IN THE COURT OF COMMON PLEAS
SUMMIT COUNTY, OHIO

MEMBER WILLIAMS, *et al.*,

Plaintiffs,

vs.

KISLING, NESTICO & REDICK, LLC, *et al.*,

Defendants.

Case No. 2016-CV-09-3928

Judge Patricia A. Cosgrove

Plaintiffs' Memorandum in Opposition to Defendants' Motion to Strike Class Allegations

I. Introduction

Motions to strike under Civ. R. 23(D)(1)(d) properly serve to challenge the sufficiency of the class allegations contained in the complaint. They do not serve as a "substitute" for ruling on the merits of class certification. *Faktor v. Lifestyle Lift*, No. 1:09-cv-511, 2009 U.S. Dist. LEXIS 47978 at *5-*6 (N.D. Ohio June 3, 2009). Thus, Courts condemn their use "to slip through the backdoor what is essentially an opposition to a motion for class certification before [p]laintiffs have made such a motion and when discovery on the issue is ongoing." *Korman v. Walking Co.*, 503 F. Supp. 2d 755, 762 (E.D. Pa. 2007).

Defendants disregard these prevailing standards in their Motion to Strike the class allegations in the Third Amended Complaint, by which a premature ruling on class certification is effectively what they seek. They ask the Court to reject class certification not on the basis of the Plaintiffs' pleading alone, but also taking into account the carefully curated evidence they have chosen to submit, knowing that Plaintiffs have not had the opportunity to conduct sufficient discovery to respond in kind.

The Motion to Strike also attacks a fundamentally skewed conception of the Plaintiffs' claims. The Defendants can declare the impossibility of class certification only by distorting essential aspects of the Third Amended Complaint.

In moving to strike, the Defendants seek to hijack the class certification process and deprive the Plaintiffs of a fair opportunity to litigate their claims on behalf of all affected parties. The Court should deny the Motion.

II. Factual Background

A. The Plaintiffs' claims

Defendants have mischaracterized Plaintiffs' claims to suit their premature attempt to foreclose class certification. Accurately portrayed, these counts—which are based on detailed allegations in the Third Amended Complaint including extensive quotations from Defendants' email communications—undercut the fundamental underpinnings of the Motion to Strike.

The putative class-action claims included in the Third Amended Complaint[1] fall within four general categories: the investigation fee claims, the Liberty Capital Claims, the chiropractor claims, and the narrative fee claims.

1. The investigation fee claims

The investigation fee class relates to KNR's practice of charging a flat-fee, typically $50, on every case that the firm closes on behalf of its clients, for so-called "investigative" services. The Defendants attempt to frame the dispute over these fees as a question of whether each individual class member received sufficient "investigative" services as to justify the fee. The real issue,

[1] While Defendants' refer to the "Corrected Third Amended Complaint" throughout their Memo in Support of their Motion to Strike, there is no document captioned as such in this case. There is no dispute that the operative complaint in this lawsuit is the Third Amended Complaint filed on November 13, 2017. This document supplanted the erroneous version of the Third Amended Complaint filed on October 18, 2017, which, due to a clerical error, omitted Plaintiff Matthew Johnson's fraud claim against Defendant KNR.

however, is whether the fee is a subterfuge by which KNR double-charges contingency clients for ordinary overhead costs, a practice that Ohio law plainly prohibits. Third Amended Complaint ("TAC") ¶¶ 84–111.

The Third Amended Complaint contains detailed allegations, supported by extensive quotations from documents the Plaintiffs procured on their own, showing that the primary function of the so-called "investigators" was to chase down potential clients as quickly as possible to have them sign KNR fee agreements so that KNR did not lose the potential clients' business to competitors. TAC, ¶¶ 101–¶06. These documents also show that Defendants routinely referred to the investigation fee as a "sign-up fee" in their internal communications (but never to clients who were charged the fee), and that these "investigators" did not perform any actual "investigative" work at all, but rather only odd-jobs and basic administrative tasks, the costs for which were already subsumed in KNR's contingency fee. *Id.* at ¶¶ 84–98, 101–111.

2. The Liberty Capital claims

The Liberty Capital claims derive from KNR's abrupt decision in 2012 to refer its clients exclusively to that lender immediately upon its formation, despite its lack of any track record. The Plaintiffs have alleged that the Defendants owned an interest in Liberty Capital and received secret compensation for the loans it placed with company. *Id.* at ¶¶ 112–134. The Plaintiffs seek disgorgement of these amounts and the fees and interest paid on these loans on behalf of themselves and other members of the proposed class.

3. The chiropractor claims

The chiropractor claims concern Defendants' unlawful quid pro quo affiliation with the Akron Square Chiropractic clinic and chiropractor Minas Floros. Defendants allegedly pressured clients to treat with ASC in exchange for ASC's commitment to solicit clients for KNR and otherwise channel its patients to the firm. *Id.* at ¶¶ 17–45.

The Plaintiffs are pursuing claims based on this kickback arrangement on behalf of KNR clients who terminated the firm and against whom KNR has a future lien for attorneys' fees on any future settlement. The Plaintiffs are seeking to have the liens declared null and void, and all amounts collected under them disgorged.

4. The narrative fee claims

The Plaintiffs allege that Defendants charged clients for narratives prepared by their treating chiropractors. Plaintiffs have alleged that the narratives were largely worthless, and in any event served as a kickback payment from KNR to preferred practitioners, who in exchange solicited and/or referred clients to the firm. *Id.* at ¶¶ 57–76. The Plaintiffs have sued for disgorgement of all narrative fees assessed by KNR.

B. The status of discovery

Further underscoring the unlawful nature of Defendants' motion, they have stonewalled the Plaintiffs efforts to conduct documentary discovery on the putative class-action claims, refusing to produce even the most basic information necessary to prove them. For example, after the Plaintiffs served 70 document requests in late July and early August, the Defendants only produced documents responsive to eight of them, with most of the approximately 3,000 pages produced having little to no bearing on the case. In their written responses the Defendants stated their refusal to produce any documents responsive to no fewer than 45 of the Plaintiffs' pending requests, including documents reflecting the following items of essential relevance to the claims at issue:

- policies and procedures on when and how to use an "investigator" on a client matter, and when an "investigation fee" should be charged;
- policies and procedures relating to "sign-ups" and "sign-up fees" (or "SU fees"), terms that are apparently synonymous with "investigations" and "investigation" fees;
- evidence of actual "investigative" work that was performed by the Defendants' so-called "investigators";
- policies and procedures on the referral or steering of clients to

chiropractors, and obtaining referrals from chiropractors;

- policies and procedures on when and how to request a "narrative" report from a chiropractor;
- discussions, communications or assessments of the value of narrative reports in pursuing personal injury settlements, and KNR's requirements for those reports;
- negotiations with and solicitation of chiropractors about referrals and narrative fees;
- formal or informal agreements to refer clients to a particular chiropractor or for a particular chiropractor to refer patients to KNR;
- non-client-specific communications with Liberty Capital representative Ciro Cerrato;
- Defendants' efforts to determine the financial stability or general quality of Liberty Capital Funding prior to Defendant Nestico asking that his employees recommend them exclusively; and
- comparisons or discussion of the number of referrals made by KNR to a given chiropractor(s) and referrals made by that chiropractor to KNR over any period of time.

In response to the Plaintiffs' letters raising objections to their non-responses, the Defendants have since released a trickle of approximately 130 pages of responsive documents, while maintaining their refusal to perform a comprehensive search for the same. For example, the Defendants have refused to perform a comprehensive review of e-mail search results including the following essential terms, claiming that the numbers of documents that these searches turned up are so large as to excuse them from their obligations under the Civil Rules:

- Investigation fee
- Investigator
- Narrative fee
- Narrative report
- Referrals
- Liberty Capital

These are only some examples of the Defendants' non-compliance with discovery to date, as shown in the correspondence attached as **Exhibit A**, which clarifies the lack of merit to their Motion to Strike under the legal standards discussed in Section III.A, below. Additionally, because

documentary discovery remains substantially incomplete, no depositions have been taken in this lawsuit to date.

III. Law and Argument

A. The prevailing standards on motions to strike class allegations are contrary to Defendants' motion.

1. Class actions facilitate litigation involving multiple parties in a single action.

Class actions "facilitate adjudication of disputes involving common issues between multiple parties in a single action." *Beder v. Cleveland Browns*, 129 Ohio App. 3d 188, 199, 717 N.E.2d 716 (8th Dist. 1998). The "spirit" of Civ. R. 23 is "to open the judicial system to more people through the class action mechanism." 73 OHIO JUR. 3D *PARTIES* § 46 (2017). These principles should inform any evaluation of the class allegations contained in the Third Amended Complaint.

2. Only a "rare few" complaints are vulnerable to a motion to strike class claims.

Under Civ. R. 23(D)(1)(d) and its predecessor, Civ. R. 23(D)(4), courts in a putative class action "may issue orders that … require the pleadings be amended to eliminate allegations about representation of absent persons, and the action proceed accordingly." A motion to strike becomes "appropriate" under this provision only where the plaintiff "has failed to properly plead operative facts demonstrating compliance with Civ. R. 23(A) and (B)." *Sliwinski v. Capital Props. Mgmt.*, 9th Dist., No. 25867, 2012-Ohio-1822 at ¶14.

The complaint itself must establish the plaintiff's absolute inability to "prove … [any] set of facts sufficient to satisfy" the requirements for class certification. *Cubberley v. Chrysler Corp.*, 70 Ohio App. 2d 263, 267-68, 437 N.E.2d 1 (8th Dist. 1981). Only a "rare few" pleadings are deficient in this way. *Goode v. LexisNexis Risk & Info. Analytics Group*, 284 F.R.D. 238, 246 (E.D.Pa. 2012); *Black v. Gen. Information Servs.*, N.D.Ohio No. 1:15 CV 1731, 2016 U.S. Dist. LEXIS 26548, at *6 (Mar. 2, 2016) ("[S]triking a plaintiffs class allegations prior to discovery and a motion for class certification is

a rare remedy."). [2]

3. Courts "disfavor" motions to strike class allegations.

Striking class allegations before plaintiffs move for class certification is a "harsh remedy." *Bellissimo v. Rana USA*, No. 16-CV-03720 (RA) (BCM), 2017 U.S. Dist. LEXIS 105400 at *37 (S.D.N.Y. July 6, 2017). Courts decidedly "disfavor[ ]" such motions. *See, e.g., Gray v. BMW*, 22 F. Supp. 3d 373, 386 (D.N.J. 2014).[3]

4. Motions to strike do not address the merits of the underlying claims.

Class certification under Civ. R. 23 focuses exclusively upon whether the case can "be properly adjudicated through the ... construct of a class action." *Dublin v. Security Union Title Ins. Co.*, 162 Ohio App. 3d 97, 2005–Ohio–3482, 832 N.E.2d 815, ¶21 (8th Dist.). It does not address the substantive aspects of the underlying lawsuit. *Ojalvo v. Board of Trustees*, 12 Ohio St. 3d 230, 233, 466 N.E.2d 875 (1984); *see also Cullen v. State Farm Mut. Auto Ins. Co.*, 137 Ohio St. 3d 373, 2013-Ohio-

[2] Civ. R. 23 in general and Civ. R. 23(D)(1)(d) in particular essentially track their federal counterparts. *See* STAFF NOTES, CIV. R. 23; *cf.* FED R. CIV. P. 23. Given this fact, "federal authority is an appropriate aid to interpretation of the Ohio rule." *Hamilton v. Ohio Savings Bank*, 82 Ohio St. 3d 67, 82, 694 N.E.2d 442 (1998).

[3] *See also Cheatham v. ADT Corp.*, 161 F. Supp. 3d 815, 834 (D. Ariz. 2016) ("Motions to strike class allegations are particularly disfavored because it is rarely easy to determine before discovery whether the allegations are meritorious."); *Smith v. Washington Post Co.*, 962 F. Supp. 2d 79, 85 (D.D.C. 2013) (("[A] motion to strike is a disfavored, drastic remedy, and courts favor an adjudication on the merits ... . [C]ourts rarely grant motions to dismiss or strike class allegations before there is a chance for discovery."); *Thorpe v. Abbott Labs.*, 534 F. Supp. 2d 1120, 1125 (N.D. Cal. 2008) ("Motions to strike class allegations are disfavored because a motion for class certification is a more appropriate vehicle for the arguments [Defendant] advances herein."); *In re Horizon Organic Milk Plus DHA Omega-3 Mktg. & Sales Practice Litig.*, 955 F. Supp. 2d 1311, 1351-52 (S.D. Fla. 2013) (same); *Sauter v. CVS Pharm., Inc.*, 2014 U.S. Dist. LEXIS 63122, *6 (S.D. Ohio 2014) ("[A] motion to strike class actions ... is even more disfavored because it requires a reviewing court to preemptively terminate the class aspects of ... litigation, solely on the basis of what is alleged in the complaint, and before plaintiffs are permitted to complete the discovery to which they would otherwise be entitled on questions relevant to class certification."); *Calibuso v. Bank of Am.*, 893 F. Supp. 2d 374, 383 (E.D.N.Y. 2012) (same); *Mayfield v. Asta Funding*, 95 F. Supp. 3d 685, 696 (S.D.N.Y. 2015) (same); *Ironforge.com v. Paychex, Inc.*, 747 F. Supp. 2d 384, 404 (W.D.N.Y. 2010) (same); *Mazzola v. Roomster Corp.*, 849 F. Supp. 2d 395, 410 (S.D.N.Y. 2012) (same).

4733, 999 N.E.2d 614, ¶17 (merits of claims relevant "only to the extent necessary to determine" whether the plaintiff has satisfied Civ. R. 23).

The Defendants have already tried and failed to secure dismissal of most of the claims appearing in the Third Amended Complaint. The Motion to Strike cannot properly serve as a reprise of this effort. Class certification does not turn on the merits of the plaintiffs' case. Nor, then, can the sufficiency of the plaintiffs' class allegations under Civ. R. 23(D)(1)(d).

5. Defendants may not base motions to strike on evidence "outside the four corners" of the complaint.

As indicated above, a "motion to strike class allegations is not a substitute for class determination and should not be used in the same way." *Faktor*, 2009 U.S. Dist. LEXIS 47978 at *5-*6. If the "motion is based on evidence outside of the four corners of the pleadings," it becomes an "ill-fitting procedural vehicle" for contesting class certification. *Henderson v. Bank of N.Y. Mellon*, No.15-10599-PBS, 2017 U.S. Dist. LEXIS 156021 at *4 (D. Mass. Sept. 25, 2017). Instead, motions to strike based on extraneous evidence seek to "slip through the back door what is essentially an opposition to a motion for class certification" before its actual filing and while discovery remains ongoing. *Korman*, 503 F. Supp. 2d at 762.

6. Motions to strike deprive plaintiffs of their opportunity to conduct class discovery.

This last point is critical. Deciding whether to certify a class "generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiffs cause of action." *Gray*, 22 F. Supp. 3d at 386. "[D]iscovery is therefore integral." *Id.* Only through this means does the "shape and form of a class action evolve[ ]." *Bellissimo*, 2017 U.S. Dist. LEXIS 105400 at *30. "[M]otions to strike class allegations are generally regarded as premature" since they preempt discovery required to assess the propriety of class certification. *Brown v. Swagway, LLC*, No. 3:15-CV-588 JVB, 2017 U.S. Dist. LEXIS 31997 at *1-*2 (N.D. Ind. Mar. 7, 2017); *See also Pry v. Health Care & Retirement Corp. of Am.*, 3d Dist. Crawford No. 3-98-11, 1998 Ohio App. LEXIS 6586, at *10-12

(Dec. 24, 1998) ("It is unclear to this court how Appellant is supposed to succeed in [certifying a suit as a class action under Civ.R. 23] without being able to discover certain critical facts about potential class members."); *Sauter, et al.*, FN3, *supra.*

7. The Defendants' Motion to Strike is procedurally defective.

The Defendants' Motion to Strike fails to restrict its attack on the Plaintiffs' class allegations to the Third Amended Complaint. Instead, the Defendants present evidence "outside of the four corners of the pleadings" in attempting to foreclose the possibility of class certification before the Plaintiffs even file their motion under Civ. R. 23. *Henderson*, 2017 U.S. Dist. LEXIS 156021 at *4.

The Defendants pull this maneuver after providing the Plaintiffs with only a small fraction of the documentation and information requested in discovery. They are asking the Court to evaluate the "shape and form" of this putative class action based upon their selective rendition of the evidence, under circumstances that prevent the Plaintiffs from responding with proof of their own. *Bellissimo*, 2017 U.S. Dist. LEXIS 105400 at *30.

This is the "backdoor" to opposing class certification that courts decry. *Korman*, 503 F. Supp. 2d at 762. Even if motions to strike were not generally "disfavored," the law would not countenance this subversion of Civ. R. 23. *Gray,* 22 F. Supp. 3d at 386.

The two cases Defendants cite in support of their argument to the contrary (Defs' Memo at 5–6) do not change this conclusion:

In *Loreto v. P&G*, No. 1:09-cv-815, 2013 U.S. Dist. LEXIS 162752 (S.D. Ohio Nov. 15, 2013), the defendant moved to strike class allegations after providing the plaintiffs with "virtually all the discovery that … is conceivably relevant" in a case that turned on the simple question of whether a certain statement appeared in Defendants' advertisements or product packaging. *Id.* at *9 (internal punctuation omitted). Thus, the court was able to grant the Defendants' motion based on finding, as a matter of fact, that the statement did not so appear, and that "further discovery and

briefing on the certification issue would simply postpone the inevitable conclusion that the putative class cannot be certified." *Id.* at *10. Thus, the *Loreto* court could and did effectively treat the motion to strike as a motion to deny class certification.

Here, unlike in *Loreto*, the factual questions are many, and not susceptible to resolution on Defendants' premature request to deny class certification. This is especially so given that the Plaintiffs have only a small fraction of the "conceivably relevant" evidence that would be properly considered on a motion for class certification. 2013 U.S. Dist. LEXIS 162752 at *9. Thus, *Loreto* does not support the Defendants' Motion to Strike.

Neither does *Jiminez v. Allstate Indem. Co.*, No., 2010 U.S. Dist. LEXIS 95993 (E.D. Mich. Sept. 15, 2010), *rev'd*, 765 F Supp. 2d 986 (E.D. Mich. 2011). In *Jiminez*, the defendant moved to limit the size of the class based on the single and primarily legal question of whether an insurance policy's terms required certain "policyholders [to] submit claims within one year of their loss." *Id.* at *10, *18. While the *Jiminez* court did consider some "documents outside the pleadings" in resolving this question in the defendant's favor, it noted that it only did so because the plaintiff "d[id] not dispute the relevance or authenticity of these documents." *Id.* at *10. Thus, *Jiminez* is hardly comparable to this action, where Plaintiffs dispute the relevance of the evidence presented by Defendants and discovery is needed to resolve the many pending factual and legal questions at issue.

As even the cases that Defendants cite in support of their Motion to Strike show, the Motion is procedurally improper. The Court should deny it on this basis alone.

B. No grounds exist for striking the class allegations pertaining to the claims based on the investigation fee.

Under Civ. R. 23(B)(3), plaintiffs seeking certification of a damages claim must establish that "questions of law or fact common to class members predominate over any questions affecting only individual members." According to the Defendants, the Plaintiffs cannot satisfy this requirement with respect to claims based on KNR's investigation fee, since the "investigation services provided"

were "different for each client." Defs' Memo. at 8.

"In some cases, an investigator took photographs of the client's damages automobile at a tow yard or their home." *Id* at 9. In others, the investigator "photographed visible injuries" or "traveled to the offices of health care providers to obtain records or medical bills." *Id.*

Given these and other variations, Defendants claim that the Court would have to determine separately for each class member whether the $50 to $100 investigation fee "was unreasonable considering the services rendered." *Id.* From this premise, the Defendants contend that conducting discovery could not possibly enable the Plaintiffs to prove predominance under Civ. R. 23(B)(3).

1. The investigation fee was an across-the-board sham by which Defendants unlawfully passed off overhead expenses to their clients.

The Defendants' argument misconstrues the Plaintiffs' claims, which do not depend on whether the amount of the investigation fee was "unreasonable" in exchange for the "investigative" service provided. Defs' Memo at 9. The Plaintiffs are not alleging that KNR shortchanged them on an otherwise legitimate charge. Nor are they alleging, as Defendants claim, that "charging clients a flat rate for investigation fees violates the Rules of Professional Conduct." *Id.* at 2.

Rather, the Plaintiffs claim that the investigation fee as an across-the-board sham, an unlawful tax for the "basic administrative service" of signing up clients. TAC ¶ 98. The investigators functioned as adjuncts to the firm, which passes on "overhead expenses" to its clients through the $50 to $100 charge. *Id.* at ¶ 95.

The Plaintiffs further allege that any additional tasks performed by the investigators did not pertain to any actual investigative work, and were so basic in nature that they could not possibly justify a separate charge. Nowhere in their Motion to Strike do Defendants confront Plaintiffs' essential claim that KNR was billing clients a flat sum for work rightfully encompassed by its contingency fee.

2. **Ohio statutes prohibiting unlicensed investigative work further illustrate the**

unlawfulness of Defendants' practice of charging separately for their unlicensed "investigators."

As a preliminary matter, the Court should note that the unlicensed status of KNR's investigators implicates the lawfulness of charging clients separately for their fees. Plaintiffs have alleged that none of KNR's investigators are licensed with the Ohio Department of Public Safety (TAC ¶ 90). Defendants have produced no information to suggest otherwise (*see* Defs' Answer to TAC ¶ 90), and a search of the Ohio Department of Public Safety's public registry confirms the same (https://services.dps.ohio.gov/PISGS/Pages/public/ProviderSearch.aspx).

Under the Ohio Revised Code, the "[b]usiness of private investigation" includes paid efforts to "secure evidence for use in any … judicial investigation or proceeding." R.C. 4749.01(A). This category would encompass the additional services KNR says its investigators performed, as well as those alleged by Plaintiffs. In Ohio, however, no person can lawfully "engage in the business of private investigation" without a license. R.C. 4749.13(A). The law also forbids parties from "[k]nowingly authoriz[ing] or permit[ting]" someone either to disregard the licensure requirement or to "violate" any of other statutory rule governing private investigators. R.C. 4947.13(C). Non-compliance exposes defendants to a potential fine or imprisonment, or both. R.C. 4749.99.

"Attorneys at law" are exempt from the law governing private investigators. R.C. 4749.01(H)(2). KNR would therefore face no jeopardy if its investigators operate as firm representatives in doing what they do. If, on the other hand, they act independently as Defendants claim, such that their fees become a recoverable expense, Defendants are suborning the sort of unlicensed "business of private investigation" that that the law prohibits, thus underscoring the unlawful nature of Defendants' practice of charging the investigation fees to their clients.

3. Common issues predominate over individual ones with respect to the claims based on the investigation fee.

The Plaintiffs are facing no insuperable bar to establishing predominance under Civ.R.

23(B)(3). Predominance does not require plaintiffs to demonstrate that they will ultimately prevail on common issues. *Amgen, Inc. v. Connecticut Ret. Plans & Trust Funds*, 568 U.S. 455, 460 (2013). Any such rule would "put the cart before the horse" by making plaintiffs show they "will win the fray" as a precondition to class certification. *Id.*

Predominance instead requires only that "issues subject to generalized proof and applicable to the class as a whole predominate over those issues that are subject only to individualized proof." *Cullen*, 2013-Ohio-4733, ¶30. This balancing test" is "qualitative, not quantitative." *Musial Offices v. Cuyahoga Cty.*, 2014-Ohio-602, 8 N.E.3d 992, ¶ 32 (8th Dist.).

Predominance does not turn on the "time" required to resolve "common issues" as compared to "the time that individual issues" will consume. *Hamilton v. Ohio Savings Bank*, 82 Ohio St. 3d 67, 85, 694 N.E.2d 442 (1998). Courts instead focus upon whether "one or more common issues constitute significant parts of each class members' individual cases," such that "common questions are central" to all their claims. *Westgate Ford Truck Sales v. Ford Motor Co.*, 8th Dist., No. 86596, 2007-Ohio-4013, ¶ 64.

More specifically, common issues predominate so long as they are "capable of resolution for all members in a single adjudication." *Cirino v. Ohio Bureau of Workers Comp.*, 2016-Ohio-8323, 75 N.E.3d 965, ¶ 99 (8th Dist.). Class members' claims must "prevail or fail in unison." *Musial*, 2014-Ohio-602 at ¶ 32. "[G]eneralized evidence … proves or disproves" the determinative points "on a simultaneous class-wide basis." *Rimedio v. SummaCare, Inc.*, 9th Dist., No. 25068, 2010-Ohio-5555, ¶68.

In such situations, the "mere existence of different facts" underlying class members' claims will not negate the predominance of common issues. *In re Consolidated Mtg. Satisfaction Cases*, 97 Ohio St. 3d 465, 2002-Ohio-6720, 780 N.E.2d 556, ¶ 10. Civ. R. 23(B)(3) "gives leeway in this regard." *Id.* So long as the "gravamen" of each class members' claim "is the same," common issues

predominate. *Baughman v. State Farm Mut. Auto. Ins. Co.*, 88 Ohio St. 3d 480, 489, 727 N.E.2d 1265 (2000).

Applying these predominance standards to he Supreme Court of Ohio has made clear that Ohio law prohibits attorneys from billing "normal overhead" expenses to contingency clients, including "secretarial" services or the work performed by "paraprofessionals." *Columbus Bar Ass'n v. Brooks*, 87 Ohio St. 3d 344, 346, 721 N.E.2d 23 (1999); *See also Columbus Bar Assn. v. Mills*, 109 Ohio St.3d 245, 2006-Ohio-2290, 846 N.E.2d 1253, ¶¶ 6, 10, 20 (holding that an attorney violated the prohibition against "collecting an illegal or clearly excessive fee" by "aggressively billing for secretarial, clerical, and other 'administrative' activities").

The success of class members' claims universally depends upon the applicability of these principles to the investigation fee. Was KNR recapturing overhead expenses in assessing this amount against clients? TAC ¶ 95. The Court can resolve this issue based on "[g]eneralized evidence" focusing upon the following, for example:

- KNR's internal accounting for the fee;
- its rationale for charging a flat fee for the services;
- its arrangement for compensating its investigators;
- its relationship with the investigators, including whether the investigators were more properly considered as employees than as independent contractors;
- the unlicensed status of the investigators (*See* Section III.B.2, above);
- the non-investigative nature of the work performed by investigators (*See* Defs' Mot. at 9);
- Defendants' misrepresentations about and pertaining to the fee, including the representations on the settlement statements that it was to pay for "investigative" work, KNR's promise of a "free consultation" to prospective clients, and that "If you can't come to us, we'll come to you" (*See* TAC ¶¶ 85–87);[4]

[4] Defendants' misconstrue the Third Amended Complaint's references to KNR's promotional materials promising "free consultations." Defs' Memo at 20. Contrary to Defendants' argument, Plaintiffs are not seeking to recover for the breach of a promise of a free consultation, or the

- KNR's policies about tracking costs for actual "investigations" (*See* TAC ¶¶ 107–111);
- the frequency with which Defendants' referred to the charge as a "sign-up fee," and its reasons for doing so (*See* TAC ¶¶ 102);
- e-mails from Defendants showing that the investigation fee was charged only for "sign-ups" and that other tasks performed by the investigators such as "pick[ing] up records [or] knock[ing] on the door to verify [an] address" could be charged separately "on a case by case basis." (*See* TAC ¶¶ 101–102).

Rimedio, 2010-Ohio-555 at ¶68.

Investigators may have handled tasks in particular cases beyond just signing up the client. Yet so long they were acting as KNR functionaries in doing so, the firm's overhead would still subsume any corresponding expense, no matter what services they performed. TAC ¶ 95. The Plaintiffs therefore can still address on "on a simultaneous class-wide basis" a common issue that will determine the outcome of all class members' claims. *Rimedio*, 2010-Ohio-555 at ¶68. Predominance would exist under these circumstances.

4. The Plaintiffs can prove that all would-be class members have sustained injury.

The Ohio Supreme Court has held that a plaintiff seeking class certification must be able to "prove through common evidence that all class members were in fact injured by the defendant's actions." *Feliz v. Ganley Chevrolet*, 145 Ohio St. 3d 329, 2015-Ohio-3430, 49 N.E.3d 1224, ¶31. According to the Defendants, the Plaintiffs cannot satisfy this requirement, since some class members purportedly got their money's worth or more for the $50 to $100 fee through the extra services performed by KNR's investigators. Defs' Memo at 10–13. As support for their position, the

---

promise that KNR would "come to [them]." *Id.* The point of these allegations, rather, is that these promises by Defendants tend to show that the investigation fee was a disguised double-charge for overhead. While such a charge is unlawful no matter "which class members, if any, saw these promotional materials" (*Id.*), as set forth above (*see Brooks,* 87 Ohio St. 3d 344; *Mills*, 109 Ohio St.3d 245), the fact that Defendants would charge a fee precisely for "coming to you" while promising otherwise shows that they intended to mislead the putative class members into paying their overhead costs.

Defendants cite *Linn v. Roto Rooter*, 8th Dist., No. 82657, 2004-Ohio-2559, and the Supreme Court's decision in *Cullen*, 2013-Ohio-4733.

Linn concerned a "miscellaneous supplies charge" that a plumbing company uniformly assessed against its customers. 2004-Ohio-2559 at ¶ 3. The plaintiffs claimed that "the charge was implemented to boost [the company's] profits" and "bore no relation to the cost of supplies," which the company may not have even used in a given case. *Id.* at ¶ 5.

In reversing certification of claims under the Ohio Consumer Sales Practices Act, the court held that it could find no support under Ohio law that "a predetermined fixed charge, **disclosed to the customer in advance** of the decision to accept goods or services and **included within the price**, is inherently illegal, deceptive, or fraudulent, regardless of the goods or supplies the customer actually receives. 2004-Ohio-2559 at ¶17 (emphasis added). Common issues did not predominate, because the court would have to determine on a case-by-case basis what each the defendant provided and said to each individual customer.

Here, unlike in *Linn*, Defendants did not "disclose[ ] … in advance" the $50 to $100 investigation fee it charged its clients. *Linn*, 2004-Ohio-2559 at ¶17. Nor did the firm "include[ ]" this amount in the "price" of its contingency fee. *Id.* Rather, unlike in *Linn*, what Defendants here have done is double charge their clients after the fact for "normal overhead" that was already subsumed in KNR's contingency fee. *Brooks*, 87 Ohio St. 3d at 346. Thus, again, the investigation fee class claims do not depend upon whether the $50 served exclusively as a sign-up fee, or whether KNR ascribed other "investigatory" tasks to it in certain cases. This unlawful charge involves the sort of universal injury in fact required to prove predominance under Civ. R. 23(B)(3).

In *Cullen*, policyholders claimed that the insurer-defendant breached its duty to "restore [their] windshields to preloss condition." 2013-Ohio-4733 at ¶48. The Supreme Court of Ohio held that individual issues predominated because the demands of any given jobs varied, and since the

"cost to repair or replace a particular windshield … [depended on the] make, model and year of the … vehicle and by time and place of repair." *Id.* at ¶41.

Here, unlike in *Cullen*, the Plaintiffs' claims involve no such variability with respect to actual damage inflicted upon class members. Whether the investigation fee covers only sign-ups or also includes other services, KNR is unlawfully using the charge to recoup the ordinary cost of doing business. Clients should not have to pay this amount, regardless of what investigators specifically did in their individual cases.

The Plaintiffs can use common evidence to establish injury in fact for all class members under the claims based on the investigation fees. The Defendants' argument to the contrary does not justify striking the class allegations.

C. No grounds exist for striking the class allegations pertaining to the claims based on Defendants' apparent interest in Liberty Capital.

The Defendants contend that the Plaintiffs cannot possibly prove the predominance of common issues with respect to their claims concerning KNR's interest in Liberty Capital and the kickbacks it allegedly received from the company. According to the Defendants, recovery by individual class members would require proof that they personally "entered into [a] loan agreement as a result of and in reliance on KNR's misrepresentation and concealment." Defs' Memo at 30.

Defendants also argue that "there is no misrepresentation common to all class members." *Id.* Further, they contend that class members' right to recovery would hinge upon "individual verbal discussions" and their "individual understanding" of the disclosures contained in the loan documents they signed. *Id.* at 28–29. The "financial condition of each class member" and the specific "amount" of their loans also could impact their decision to transact business with Liberty Capital, according to Defendants. *Id.* at 30. Based on these alleged deviations in the relevant evidence, the Defendants proclaim as futile any attempt by the Plaintiffs to prove predominance of common issues under Civ. R. 23(B)(3).

1. Defendants perpetrated the same fraud on all Liberty Capital borrowers.

Contrary to the Defendants' argument, they did perpetrate the same fraud on all KNR clients who borrowed from Liberty Capital. Specifically, the firm concealed its alleged interest in the company and the kickbacks it purportedly received from it.

"When there is nondisclosure of a material fact, courts permit inferences or presumptions of inducement and reliance." *Cope v. Metropolitan Life Ins. Co.*, 82 Ohio St. 3d 426, 436, 696 N.E.2d 1001 (1998). Accordingly, "cases involving common omissions across the entire class are generally certified as class actions, notwithstanding the need for each class member to prove these elements." *Id.*; *accord*, *Baughman*, 88 Ohio St. 3d at 490.

Moreover, Defendants have denied that any such ownership or kickback relationship exists, both in their Motion to Strike (at 29–30) and in their responses to Plaintiffs' Second Set of Requests for Admission, attached as **Exhibit B.** (*See* Nos. 85–86, "[T]his request incorrectly assumes that Liberty Capital Funding and KNR did not have an arms-length relationship. Defendants deny this assumption ... Defendants deny this request because KNR had an arms-length relationship with Liberty Capital Funding."). They cannot be heard to claim that they once disclosed what they now claim does not exist.

2. Class members do not have to prove either reliance or damages on claims seeking disgorgement of profits obtained through fiduciary breaches.

In fact, class members do not have to present any evidence of reliance, causation, or injury to prove their Liberty Capital claims. These counts seek disgorgement of the fees Defendants extracted from clients' loans, in violation of their fiduciary duty as counsel.

"[W]hen a party is a wrongdoer, disgorgement is an option." *Miller v. Cloud*, 7th Dist., No. 15 CO 0018, 2016-Ohio-5063, ¶92. This is a "well-established … remedial consequence when a fiduciary obtains a benefit in breach of a duty of loyalty." Deborah A. Demott, "Causation in the Fiduciary Realm," 91 BOSTON L. REV. 851, 855 (2005).

Plaintiffs can assert such claims even if they have suffered no damage as a result of the defendant's misconduct. *See, e.g., Hendry v. Pelland*, 73 F.3d 397, 402 (D.C. Cir. 1996). The Supreme Court of Ohio expressly affirmed this principle in *In re Binder: Squire v. Emsley*, 137 Ohio St. 26, 57, 27 N.E.2d 939 (1940), where it countenanced equitable rescission claims against a self-dealing fiduciary "notwithstanding there may be no causal relation between [the defendants'] self-dealing and the loss or deprecation incurred." The *Binder* Court explained that this principle is a matter of "public policy" to deter "self-dealing ... [in] relation[s] which demand[ ] strict fidelity to others," made necessary by to the natural "temptation to wrong-doing" that fiduciary relations create. *Id.* at 38, 47.

In so holding, the *Binder* Court touted the "uncompromising rigidity" needed to ensure that "the level of conduct for fiduciaries [is] kept at a level higher than that troddened by the crowd." *Id.* at 47. *See also Myer v. Preferred Credit*, 117 Ohio Misc. 2d 8, 9, 2001-Ohio-4190, ¶¶ 23, 26, 30, 33, FN 20, 38, 766 N.E.2d 612 (2001), (collecting cases, citing *Bell v. McConnell*, 37 Ohio St. 396 (1881) ("Not many rules of law are as entrenched or honored in our system of justice in the United States as are the fiduciary's duty of full disclosure and the fiduciary's duty of good faith and loyalty"), and quoting 3 OHIO JURISPRUDENCE 3D (1998) 136, 134, Agency, §§ 117, 115 ("When agents intentionally conceal material facts or secure to themselves enrichment directly proceeding from their fiduciary position, agreements accompanying such conduct are fraudulent and may be set aside."), 49 OHIO JURISPRUDENCE 3D (1984) 191, Fiduciaries, § 94 ("The law is strict in seeing that a fiduciary shall act for the benefit of the person to whom he stands in a relation of trust and confidence and in maintaining the trust free from the pollution of self-seeking on the part of the fiduciary."), and 49 OHIO JURISPRUDENCE 3D (1984) 66, 71, Fiduciaries, § 13 ("Abuse of a relation of trust or confidence for personal aggrandizement is the cardinal sin of a fiduciary, and courts are quick to denounce, prevent, or remedy any such action."), *Greenberg v. Meyer*, 50 Ohio App.2d 381,

384, 363 N.E.2d 779 (1st Dist.1977) ("The rule [providing that "it is immaterial whether the principal suffered injury or damage" when "agents/fiduciaries" breach their duties of "absolute good faith and loyalty"] does not depend upon whether ... the principal is injured by the conduct of the agent. The wholesome rule is that the agent shall not put himself in a position where he may be tempted to betray his principal, or to serve himself at the expense of his principal. The rule ... was intended not solely to remedy actual wrongs caused by such misconduct, but to discourage the occurrence of such misconduct altogether."), *inter alia*).

Accordingly, attorneys, as any fiduciaries, face liability for forfeiture or disgorgement based on their fiduciary breaches, regardless of any proof of consequential injury. *See, e.g., Hendry*, 73 F.3d at, 402; *Burrow v. Acre*, 997 S.W.2d 229, 239-40 (Tx. 1999); *Pausell v. Gaffney*, No. 74744-4-I, 2017 Wash. App. LEXIS 2132 at *8 (Sept. 18, 2017). Consistent with *Binder*, the "central purpose" of this principle "is to protect relationships of trust by discouraging [attorneys'] disloyalty." *First United Pentecostal Church v. Parker*, 514 S.W.3d 214, 221 (Tx, 2017). It also vindicates the "fundamental principle of equity … that fiduciaries should not profit" from the betrayal of their duties. *Hendry*, 73 F.3d at, 402.

Thus, class certification will not need to account for individual issues regarding class members' personal state of knowledge concerning Liberty Capital, the disclosures they did or did not receive, or the effect of the loans on their financial situation. Given the irrelevancy of causation and damages to the claims for disgorgement and forfeiture, these considerations cannot defeat predominance under Civ. R. 23(B)(3), no matter how significantly they deviate among the class. The Defendants have presented no basis for striking the class allegations pertaining to the Liberty Capital claims.

D. No grounds exist for striking the class allegations pertaining to the chiropractor claims.

According to the Defendants, only seven former KNR clients qualify as potential class

members under the Plaintiffs' chiropractor claims, an insufficient total to satisfy the numerosity requirement under Civ. R. 23(A). Defs' Memo at 25. The Defendants also argue that the Plaintiffs lack standing to serve as class representatives will respect to these counts, since KNR has not executed on any lien against them for attorneys fees. *Id.*, pp. 23-24.

KNR supposedly had no "uniform communication" with clients about its arrangement with ASC. Defs' Memo at 23. Since different class members purportedly received different disclosures, individual issues purportedly predominate on the question of the Plaintiffs' reliance. *Id.* Finally, the Defendants argue that the Plaintiffs cannot establish damages with respect to the chiropractor claims. *Id.* at 30.

1. Discovery will reveal whether the chiropractor class has a sufficient number of members.

Class certification becomes appropriate pursuant to Civ. R. 23(A)(1) where the number of prospective class member is such that joinder of them all as parties to the lawsuit is "impracticable." *See generally Ritt v. Billy Blanks Enter.*, 171 Ohio App. 3d 204, 2007-Ohio-1695, 870 N.E.2d 212, ¶43 (8th Dist.). If a class includes fewer than 25 individuals, "numerosity probably is lacking." *Adkins-Bagola v. Universal Nursing Serv.*, 9th Dist., No. 22033, 2004-Ohio-6082, ¶16.

The Plaintiffs, however, should not have an opportunity to confirm for themselves whether he chiropractor class really only includes seven members. If discovery corroborates this fact, Plaintiffs will not seek class certification of this aspect of their case. *Adkins-Bagola*, 2004-Ohio-6082 at ¶16. Until then, the Court has no reason to take up the issue.

2. KNR failed to disclose its quid pro quo relationship with ASC on a class-wide basis.

KNR did in fact mislead members of the chiropractor class in a uniform way. Whatever specific information each of them received, KNR told no one about its *quid pro quo* relationship with ASC, which required it to refer clients to the chiropractor not on the basis of their best interests, but

because ASC would refer patients back to the firm. As discussed in Section III.C.2., above, regarding the Liberty Capital class, courts presume class-wide "inducement and reliance" in such situations, where the defendant fails to disclose "material fact[s]." *Cope*, 82 Ohio St. 3d at 436. And here, as with the Liberty Capital class, Defendants have denied that any such quid pro quo relationship exists—including in their responses to Plaintiffs' Second Set of Interrogatories, attached as **Exhibit C.** (*See* No. 8, stating that "Defendants ... have no agreement, including a 'reciprocal referral agreement' with ASC or any Medical Service Provider."). Thus, again, they cannot be heard to claim that they have disclosed something that they simultaneously claim doesn't exist. Thus, individual issues do not predominate under the chiropractor claims with respect to any of these subjects.

3. Class members do not have to prove causation or damages under the chiropractor claims.

In seeking to invalidate KNR's lien for attorneys fees, the Plaintiffs are effectively looking to compel the firm to forfeit its right to compensation on account of its surreptitious arrangement with ASC. Claims of the nature do not require proof of causation or damage. *In re Binder*, 137 Ohio St. 26, 57; *Hendry*, 73 F.3d at 402. As discussed in Section III.C.2. above, this rule "protect[s] relationships of trust by discouraging [attorneys'] disloyalty." *First United*, 514 S.W.3d at 221. The supposed impossibility of proving that all class members sustained injury does not foreclose class certification of the chiropractor claims.

4. The Plaintiffs have standing to serve as class representatives.

The threat of "direct and concrete injury" confers standing on a would-be litigant to pursue a claim. 73 *OHIO JUR.* 3D PARTIES § 5 (2017). The Plaintiffs satisfy this standard with respect to the chiropractor claims. KNR has not waived the lien it holds for recovery of its attorneys' fees. The Plaintiffs do not have to wait until KNR actually collects before they can proceed with their lawsuit. The Defendants have failed to present any valid basis to strike the class allegations concerning this aspect of the Plaintiffs' case.

E. No grounds exist for striking the class allegations pertaining to the narrative-fee claims.

In contesting the Plaintiffs' right to seek class certification of the narrative-fee claims, the Defendants repeat essentially the same arguments they raised against the Liberty Capital and chiropractor classes. These arguments fail, for essentially the same reasons.

Predominance under Civ. R. 23(B)(3) does not disappear because the narratives KNR charged to clients might have served a useful purpose in a given case. Whether this was incidentally true, the fact remains under the Plaintiffs' theory of the case that KNR in every instance ordered the narrative not for legitimate purposes but as a means of funneling extra income to crony chiropractors. As discussed in Section III.C.2., above, this type of fiduciary breach entitles the Plaintiffs to pursue disgorgement of the narrative fee on behalf of the class without having to prove consequential damages. *Hendry*, 73 F.3d at 402. The Defendants cannot justify their attempt to preempt class certification of the narrative-fee claims.

IV. Conclusion

The Defendants will have every opportunity to contest class certification at the appropriate time, after class discovery is complete. The law does not countenance its attempt to defeat this aspect of the litigation before the Plaintiffs have had a fair and reasonable opportunity to substantiate their case under Civ. R. 23. The Court should deny the Motion to Strike.

Respectfully submitted,

/s/ Peter Pattakos
Peter Pattakos (0082884)
Dean Williams (0079785)
Daniel Frech (0082737)
THE PATTAKOS LAW FIRM LLC
101 Ghent Road
Fairlawn, OH 44333
330.836.8533 Phone
330.836.8536 Fax
peter@pattakoslaw.com
dwilliams@pattakoslaw.com
dfrech@pattakoslaw.com

/s/ Joshua R. Cohen
Joshua R. Cohen (0032368)
COHEN ROSENTHAL & KRAMER LLP
3208 Clinton Avenue
1 Clinton Place
Cleveland, Ohio 44113
216.815.9500 Phone
216.815.9500 Fax
jcohen@crklaw.com

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I certify that on December 8, 2017 a copy of the above Memorandum in Opposition was filed with the Court's electronic filing system and service will be made on all necessary parties through that system:

/s/ Peter Pattakos
Attorney for Plaintiff

Exhibit A

PATTAKOS
LAW FIRM LLC
101 Ghent Road • Fairlawn, Ohio 44333
Phone: 330.836.8533 • Fax: 330.836.8536
www.pattakoslaw.com

October 26, 2017

By e-mail to broof@sutter-law.com

Brian Roof
Sutter O'Connell
3600 Erieview Tower
1301 E. 9th Street
Cleveland, OH 44114

Re: *Member Williams et al. v. Kisling Nestico & Redick LLC, et al.*

Dear Mr. Roof:

This letter is to follow up on our discussion about the substantial deficiencies in Defendants' responses to Plaintiffs' requests for production of documents. Of the 70 pending requests in Plaintiffs' third and fourth sets, Defendants only produced documents responsive to eight of them, with most of the "3,000 pages" produced having little to no bearing on the case (2,158 pages of the Named Plaintiffs' client files and a 992-page manual for Defendants' computer system). Moreover, Defendants have stated that they refuse to produce documents responsive to 45 of Plaintiffs' pending requests. This refusal pertains to requests for basic information essential to the claims at issue in the lawsuit, including documents reflecting the following:

- the complete "email chains" from which Defendants have claimed that the emails quoted in the second amended complaint were "taken out of context" (3-1);
- policies and procedures on when and how to use an "investigator" on a client matter, and when an "investigation fee" should be charged (3-43, 3-41, 4-1);
- policies and procedures relating to "sign-ups" and "sign-up fees" (or "SU fees"), terms that are apparently synonymous with "investigations" and "investigation" fees (3-44, 4-1);
- evidence of actual "investigative" work that was performed by Defendants' so-called "investigators" (4-4);
- daily intake emails showing which "investigator" was paid on each case, and from where each case originated (3-16, 4-3);
- policies and procedures on the referral or steering of clients to chiropractors, and obtaining referrals from chiropractors (3-37, 3-46, 3-47);
- changes to KNR's policies and procedures in response to the fraud lawsuits by insurance companies against Plambeck-owned chiropractic clinics, of which Defendants' admit they were aware (4-2);
- policies and procedures on when and how to request a "narrative" report from a chiropractor (3-45, 3-48);
- discussions, communications or assessments of the value of narrative reports in pursuing personal injury settlements, and KNR's requirements for those reports (3-27, 3-28, 3-29);
- negotiations with and solicitation of chiropractors about referrals (3-21, 3-30) and narrative fees (3-22);

- payments made by Defendants to chiropractors that are not associated to a specific KNR client (3-25);
- formal or informal agreements to refer clients to a particular chiropractor or for a particular chiropractor to refer patients to KNR (3-20);
- payments made by KNR Defendants for advertising by other business entities, including chiropractic offices (3-32);
- non-client-specific communications with Liberty Capital representative Ciro Cerrato (3-2);
- Defendants' efforts to assure that the Litigation Finance Company to which they referred clients was the company providing the most competitive terms and most reliable service (3-6);
- Defendants' efforts to determine the financial stability or general quality of Liberty Capital Funding prior to Defendant Nestico asking that his employees recommend them exclusively (3-7);
- comparisons or discussion of the number of referrals made by KNR to a given chiropractor(s) and referrals made by that chiropractor to KNR over any period of time (3-15);
- Defendants' imposition or suggestion of quotas or benchmarks on their employees, including as to the amount of intakes, cases resolved, or amounts recovered in any given period of time (3-54);
- The employment files for Rob Horton and Gary Petti (3-55, 3-56);
- Documents relating to the litigation between Defendants and Dr. James Fonner, which involved allegations substantially similar to those at issue here (3-60).

None of these requests are vague, and none are overbroad or unduly burdensome in the context of what is at issue in this litigation, despite Defendants' assertion of these objections more than 45 times. It's impossible to look at Defendants' summary refusal to produce these documents without inferring a deliberate intent to violate the Civil Rules and abuse the discovery process. And the above is only a partial list of the documents that Defendants have wrongfully withheld.

Because Defendants have seen fit to assert literally hundreds of objections in their responses to 70 document requests, I won't take the time to address each of them individually, but will rather address them categorically.

First, there are myriad objections to the "vagueness" of terms or language used in Plaintiffs' RFPs. These include objections to basic terms like "you," "instructed," investigatory fee," "referrals," routine practice," and the like (*see* responses to RFP Nos. 3-4, 3-5, 3-6, 3-7, 3-12, 3-14, etc). It's hard to believe that you don't understand what we're asking for with any of these requests, but to the extent this is the case, I'm sure any misunderstanding can be resolved through a simple conversation regarding what Plaintiffs intended certain terms to mean, a conversation I'm prepared to have immediately. In each instance, "vague" language should be

capable of resolution between the parties and should in no case serve as a basis for failing to respond to any RFP.

Second, in no less than 45 of Defendants' responses, they recite a claim that the request is "overly broad and/or unduly burdensome" and, either in whole or in part, refuse to respond on these grounds (see responses to RFP Nos. 3-2, 3-5, 3-6, 3-7, 3-8, 3-11, 3-15, etc.). These assertions are made in offhandedly and in every instance unsupported by any evidence regarding the burden that complying with the request would "unduly" create for the Defendants. I'm sure Defendants understand that, "[m]ere recitation of the familiar litany that an interrogatory or a document production request is 'overly broad, burdensome, oppressive and irrelevant' will not suffice." *Momah v. Albert Einstein Med. Ctr.*, 164 F.R.D. 412, 417 (E.D. Pa. 1996); see also *Cattanach v. Burlington Northern Santa Fe, LLC,* 2014 U.S. Dist. LEXIS 186374, *21-22, 2014 WL 11429037 (D. Minn) ("the Court gave no weight to BNSF's burdensomeness argument because it offered no factual support for this conclusory contention. Broad allegations of burdensomeness, without more, will not suffice."). Rather, as the party objecting to discovery, Defendants have "the burden of showing facts justifying their objection by demonstrating that the time or expense involved in responding to requested discovery is unduly burdensome." *Moss v. Blue Cross & Blue Shield of Kan., Inc.,* 241 F.R.D. 683, 689, 2007 U.S. Dist. LEXIS 25301, *9-10. (D. Kan.). "[V]irtually all responsibilities in responding to discovery are *burdensome*," it is the responsibility of the Defendant to prove that each individual assertion of this objection "established that the request is *unduly* burdensome" within the context of the claims at issue. *Wichita Fireman's Relief Ass'n v. Kan. City Life Ins.* Co., 2011 U.S. Dist. LEXIS 118990, *23, 2011 WL 4908870 (D. Kan). The "mere fact that compliance with an inspection order will cause great labor and expense or even considerable hardship and the possibility of injury to the business of the party from whom discovery is sought does not itself require denial of the motion [to compel]." *Id.*

As noted in the bullet points above, Defendants have lodged this objection to requests for information that is basic and essential to the claims at issue in this lawsuit. It could not possibly be considered *unduly* burdensome to produce this information. Thus, if Defendants continue to withhold this information based on this objection, Plaintiffs will have no choice but to file a motion to compel and seek their fees for being forced to do so.

Plaintiffs are willing to consider that certain categories of information not set forth in the above bullet points may not be worth the burden of producing at the moment, at least until after a class is certified. But Defendants cannot continue to maintain the "unduly burdensome" objection by mere dint of their assertion. They must provide evidence satisfying their burden to show that producing the information would actually be unduly burdensome.

Third, Defendants repeatedly refuse to provide documents responsive to RFPs on the grounds that "Plaintiffs should not be able to take advantage of illegally obtained documents" (*see* RFP Response Nos. 3-1, 3-2, 3-3, 3-4, 3-26, 3-29, 3-41, 3-42, 3-43). Defendants state this objection despite the fact that there has not been nor could there be a finding by any court or regulatory

body that the Plaintiffs' "illegally" obtained documents that were freely given to them by a former KNR employee. Moreover, even if this objection were not based on a false premise, it would still not supported by the single extraordinary District Court case from Kansas that Defendants' use to support it: *Raymond v. Spirit AeroSystems Holdings, Inc.*, Case No. 16-1282-JTM-GEB, 2017 U.S. Dist. LEXIS 101926 (D. Kan. June 30, 2017). The *Raymond* decision—which, not surprisingly, the sanctioned party intends to appeal—involved a discovery sanction providing that Plaintiffs' would turn over certain documents obtained from a confidential informant and not be allowed to obtain further documents based on their knowledge of these documents. Unlike in our case, the documents in *Raymond* were clearly attorney-work product and marked as privileged and confidential. Unlike in our case, the documents in *Raymond* did not constitute evidence of fraud that cannot in any event be shielded by a confidentiality agreement. And unlike in *Raymond*, the Court presiding over our case has entered no sanction against the Plaintiffs that would restrict their reliance on any document or class of documents. Indeed, the Court has already rejected the Defendants' invitation to enter such a sanction. *See* 06-29-2017 Order denying Defendants' 03-27-16 Motion for Discovery Sanctions. Thus, as I'm sure you understood when you served your discovery responses, every assertion of an "objection" based on this extraordinary and inapplicable case is necessarily baseless. We will move to compel any documents withheld on these grounds and will seek our fees in doing so.

Fourth, you identify but repeatedly refuse to produce a "training manual" that you claim is "proprietary and confidential information" (3-44, 3-45, 3-48, 3-49, 3-50). You are surely aware that this is never sufficient grounds on which to refuse to produce relevant evidence, and that the appropriate remedy to a party's desire to keep allegedly confidential and proprietary information safe is a protective order. *Tesseron, Ltd. v. R.R. Donnelley & Sons Co.*, 2007 U.S. Dist. LEXIS 49728, *13, 2007 WL 2034286 (N.D. Ohio 2007) ('these problems can be overcome by discovery of the confidential and proprietary information under an appropriate protective order.") Courts have repeated *ad nuseum* that "there is no absolute privilege for confidential information." *Federal Open Market Committee v. Merrill*, 443 U.S. 340, 362, 99 S. Ct. 2800, 2813, 61 L. Ed. 2d 587 (1979); *Hartley Pen Co. v. United States Dist. Court for the S. Dist. of Cal.*, 287 F.2d 324, 330 (9th Cir. 1961); *Centurion Indus., Inc. v. Warren Steurer & Assoc.*, 665 F.2d 323, 325 (10th Cir. 1981).

Rather, Courts have made clear that if a party "truly believe it has confidential proprietary information that should be protected," it should "enter[] into a stipulated protective order with plaintiff or filed a motion for a protective order before the date by which it was to respond to plaintiff's requests." *See, e.g.*, *DIRECTV, Inc. v. Puccinelli*, 224 F.R.D. 677, 690 (D. Kan. 2004) Plaintiffs and Defendants in this case already have a protective order in place and it is sufficient to protect any "confidential or proprietary" information the Plaintiffs might be requesting.

Thus, the training manual, which you concede to be responsive to several of Plaintiffs' requests (3-44, 3-45, 3-48, 3-49, 3-50), must be provided and marked accordingly under the Parties' stipulated protective order. Again, if Plaintiffs' have to move to compel the production of this

clearly relevant and non-privileged document, they will seek and expect the Court to award their fees for doing so.

Fifth, Defendants' claim that they cannot produce the employment records of Robert Horton or Gary Petti without their permission is plainly wrong and without any support in the law. Additionally, any legitimate concerns over the confidentiality of these documents (we don't suppose there are any) would be easily resolved by the binding protective order as set forth above. Thus, this information, as well, should be immediately produced.

Sixth, Defendants' claims that they do not have to provide any information regarding class members, including information about the "investigation fees" charged to the Named Plaintiffs' files, are similarly baseless. The information requested about these so-called "investigations" must be produced.

Seventh, Defendants' repeated contention that they do not have to produce information relating to any chiropractor other than those at ASC is also baseless. Given the claims at issue, Plaintiffs are entitled to discover any and all evidence pertaining to quid pro quo relationships between Defendants and any chiropractor. All of the requested information relating to all chiropractic referrals and narrative fees must also be produced.

Finally, to address the outstanding issues relating to Plaintiffs' first and second sets of document requests that were the subject of our earlier correspondence (most recently your 09-21-17 letter that was in response to my 09-07-17 letter):

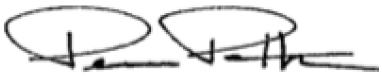
Regarding RFP 1-3: As we discussed in Court last Monday, if Defendants will stipulate as to the percentage of closed cases on which the investigation fee was charged (such as by stipulating that it was charged on every settled case except for a handful), and stipulate as to tell us how many settled cases there were, then we will not need the settlement statements for class certification purposes.

And regarding RFP 1-4 and Interrogatory 1-11, our position is not negotiable on these requests. We will need to see documentation of every payment made from or through the Defendants to the investigators for any service whatsoever, for the reasons explained in my August 3, 2017 letter to you, which includes any and all tax forms issued by Defendants to the investigators (such as W-2, W-9, or 1099 forms). We are entitled to this information to disprove Defendants' contention that the investigation fees were appropriately charged to clients as opposed to an overhead expense that was already subsumed in the firm's contingency fee, and to prove that the so-called "investigators" were, for all intents and purposes, KNR employees, intentionally disguised as independent "investigators" for Defendants' own benefit.

In summary, we are asking you to consider the lack of legal basis underlying most all of Defendants' refusals to produce responsive documents, and to be prepared to discuss these

matters as soon as possible. As you know, you may contact me anytime to schedule a call or meeting on these issues.

Sincerely,



Peter Pattakos

cc: Josh Cohen
Dan Frech
Eric Kennedy
Tom Mannion
James Popson

PATTAKOS
LAW FIRM LLC

101 Ghent Road • Fairlawn, Ohio 44333
Phone: 330.836.8533 • Fax: 330.836.8536
www.pattakoslaw.com

November 7, 2017

By e-mail to broof@sutter-law.com

Brian Roof
Sutter O'Connell
3600 Erieview Tower
1301 E. 9th Street
Cleveland, OH 44114

Re: *Member Williams et al. v. Kisling Nestico & Redick LLC, et al.*

Dear Mr. Roof:

This is to follow up on our meeting of last Thursday, which was intended to address the outstanding deficiencies in Defendants' document production as outlined in my October 26, 2017 letter to you. At this meeting, you, Jim Popson, and Eric Kennedy provided Josh Cohen and me with the attached documents reflecting hit counts for searches of Defendants' email files using various key words of varying relevance to our lawsuit. You also expressed your contention that these hit counts are so numerous as to excuse Defendants' failure to produce documents responsive to the requests identified in my October 26 letter.

We have considered the information you provided to us at last week's meeting, including following hit counts for these essential terms:

- Investigation fee: 3,685
- Sign up fee: 95
- SU fee: 71
- Investigator: 49,096
- Narrative fee: 3,121
- Narrative report: 16,823
- Referrals: 4,878
- Liberty Capital: 14,568
- Ciro: 12,204

There is no apparent reason why these categories of documents were not already searched, and responsive documents produced. These documents should be produced as soon as possible.

As for searches that led to substantially larger hit counts or were related to less essential terms, we will concede, in response to your request, that Defendants need not search the results for the following single-term searches:

- Liberty: 126,773
- Intake: 111,921
- ASC: 156,147
- Akron Square: 81,877

- Akron Square Chiropractic: 31,513
- Akron Square Chiro: 2,782
- Williams: 481,778
- Matthew: 426,975
- Matt: 395,148
- Johnson: 386,429
- Member: 364,385
- Wright: 91,425
- Reid: 12,760
- Naomi: 10,237

In response to your request that we provide additional search terms to help narrow your searches for responsive documents relating to the terms immediately above, we submit that Defendants should produce responsive documents based on the following searches as soon as possible:

1. chiropract! AND referral!
2. chiropract! AND narrative!
3. "red bag!"
4. ("Akron Square" or ASC or Floros) AND referral!
5. ("Akron Square" or ASC or Floros) AND narrative!

In light of the above, we do not see any need to reduce the searches to certain mailboxes as you suggested. And again we emphasize that Plaintiffs are entitled to discover any and all evidence pertaining to quid pro quo relationships between Defendants and any chiropractor, not just those from Akron Square. All of the requested information relating to all chiropractic referrals and narrative fees must be produced.

Additionally, there are open items to which hit counts from searches should be irrelevant. This includes,

- the complete "email chains" from which, Defendants have repeatedly claimed in their respective Answers, that the emails quoted in the second amended complaint were "taken out of context" (RFP 3-1);

- the daily intake emails showing which "investigator" was paid on each case, and from where each case originated (RFP 3-16, 4-3);

- the employment files for Rob Horton and Gary Petti (RFP 3-55, 3-56);

- documents relating to the litigation between Defendants and Dr. James Fonner, which involved allegations substantially similar to those at issue here (RFP 3-60).

These documents should all be produced immediately, as should the entire "training manual" to which you have repeatedly referred in your responses to our document requests (RFP 3-44, 3-45,

3-48, 3-49, 3-50), and in last week's meeting. Plaintiffs are entitled to discover the entire manual, not just the selected excerpts that you said the Defendants would produce. Plaintiffs are entitled to discovery as to how Defendants trained their employees, including to discover which subjects were and were not covered or emphasized in KNR's training, as well as instances where Defendants' conduct is contradicted by their manual.

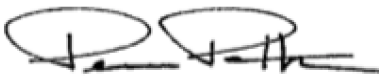
Also, regarding Interrogatory Nos. 24, 25, 46, and 47, Defendants are obligated to answer these interrogatories about the "investigative work" charged on Matthew Johnson's and Naomi Wright's files. Please provide this information and any responsive documentation of such "investigations" (RFP 3-52) immediately.

Relatedly, Plaintiffs are entitled to all evidence of "investigative work" performed by the so-called "investigators" (RFP 4-1, 4-4) as well as other work performed for Defendants by the investigators that did not relate to any specific client file, such as stuffing promotional envelopes, decorating the office for holidays, running errands for Rob Nestico, or performing other odd jobs (RFP 3-39, RFA 2-77, RFP 1-11). Based on the attached documents you provided us at last week's meeting, there are 19,427 items in investigator Aaron Czetli's KNR email inbox, and 18,534 in investigator Michael Simpson's. Presumably, there are even fewer items relating to the other 21 investigators you identified in your second amended response to Interrogatory 1-8. These items should all be searched and all responsive documents should be produced immediately.

And finally, our concerns regarding RFP 1-3, 1-4, and Interrogatory 1-11, as stated in my October 26, 2017 letter, remain unaddressed. All of this requested information, including all tax forms issued by Defendants to the investigators (such as W-2, W-9, or 1099 forms), should be produced immediately.

We hope that these issues relating to Defendants' document production will be resolved shortly so that we may proceed with third-party discovery and depositions. Please advise as to any further questions or concerns.

Sincerely,



Peter Pattakos

cc: Josh Cohen
Dan Frech
Eric Kennedy
Tom Mannion
James Popson

SUTTER O'CONNELL ATTORNEYS

Brian E. Roof
Phone: 216.928.4527
Fax: 216.928.4400
Cell: 440.413.5919
broof@sutter-law.com

November 15, 2017

VIA E-MAIL

Peter Pattakos
peter@pattakoslaw.com
The Pattakos Law Firm, LLC
101 Ghent Road
Fairlawn, Ohio 44333

Re: Member Williams v. Kisling, Nestico and Redick, LLC, et al.
Summit County, Court of Common Pleas Case No. CV-2016-09-3928
Our File No. 10852-00001

Dear Peter:

We are in receipt of your letters dated November 7, 2017 and November 10, 2017. This letter serves as Defendants' formal response to these letters as well as your October 26, 2017 letter, and our meeting on November 2, 2017 with you and Joshua Cohen.

Response to November 7, 2017 Letter

You listed the following items demanding that Defendants produce these voluminous documents.

- Investigation fee: 3,685
- Sign up fee: 95
- SU fee: 71
- Investigator: 49,096
- Narrative fee: 3,121
- Narrative report: 16,823
- Referrals: 4,878
- Liberty Capital: 14,568
- Ciro: 12,204

Defendants will not review and search over 104,500 items (which could include thousands of more pages of documents) as part of your fishing expedition. The fishing expedition is confirmed by Plaintiffs' lack of proper responses to Defendants' interrogatories and requests for admission in which it has offered no evidence of any wrong doing by Defendants. There are absolutely no facts to support Plaintiffs' allegations. In addition, this request is extremely unduly burdensome. Furthermore, this amount of discovery is not proportional to the needs of the case, considering the stipulations to which Defendants are willing to enter as outlined below. *See*

Fleming v. Honda of Am. Mfg., S.D. Ohio Case No. 2:16-cv-421, 2017 U.S. Dist. LEXIX 161578, * 6-11 (applying the proportionality standard and noting that the court has the right to prevent a fishing expedition by plaintiff) Indeed, as you have stated before most of the facts are not in dispute.

However, Defendants will produce the responsive and non-privileged documents relating to the 95 hits for "Sign up fee" and the 71 hits for "SU fee." In addition, Defendants will run searches for "investigation fee" for the seven (Aaron Czetli, Brandy Lamtman, Rob Nestico, Robert Redick, Michael Simpson, Holly Tusko, and Jenna Wiley) individuals previously identified in our spreadsheet. Defendants will produce responsive and non-privileged documents. This should provide responsive documents regarding Class A (Investigation Fee Class).

As for Class C (the Liberty Class), we will run searches of Nestico's documents for Ciro or Cerrato and Redick's documents for Ciro or Cerrato. Defendants will produce responsive and non-privileged documents. This should provide the necessary responsive documents for Class C.

You listed the following potential search terms to be run on KNR's entire database:

- chiropract! AND referral!
- chiropract! AND narrative!
- "red bag!"
- ("Akron Square" or ASC or Floros) AND referral!
- ("Akron Square" or ASC or Floros) AND narrative!

We will not run these searches on the entire database as that will be unduly burdensome and crash the system, as we have established before with the documents that we provided to you at the meeting (see attached documents: "Multi-mailbox search failed because the estimated size of the search…"). Again, your request is not proportional to the needs of the case and is a fishing expedition.

But we will run searches of Nestico's documents for ("Akron Square" or ASC or Floros) AND narrative! and of Redick's documents for ("Akron Square" or ASC or Floros) AND narrative!. Defendants will produce responsive and non-privileged documents. This should resolve the production of documents for Classes B (Lien Class) and D (Narrative Fee Class). As an alternative, Defendants are willing to enter into a stipulation that KNR's policy is to receive a narrative report from ASC on all cases, except for cases involving clients under the age of 12 and a few other minor exceptions, for $150.

In addition, we ran searches of communications between Nestico and Floros with the search term "referral!" and searches of communications between Redick and Floros with the search term "referral!". However, the search resulted in no responsive documents.

Furthermore, we will not run searches for all chiropractors, as the other chiropractors are not part of Class B, as Class B is specifically limited to ASC. Per our prior discussions, because ASC is the only chiropractor listed in the class, we will only produce documents outlined above relating to ASC. Similarly, because Plaintiff Reid saw only Dr. Floros as a patient (and not any

of the other chiropractors) and she only sued Dr. Floros, Defendants will not search for other chiropractors for Class D. Your request for all of these documents is not proportional to the needs of the case.

As for the open items to which hit counts from searches should be irrelevant, we will review and produce any responsive, non-privileged documents that complete the "email chains" (RFP 3-1) referenced in Defendants' Answers. We agreed to this in the November 2nd meeting. This search and review will take several weeks to complete.

Regarding the daily intake emails showing which "investigator" was paid on each case, and from where each case originated (RFP 3-16, 4-3), Defendants stand by their objections that these requests seek documents relating to putative class members in which Plaintiffs are not allowed, as the case has not been certified as a class action. In addition, this request is unduly burdensome as it would require a review of each day's emails going back to 2009.

Furthermore, these requests seek irrelevant documents that are not reasonably calculated to lead to the discovery of admissible evidence. Defendants admit that since 2009 KNR has paid the investigator a flat fee (e.g., $30-$100) upfront on each individual case, that most of the clients were charged (as long as there was a recovery) the flat fee, which was clearly set forth on the Settlement Memorandum, and that there were no upcharge or surcharge on that flat fee. Defendants are not hiding these facts, as Defendants have stated the same facts in their discovery responses. Therefore, it is unduly burdensome and irrelevant to go through thousands of pages of documents to establish these admitted facts. Moreover, during the meeting you were open to a stipulation on this issue and agreed to provide us with a draft of the stipulation. Please provide us with a draft of the stipulation for review and consideration.

As for the employment files for Rob Horton and Gary Petti (RFP 3-55, 3-56), Defendants stand by their objection that they cannot produce these files without Horton and Petti's written permission. Per our discussion at the meeting, you can easily obtain their written permission (especially Gary Petti as he is your witness), which will eliminate this issue. You are creating a discovery dispute where there is none.

Regarding the documents relating to the litigation between Defendants and Dr. James Fonner (RFP 3-60), Defendants will not produce these documents as they are irrelevant and not reasonably calculated to lead to the discovery of admissible evidence. In addition, the documents can be obtained from the Court's website and from Dr. James or his counsel.

As we expressed in our meeting, Defendants will not produce the three entire training manuals as the majority of them are irrelevant and are not reasonably calculated to lead to the discovery of admissible evidence. Plaintiffs are not entitled to all the information regarding the training of their employees. Plaintiffs are only entitled to portions of the training manuals that are responsive to Plaintiffs' document requests (RFP 3-44, 3-45, 3-48, 3-49, 3-50). Furthermore, KNR will not produce the entire manuals as they are proprietary and confidential. This objection is especially relevant considering that The Pattakos Law Firm is a new law firm and competitor of KNR, which in fact advertises as a law firm handling personal injury and auto accident cases.

Regarding Interrogatory Nos. 24, 25, 46, and 47 and RFP 3-52, Defendants are not obligated to answer these interrogatories and produce responsive documents about the

"investigative work" charged on Matthew Johnson and Naomi Wright's files, as they are not named Plaintiffs of Class A (Investigation Fee Class). In addition, Johnson and Wright have not asserted any claims relating to the investigation fee. As we have repeatedly stated and which you have failed to provide any case law to the contrary, Plaintiffs are not entitled to the discovery of putative class members until the case has been certified as a class action, which obviously has not happened. Johnson and Wright are putative class members of Class A, and therefore, Plaintiffs are not entitled to discovery on the investigation work for them.

Similarly, Plaintiffs are not entitled to all evidence of "investigative work" performed by the so-called "investigators" (RFP 4-1, 4-4). But as we discussed, we are willing to produce exemplars of some of the investigative work done by MRS and AMC. We are in the process of collecting these exemplars.

In addition, Plaintiffs cannot discover the other work performed by Aaron Czetli and Michael Simpson for Defendants that do not relate to any specific client file, such as stuffing promotional envelopes, decorating the office for holidays, running errands for Rob Nestico, or performing other odd jobs (RFP 3-39, RFA 2-77, RFP 1-11). The focus of the Third-Amended Complaint, specifically Class A (Investigation Fee Class), is the work done for the investigation fee. And right now, Plaintiff is entitled to only discovery on the investigation fee as it relates to Member Williams. Defendants have produced that information and documents.

Regarding your concerns about RFP 1-3, 1-4, and Interrogatory 1-11, as we have repeatedly stated, we are open to a stipulation on this issue and have been waiting for a proposed stipulation from you. Our letters and discovery responses provide the information for which you are asking. Please provide us with a proposed stipulation to resolve this discovery issue.

Finally, as we explained during our meeting, Aaron Czetli and Michael Simpson do not receive W-2, W-9, or 1099 forms from KNR. Rather, they receive an individual check for each case they are assigned. Defendants are not going to produce thousands of checks to establish, which we again are willing to stipulate to, that MRS and AMC are paid $50 per case for their investigative work. This is a pass-through, third-party expense with no surcharge or upcharge. There is absolutely no need to produce the checks.

Response to November 10, 2017 Letter

Regarding Request No. 2 from the Fourth Set of Requests for Production of Documents, please see the First Amended Responses. Because there are no responsive documents, we will not run searches for "Plambeck." Also, please see the First Amended Responses to the Third Set of Requests for Production of Documents.

As for your unreasonable request for the current addresses of the 21 investigators, Defendants will not provide the information. This lawsuit and specifically Plaintiff Williams' investigation fee claim are only about MRS and AMC. The other investigators are not relevant to the lawsuit, as none of them were used on Plaintiff Williams' case. Your attempt to subpoena them is nothing but pure harassment and a fishing expedition to drive up litigation costs for everyone, including third parties who have nothing to do with this lawsuit.

Finally, we will not assist in your efforts to subpoena Ciro Cerrato. You are perfectly capable of serving a subpoena on him.

This should address all of your concerns and resolve the discovery dispute. Please contact me with any questions or comments.

Sincerely,

Sutter O'Connell

Brian E. Roof

BER/ma
Enclosure
cc: James M. Popson
Eric Kennedy
Tom Mannion
John F. Hill

Exhibit B

IN THE COURT OF COMMON PLEAS
SUMMIT COUNTY, OHIO

MEMBER WILLIAMS, e*t al.*, Plaintiffs, vs. KISLING, NESTICO & REDICK, LLC, *et al.*, Defendants.	 Case No. 2016-CV-09-3928 Judge Alison Breaux

DEFENDANTS' RESPONSES TO PLAINTIFFS' SECOND SET OF REQUESTS FOR ADMISSION

Pursuant to Rule 36 of the Ohio Rules of Civil Procedure, Defendants Kisling, Nestico & Redick, LLC ("KNR"), Alberto R. Nestico, and Robert Redick (collectively "Defendants") object and respond as follows to Plaintiffs' Second Set of Requests for Admission ("Requests for Admission"):

GENERAL OBJECTIONS

1. Defendants object to Plaintiffs' Requests for Admission to the extent that they seek information protected by the attorney-client privilege, work product doctrine, and the joint defense and common interest privilege, and other applicable privileges and rules. Specifically, some requests of Plaintiffs' Requests for Admission seek information and communications between Plaintiffs and KNR and between putative class members and KNR that are protected by the attorney-client privilege, work product doctrine,

this request.

83. Admit that KNR suggested that Matthew Johnson take a litigation advance from Liberty Capital Funding.

RESPONSE: Objection. Defendants object that the terms "suggested" and "litigation advance" are vague, ambiguous, and undefined. Subject to and without waiving these objections, Defendants deny this request.

84. Admit that, for a certain period of time, KNR suggested that all of its clients who were interested in a litigation advance seek a litigation advance from Liberty Capital Funding.

RESPONSE: Objection. Defendants object that the term "litigation advance" and the phrase "for a certain period of time" are vague, ambiguous, and undefined. Defendants further object that this request is based on illegally obtained documents. Plaintiff should not be able to take advantage of the illegally obtained documents. *See Raymond v. Spirit AeroSystems Holdings, Inc.*, Case No. 16-1282-JTM-GEB, 2017 U.S. Dist. LEXIS 101926 (D. Kan. June 30, 2017). Subject to and without waiving these objections, Defendants admit this request. This was done to try out a new company so that KNR's clients have other options. It also allowed KNR to negotiate a discount on the loan repayment.

85. Admit that KNR did not disclose to Matthew Johnson that it had anything other than an arms-length relationship with Liberty Capital Funding.

RESPONSE: Objection. Defendants object that this request incorrectly assumes that Liberty Capital Funding and KNR did not have an arms-length relationship. Defendants deny such an assumption. Subject to and without waiving this objection, Defendants deny this request because KNR had an arms-length relationship with Liberty Capital Funding.

86. Admit that KNR did not disclose to any of its clients that it had anything other than an arms-length relationship with Liberty Capital Funding.

RESPONSE: Objection. Defendants object that this request incorrectly assumes that Liberty Capital Funding and KNR did not have an arms-length relationship. Defendants deny such an assumption. Subject to and without waiving this objection, Defendants deny this request because KNR had an arms-length relationship with Liberty Capital Funding.

87. Admit that ASC solicited Naomi Wright.

RESPONSE: Objection. Defendants object that the term "solicited" is vague, ambiguous, and undefined. Subject to and without waiving these objections, Defendants do not have the knowledge as to whether ASC sought Naomi Wright or not, and therefore, they cannot admit or deny this request.

88. Admit that ASC solicitation of Naomi Wright was pursuant to a larger joint marketing agreement between ASC and KNR.

RESPONSE: Objection. Defendants object that the term "larger joint marketing agreement" is vague, ambiguous, and undefined. In addition, Defendants object that this request incorrectly assumes that there was some "larger joint marketing agreement between ASC and KNR." Defendants deny such an assumption. Subject to and without waiving these objections, Defendants deny this request.

As to objections,

/s/ Brian E. Roof

Respectfully submitted,

/s/ Brian E. Roof
James M. Popson (0072773)
Brian E. Roof (0071451)
Sutter O'Connell
1301 East 9th Street
3600 Erieview Tower
Cleveland, OH 44114
(216) 928-2200 phone
(216) 928-4400 facsimile
jpopson@sutter-law.com
broof@sutter-law.com

Counsel for Defendants

CERTIFICATE OF SERVICE

A copy of the foregoing Defendants' Responses to Plaintiffs' Second Set of Requests for Admission was sent this 23rd day of October, 2017 to the following via electronic Mail:

Peter Pattakos — Counsel for Plaintiff
Daniel Frech
The Pattakos Law Firm, LLC
101 Ghent Road
Fairlawn, Ohio 44333
peter@pattakoslaw.com
dfrech@pattakoslaw.com

Joshua R. Cohen
Cohen Rosenthal & Kramer LLP
The Hoyt Block Building, Suite 400
700 West St. Clair Avenue
Cleveland, Ohio 44114
jcohen@crklaw.com

/s/ Brian E. Roof
Brian E. Roof (0071451)

Exhibit C

IN THE COURT OF COMMON PLEAS
SUMMIT COUNTY, OHIO

MEMBER WILLIAMS, e*t al.*, Plaintiffs, vs. KISLING, NESTICO & REDICK, LLC, *et al.*, Defendants.	Case No. 2016-CV-09-3928 Judge Alison Breaux

DEFENDANTS' RESPONSES TO PLAINTIFFS' SECOND SET OF INTERROGATORIES

Pursuant to Rule 33 of the Ohio Rules of Civil Procedure, Defendants Kisling, Nestico & Redick, LLC ("KNR"), Alberto R. Nestico, and Robert Nestico (collectively "Defendants") object and respond as follows to Plaintiffs' Second Set of Interrogatories ("Interrogatories"):

GENERAL OBJECTIONS

1. Defendants object to Plaintiffs' Interrogatories to the extent that they seek information protected by the attorney-client privilege, work product doctrine, the joint defense and common interest privilege, and other applicable privileges and rules. Specifically, some requests of Plaintiffs' Interrogatories seek information and communications between Plaintiffs and KNR and between putative class members and KNR that are protected by the attorney-client privilege, work product doctrine, ethical and professional rules governing attorneys, or other applicable privileges. By filing this

RESPONSE: Objection. Defendants object that the terms "training," "policy," "procedure," and "intake lawyers" are vague, ambiguous, and undefined. Defendants further object that this interrogatory is overly broad and unduly burdensome in that it seeks information and documents relating to Medical Service Provider other than ASC. Subject to and without waiving these objections, Defendants state that KNR when possible vetted Chiropractors individually by questioning (including, but not limited to, do they negotiate rates, do they sue patients, do they accept letters of protection, will they testify at trial, will they author medical reports, the existence of other medical providers depending on the type and severity of the injury, client's desires, etc.) the Chiropractors in a face-to-face meeting. In addition, Defendants state that referrals are monitored for marketing purposes, business development, and to ensure compliance with ethical obligations prohibiting a quid pro quo relationship. Finally, Defendants object that this request seeks a training manual that is proprietary and confidential information. Defendants will not produce this document.

7. Identify the process, including any request for proposal ("RFP") process, by which KNR has determined which Medical Service Providers best suit its clients' needs.

RESPONSE: Objection. Defendants object that the term "process and the phrases "request for proposal process" and "best suit" are vague, ambiguous, and undefined. Defendants further object that this interrogatory is overly broad and unduly burdensome in that it seeks information and documents relating to Medical Service Provider other than ASC. Subject to and without waiving these objections, see answer to No. 6.

8. Identify every Medical Service Provider with whom any Defendant has a reciprocal referral agreement.

RESPONSE: Objection. Defendants object that the term "reciprocal referral agreement" is vague, ambiguous, and undefined. In addition, Defendants object that this interrogatory is overly broad and unduly burdensome in that it seeks information and documents relating to Medical Service Provider other than ASC. Subject to and without waiving these objections, Defendants state that they have no agreement, including a "reciprocal referral agreement" with ASC or any Medical Service Provider. Responding further and by way of explanation, Defendants state that referrals are monitored for marketing purposes, business development, and to ensure compliance with ethical obligations prohibiting a quid pro quo relationship.

45. Identify all civil lawsuits to which any Defendant has been party against any Litigation Finance Company or other attorney or law firm, including attorneys who work or worked for KNR.

RESPONSE: Objection. Defendants object that this interrogatory seeks irrelevant information that is not likely to lead to the discovery of admissible evidence. Defendants further object that this Interrogatory is compound. Subject to and without waiving this objection, Defendants refer Plaintiffs to Defendants' Response to Interrogatory No. 23.

46. Identify all persons – including their true, full and correct names, employers, positions, supervisors, and present addresses and phone numbers—who were paid for or performed any "investigations" relating to Matthew Johnson as described in Defendants' responses to Interrogatories No. 2–5 in Plaintiff Williams' First Set of Interrogatories.

RESPONSE: Objection. Defendants object that this interrogatory seeks information relating to a putative class member about Class A (the Investigation Fee Class). Mr. Johnson is not the class representative of Class A, but rather a putative class member and Defendants are not required to provide discovery regarding putative class members until there is a certified class.

47. Identify every topic and objective of any such investigation relating to your response to the immediately preceding Interrogatory, including all tasks performed by the investigator, every piece of information that was sought or discovered in the investigation, and every document for which any investigator sought Mr. Johnson's signature.

RESPONSE: Objection. Defendants object that this interrogatory seeks information relating to a putative class member about Class A (the Investigation Fee Class). Mr. Johnson is not the class representative of Class A, but rather a putative class member and Defendants are not required to provide discovery regarding putative class members until there is a certified class.

As to objections,

/s/ Brian E. Roof

Respectfully submitted,

/s/ Brian E. Roof
James M. Popson (0072773)
Brian E. Roof (0071451)
Sutter O'Connell
1301 East 9th Street
3600 Erieview Tower
Cleveland, OH 44114
(216) 928-2200 phone
(216) 928-4400 facsimile
jpopson@sutter-law.com
broof@sutter-law.com

Counsel for Defendants

CERTIFICATE OF SERVICE

A copy of the foregoing Defendants' Responses to Plaintiffs' Second Set of Interrogatories was sent this 23rd day of October, 2017 to the following via electronic Mail:

Peter Pattakos
Daniel Frech
The Pattakos Law Firm, LLC
101 Ghent Road
Fairlawn, Ohio 44333
peter@pattakoslaw.com
dfrech@pattakoslaw.com

Counsel for Plaintiff

Joshua R. Cohen
Cohen Rosenthal & Kramer LLP
The Hoyt Block Building, Suite 400
700 West St. Clair Avenue
Cleveland, Ohio 44114
jcohen@crklaw.com

/s/ Brian E. Roof
Brian E. Roof (0071451)