the plan for providing notice to the Settlement Class members complies in all respects with W.Va.R.Civ.P. 23 and meets all the requirements of due process of the law.

26. It is ordered that the date for the Final Fairness Hearing and the deadlines<sup>9</sup> and dates for filing of the notices, opt-outs, appearances by or on behalf of Settlement Class members, objections to settlement, filing of motion for attorneys' fees, expenses of litigation and incentive awards shall apply to all Parties, counsel and Settlement Class members in these class proceedings:

Class Notice Program Commences: **Upon Entry of the Order.**

Deadline for Initial Notice to be Mailed: **March 5, 2021.**

Deadline for Class Counsel to File Motion for Final Approval of Attorney's Fees/Expenses and for Final Approval of Service Awards to Class Representatives: **April 2, 2021.**

Deadline for Opt-Out Requests: **April 19, 2021.**

Deadline to File Objections to Settlement/Notice of Intent to Appear at Final Fairness Hearing: **April 23, 2021.**

Deadline for GAL to report Opt-Outs: **April 28, 2021.**

Final Fairness/Approval Hearing: **May 6, 2021 at 10 a.m.**

27. The Court reserves the right to adjourn and/or reschedule the Fairness Hearing without further notice of any kind; therefore, any Settlement Class member intending to attend the Fairness Hearing should (in addition to complying with all instructions and requirements above) confirm the date, time, and location of the Fairness Hearing with the Guardian Ad Litem or the Claims Administrator.

28. The Court shall retain jurisdiction of this matter for consideration of all further issues arising out of or in connection with the Settlement Agreement.

**WHEREFORE**, based upon the foregoing Findings of Fact and Conclusions of Law, it is hereby **ORDERED, DECREED, and ADJUDGED**, that the motion for preliminary approval of class action settlement and for the approval of the conditional class action for purposes of The

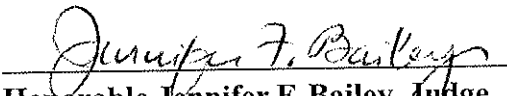
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<sup>9</sup> Compliance with the deadlines shall be determined by the postmark of the mailing.

Settled Claims, Notice Plan, and the other motions, as prayed for herein, including the motions regarding appointment of Class Counsel, appointment of Plaintiff Class Representatives, appointment of Guardian Ad Litem and Claims Administrator are hereby **GRANTED**, as modified herein.

The Clerk is directed to send certified copies of this Order to all counsel of record in Kanawha County Civil Action No. 18-C-176, as well as to Matthew L. Stonestreet, Esq., 118 Capitol Street, Suite 400, Charleston, WV 25301, Perry L. Shumate, Esq., P.O. Box 231, Mount Hope, WV 25880, and Lisa Mullins, The ILYM Group, 14771 Plaza Drive, Unit L, Tustin, CA 92780.

ENTERED this 1st day of March, 2021.

  
Honorable Jennifer F. Bailey, Judge  
Kanawha County

STATE OF WEST VIRGINIA  
COUNTY OF KANAWHA, SS  
I, GATHY S. GATSON, CLERK OF CIRCUIT COURT OF SAID COUNTY  
AND SAID STATE, DO HEREBY CERTIFY THAT THE FOREGOING  
IS A TRUE COPY FROM THE RECORDS OF SAID COURT.  
GIVEN UNDER MY HAND AND SEAL OF SAID OFFICE THIS 2  
DAY OF March 2021. 10  
CLERK  
CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA